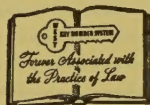


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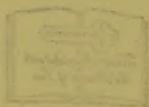
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SUPREME COURT OF CALIFORNIA.

68 Cal. 208

GUARDIAN FIRE & LIFE ASSUR. CO. *v.* THOMPSON and others.
(No. 9,304.)

Filed December 21, 1885.

PRINCIPAL AND SURETY—BOND OF EMPLOYEE—DISCHARGE OF SURETY.

A person taking a bond for the future good conduct of an agent already in his employment must communicate to a surety his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding. The mere non-communication of such knowledge, irrespective of motive or design, is a fraud in law, which will invalidate the obligation.

Department 2. Appeal from superior court, city and county of San Francisco.

Chickering & Thomas, for appellants.

Langhorne & Miller, for respondent.

MYRICK, J. The defendant Thompson as local agent of plaintiff, gave a bond with his co-defendants as sureties, for the faithful performance of his duties and for the payment to plaintiff of such sums as he might receive for premiums on insurance. This action is on the bond. The court below found that for some time previous to the execution of the bond in suit, Thompson acted as agent of plaintiff, and in such capacity defrauded plaintiff of \$2,000 premiums collected by him, and that the general agent of plaintiff well knew of such defalcation before the execution of the said bond; and that neither said general agent nor any officer or agent of plaintiff informed the sureties of such defalcation, but on the contrary concealed and suppressed the same from said sureties.

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1. The principle of law applicable to the facts of this case is thus stated in *Brandt, Sur.* § 367:

"If the party who takes a bond for the conduct of the principal in an employment knows at the time that the principal is then a defaulter in said employment, and conceals the fact from the surety, such concealment is a fraud upon the surety, and discharges him. * * * An agent for the sale of coal on commission, who by agreement was bound to turn over his receipts to his employers, within a specified time, was largely in arrear, and was required by his employers to find security, and a surety became bound for him to the extent of £1,000. The agreement of suretyship recited the terms of dealing between the employer and the agent, but the fact of the indebtedness was concealed from the surety. Held, the surety was discharged, on the ground that under the circumstances the recitals in the agreement amounted to an active misrepresentation."

"A person taking a bond for the future good conduct of an agent already in his employment, must communicate to a surety his knowledge of the past criminal misconduct of such agent in the course of such past employment in order to make such bond binding. The mere non-communication of such knowledge, irrespective of motive or design, is a fraud in law, which will invalidate the obligation." (*Sooy v. State*, 39 N. J. Law, 135.)

"We think there can be no doubt, either upon principle or authority, that where an agent has acted dishonestly in his employment, the principal, with knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge, under such circumstance, would be a fraud upon the guarantor. The bad faith in withholding from the guarantor such information, so material to the risk assumed, is manifested not only by the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal; but the holding of him out as a person entitled to confidence by continuing him in the service, was equivalent to a declaration that the principal had no knowledge of the dishonesty of the agent." *Dinsmore v. Tidball*, 34 Ohio St. 418.

Many other cases, to the same effect, might be cited, but the above are sufficient to illustrate and sustain the principal involved. A few cases to the contrary are presented, but the weight of authority is as above stated.

The judgment is affirmed.

We concur, THORNTON, J., MORRISON, C. J.

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GUARDIAN FIRE & LIFE ASSUR. Co. v. THOMPSON and others.
(No. 9,273.)

Filed December 21, 1885.

APPEAL DISMISSED.

Appeal dismissed on the ground that the court had jurisdiction of another appeal on the merits. Whether a court has power to grant leave to amend a notice of intention to move to set aside the judgment and for a new trial by inserting in place of the word "judgment" the word "decision," *quære*

Department 2. Appeal from superior court, city and county of San Francisco:

Langhorne & Miller, for appellants.

Chickering & Thomas, for respondent.

By THE COURT. After judgment had been rendered in favor of defendants, plaintiff gave notice of its intention to move the court to vacate and set aside the judgment theretofore rendered and to grant a new trial. Subsequently, on notice, the plaintiff moved the court for leave to amend the notice by inserting the word "decision" in place of the word "judgment," on the ground, as stated in affidavits, that the word "judgment" was inadvertently used by a clerk in preparing the notice, the clerk having before him a form containing the word "decision," and by inadvertence wrote the word "judgment" instead thereof. The court granted the leave to amend.

As the case itself is before us on appeal, by the party who gave the notice, from the judgment and order denying the motion for new trial, on which appeal we this day affirm the judgment, it is unnecessary for us to pass on the question of the authority of the court below to amend the notice of motion; because, conceding, for the purposes of this appeal, the court had authority, on the other appeal we hold the courts committed no error in the case. The question, therefore, remains but a moot question of no practical importance to either party and we dismiss the appeal.

SUPREME COURT OF CALIFORNIA.

HOLMES v. WARREN. (No. 11,146.)

Filed December 19, 1885.

APPEAL FROM JUSTICE'S COURT—JURISDICTION OF SUPREME COURT.

The supreme court has no jurisdiction of an appeal from the superior court, in an action for an amount less than \$300, and originally brought in the justice's court.

Department 1. Appeal from superior court, city and county of San Francisco.

This was an action brought originally in the justice's court to recover the sum of \$280, and interest. On appeal to the superior court the judgment for plaintiff was affirmed.

J. C. Bates, for appellant.

W. H. H. Hart, for respondent.

BY THE COURT. On the authority of *Sanborn v. Superior Court*, 60 Cal. 425; *Derby v. Stevens*, 64 Cal. 287; *Baily v. Sloan*, 4 Pac. Rep. 349, and cases there cited,—the appeal herein is dismissed.

68 Cal. 217

WATERMAN and others v. MORRELL and others. (No. 9,292.)

Filed December 22, 1885.

1. CONTRACT FOR MANUFACTURE OF LUMBER—CONSTRUCTION.

Where, under a contract for the manufacture of lumber, one party is entitled to take "any part or the whole of the refuse lumber that may accumulate by manufacturing," such clause refers to quantity, not to quality, and requires that the refuse be taken as a whole, and not picked over for the best pieces.

2. SAME—CONTRACT CONSTRUED—PAYMENT.

The contract sued on construed, and *held*, that the defendants had complied with the conditions on their part concerning payment.

Commissioners' decision.

Department 1. Appeal from superior court, county of Santa Cruz.

Goldsby & Zeter and *Bart Burke*, for appellants.

S. O. Houghton, for respondents.

BELCHER, C. C. This is an appeal from a judgment of nonsuit, and an order denying a motion for new trial. The action is based upon a written contract executed September 23, 1881, by which the plaintiffs leased to the defendants certain timber land in the county of Santa Cruz, for the term of three years, and the defendants undertook to cut and manufacture into lumber all the redwood and fir trees standing on the land and situable for milling purposes.

It was provided in the contract that on or before the fifth day of each month the defendants should render to the plaintiffs "a full written account of all merchantable lumber shipped each day during the preceding month, and must, within ten days after such account has been rendered, pay, or cause to be paid, to said Waterman &

Waterman, for each one thousand feet of merchantable lumber, the sum of two dollars and fifty cents in gold coin." It was further provided that in case the defendants "should not manufacture the timber trees standing" on the land leased in the year 1881, then they should, on the first day of January, 1882, pay to the plaintiffs "the sum of two dollars and fifty cents per thousand feet on one-third of all merchantable timber cut and shipped by them from their mill" on another tract. It was further provided that plaintiffs should have the right to any part or the whole of the refuse lumber that might accumulate by manufacturing said timber into lumber, for the price of \$7.50 per thousand feet, the money to be credited by the plaintiffs to the defendants on the account for stumpage.

It is alleged in the complaint that the defendants had manufactured from trees cut on the demised premises and had shipped 450,000 feet of merchantable lumber, for which the defendants became indebted to the plaintiffs in the sum of \$1,125, and that no part of that sum had been paid; that the defendants had failed to render any account to the plaintiffs of the lumber manufactured and shipped by them, as required by the contract, and had failed and refused to let the plaintiffs have or take, at their election, "any part or all of the refuse lumber," upon the terms and at the prices named in the contract. The prayer is for judgment for the \$1,125, and for \$1,000 damages.

From the evidence it appears that the defendants cut no timber and manufactured no lumber on the plaintiff's land in the year 1881, but they manufactured at the mill on their other tract such a quantity that they were required, under the terms of their contract, to pay to the plaintiffs, on the first day of January, 1882, the sum of \$1,225.88. This sum they paid to the plaintiffs on the thirty-first day of December, 1881, and took from them a receipt reading as follows:

"Received of Morrell & Spidell \$1,225.88 on account of stumpage on a certain contract dated September 23, 1881.
W. W. WATERMAN."

The defendants did not commence to manufacture lumber on the demised land until September 20, 1882, but during the balance of that month and the next month they manufactured and shipped therefrom 346,713 feet, for which the stumpage, at \$2.50 per thousand, amounted to \$866.77. They made no report of the lumber shipped until the fourth day of November, when they rendered to the plaintiffs a full written account of all merchantable lumber shipped each day during the preceding two months. On the day the defendants commenced manufacturing lumber on the plaintiffs' land—September 20th—the plaintiffs went to the defendants to talk about the refuse lumber. They said they wanted a considerable quantity of it, but were not then prepared to say how much. They claimed the right to select from the mass of refuse the best of it, and leave the balance to the defendants. The defendants objected to this, but

offered to let the plaintiffs take all the refuse during an hour's run, a day's run, a week's run, or a month's run. Afterwards, on October 18th, the defendants sent to the plaintiffs a written notice that they could "take any part or the whole of the refuse lumber as it comes from the saw." The plaintiffs made no demand for pay for the lumber shipped, and no further demand for refuse lumber, until the third day of November, 1882, when this action was commenced.

1. It is claimed for the appellants that the court erred in granting the nonsuit, for the reason that the defendants were required by the contract to manufacture the plaintiffs' trees into lumber during the year 1881, and that the \$1,225.88 was paid as liquidated damages, or as a penalty for their failure to comply with this condition, and not upon account for the lumber to be thereafter manufactured and shipped. Clearly, this was not the understanding of the parties when the receipt for the money was given and received; and, looking at the language of the contract and the circumstances attending the transaction, we fail to see anything to warrant the claim made. The court below was right, we think, in holding that the money was paid upon account, and that nothing was therefore due the plaintiffs for lumber shipped when the action was commenced.

2. It is also claimed that the defendants failed to make any report in October of the lumber shipped in September, and that the plaintiffs were damaged by this failure. It appears that the defendants commenced to ship lumber manufactured from the plaintiffs' trees on the twenty-first of September, and that they made no report until November. This may have been a technical breach of the contract; but, if so, it was one which could not in any way have injured the plaintiffs, as they had been paid in full for all the lumber shipped.

3. The only other point made is that the plaintiffs were denied the right to cull from the refuse the best parts of it, leaving all the poorer pieces for the defendants. It is said if the best pieces could have been selected out of the mass of refuse, they would have been worth \$10 per thousand feet, and that as the plaintiffs were to pay only \$7.50 per thousand, they clearly suffered damages by the denial, which should have been found and awarded to them. Under the contract the plaintiffs were entitled to take "any part or the whole of the refuse lumber that may accumulate by manufacturing said timber into lumber." Do these words justify the claim of the plaintiffs? We think not. We agree with the court below that they refer to quantity, and not quality, and that they authorized the plaintiffs to take the whole, or any fractional part of the refuse; but required that it be taken as a whole, and not culled and picked over for the best pieces. It follows that the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 225

BROWN v. SENNET. (No. 8,743.)

Filed December 22, 1885.

MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANT.

Where a stevedore commits the entire charge of unloading a vessel to his foreman, with power to choose his own assistants, and to control and discharge them as fully and freely as the principal could, such foreman is not a fellow-servant with those employed under him; and, if in doing the work, injury or death results to the servant from the wrongful negligence of such foreman, the principal is liable, though he exercised due care in selecting the foreman.

In bank. Appeal from superior court, city and county of San Francisco.

George Turner, for appellants.

Mastick, Belcher & Mastick, for respondents.

MCKEE, J. The plaintiffs in the action in hand are the widow and children of John Brown, deceased, and they sue the defendant to recover damages for the commission of a wrongful act or negligence by him, which it is alleged caused the death of the deceased. The case was tried by the court without a jury. At the conclusion of the evidence given for the plaintiffs there was a motion made for a nonsuit, which was granted; and afterwards a motion for a new trial, made on a statement of the case, was denied; and from the judgment of nonsuit, and the order denying the motion, the plaintiffs have appealed.

The statement of the case shows that the defendant was a stevedore, who, in January, 1881, contracted to unload the British ship *Glengarry*, then lying at Pacific-street wharf, in San Francisco, with a cargo of coal. For the performance of his contract he provided himself with a stationary engine, with the usual gear and apparatus for hoisting the coal from the hold and dumping it into a hopper or screen on the wharf; and employed the requisite number of men to serve in the positions necessary for discharging. The machinery consisted of a steam-engine, located on the wharf; and the apparatus consisted of four coal tubs or buckets, each of sufficient size to hold about a thousand pounds of coal, with hoisting-gear on each; and the hoisting-gear was attached, by a block and pullies, to a pennant or wire rope, so stretched from the main-topmast to the foremast as to fix the point of attachment directly over the hatch. There were 12 or 13 men employed. One acted as foreman, who had, in his position on the deck of the ship, control and direction of the men and of the work; another as engineer, whose position was at the hoisting-engine on the wharf. Three, including the foreman, were stationed on deck near the hold; one of them in charge of a line whereby he controlled the tub as it was hoisted from the hold until it cleared the hatch; another to work a trip-line, fastened at the bottom and center of the tub, by which, when the tub was hoisted to the hopper, the coal was dumped from the tub into the hopper; and another, in charge of a

line by which the emptied tub was controlled and returned through the hatch to the floor of the ship. To fill or refill the tubs eight men were stationed directly under the open hatchway, two men for each tub, whose sole duty was to shovel the coal into the tubs; and when each tub was filled, to attach the rope-hook thereto, and steady it in its ascent until it cleared the hatchway. For that purpose John Brown was one of the men employed. The men were competent and skillful to perform the duties assigned to them; and the hoisting machinery and tackle were all in good order.

On the second day of unloading, the shovelers had worked down to the "skin" or floor of the ship, where they cleared a space of about three feet on the floor, directly under the hatch, and about twenty feet below the deck, the coal being around the space for a height of about fifteen feet. In this space two of the shovelers, John Joyce and a man named "Frenchie," hurriedly filled their tub unusually high,— "higher," a witness testified, "than the edge of the tub. As near as I could judge there was about four hundred pounds on the tub, above the edge of the tub." Loaded in that way, the engineer was signaled to start it. It was started, and safely hoisted clear of the hatchway; but when above the hatch, the tub began to rock and swing, and in that condition it was hoisted until it swung against the main-stay, 30 feet from the deck, with such force that it tilted over, and 300 or 400 pounds of the coal fell out back into the hold, and upon the head of Brown, causing his death.

There is no doubt that Joyce and Frenchie were fellow-servants of Brown; and if their wrongful act caused Brown's death, the defendant, as their common employer, would not be liable, (*Hogan v. Central Pac. R. Co.*, 49 Cal. 128; *McLean v. Blue Pt. M. Co.*, 51 Cal. 257; *McDonald v. Hazletine*, 53 Cal. 35,) and the nonsuit was properly granted. But while the evidence tended to show that the act of overfilling the tub may have contributed to the accident, there was also evidence which tended to show that the accident resulted from the swinging of the overloaded tub against the main-stay, and that that could have been prevented "by stopping the engine a second, so as to let the tub swing away from the stay." According to the evidence, when the tub cleared the hatch, there was nothing to obstruct its ascent until it came to the stay. From his position on the deck the duty devolved on the foreman to superintend and control the hoisting. By the sound of his whistle he could signal the hoisting-engine to start or to stop. He did not signal the engineer to stop, and the overloaded bucket was hoisted in its eccentric course until it struck the stay and tilted over, with the disastrous consequences to the workman.

Assuming as fact that the omission to signal the engineer to stop was the cause of the catastrophe, the question arises, is the defendant legally liable for the neglect of his foreman? Undoubtedly the

foreman and other men engaged in discharging the cargo were all working for the defendants; they were, therefore, employes of the defendants, and the relation of master and servant existed between them. But the case also shows that the defendants abdicated the control and management of the entire work to the foreman, and gave him full discretion to control and supervise it. "I was," testified the foreman, "foreman of the job, * * * and superintended it for them. * * * I employed the men for them, and they paid us all." Under that delegated power the foreman was, therefore, in the performance of the "job," in place of the master. That being the case, the defendants would be liable for any neglect of their foreman in the performance of the work, to the same extent that they would be liable for their own neglect if they had personally controlled and supervised it. Where employers owe a duty to their servants in the performance of work contracted to be performed, and for which the servants were employed, they are responsible to their servants for the manner of its performance.

The general rule upon the subject has been quoted from *Shear. & R. Neg.* § 102 and approved by this court, in *Beeson v. Green Mountain Co.*, 57 Cal. 31. The rule is this:

"One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him; and the master is answerable to all the under-servants for the negligence of such managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants. Such, at least, appears to us to be the rule, sanctioned by the weight of authority and by sound reason, though it must be admitted that it is not everywhere established by law."

It is said: "The contrary rule prevails in Massachusetts." But Chief Justice BIGELOW, in *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 377, states the rule as follows:

"If a person undertake to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence."

The fact that the master exercised due care in the selection of the person to whom he delegated his power and supervision of the work does not affect the rule which holds him responsible to his servants for the manner in which the work is performed; and if, in the performance, death or injury results to a servant from the wrongful act or negligence of the person who is controlling and supervising the performance in place of the master, the master is liable; and the rule exempting him from liability for such injuries caused by the negligence of a fellow-servant has no application. *Trask v. California*

Southern R. Co., 63 Cal. 96. The nonsuit was improperly granted. Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; THORNTON, J.; MORRISON, C. J.

For a full discussion of the question of the master's liability for the negligence of a fellow-servant, see *Kansas Pac. Ry. Co. v. Peavey*, 8 Pac. Rep. 781, and note, 791-796.

(68 Cal. 222)

CAMPBELL v. OAKS. (No. 8,242.)

Filed December 22, 1885.

JUDGMENTS—EXECUTIONS—REDEMPTION BY JUDGMENT DEBTOR.

A judgment debtor may, under section 702 of the California Code of Civil Procedure, redeem property sold under execution, on paying to the purchaser the price paid by him, with 2 per cent. per month interest thereon up to the time of redemption, together with amounts paid for taxes and assessments which the purchaser has paid, and interest thereon; and it is not necessary, to entitle him to redeem, that he pay a prior judgment against him held by a partnership of which the execution creditor is a member.

Department 2. Appeal from superior court, county of San Luis Obispo.

J. M. Wilcoxson, for appellant.

John Scott and McD. R. Venable, for respondent.

MORRISON, C. J. This suit was brought to compel the defendant, who was the sheriff of the county of San Luis Obispo, in this state, to execute to him, (plaintiff) a certificate of redemption to certain lands sold under execution. The sheriff refused to execute such certificate, for the reason that there was a prior lien on said lands, held by a certain partnership of which the purchaser at the execution sale was a member, and the court sustained him in this contention. The following are the findings in the case:

"(1) That on the third day of January, 1881, the plaintiff was the owner in fee of the land and premises described in the plaintiff's complaint herein

"(2) That pursuant to an execution duly and regularly issued out of the court of G. W. BARNES, Esq., a justice of the peace in and for the township of San Luis Obispo, county of San Luis Obispo, state of California, upon a judgment duly made and given therein in a certain action wherein E. Lasar was plaintiff, and the plaintiff herein was defendant, the defendant, W. J. Oaks, he being then duly elected, acting, and qualified sheriff of said county, duly, and in accordance with law, on the third day of January, 1881, sold said land and premises to one Ernest Cerf for the sum of \$3.15, and thereupon duly issued and filed for record, as required by law, a certificate of sale therefor.

"(3) That on the eleventh day of January, 1881, and within six months after the sale aforesaid, this plaintiff deposited with the defendant, who was then and is now the sheriff as aforesaid, the sum of \$3.22, in the same kind of money or currency in which and for which the sale was made, that sum being the amount paid by said Cerf for said real property, with interest thereon at the rate of 2 per cent. per month from the date of the purchase by said Cerf as aforesaid to the date of such deposit, together with the amount of all

assessments and taxes which said Cerf had paid thereon after the purchase by him as aforesaid, and interest on the same, and demanded from the defendant that he execute and deliver to the plaintiff a certificate of redemption of said premises, which he refused and neglected, and still neglects and refuses, to do, by direction of said E. Cerf, the purchaser at said sale.

"(4) That the plaintiff has not alienated or conveyed to any one his interest in or to the said land or premises, and at the time of the commencement of this action was the owner of the equity of redemption thereof.

"(5) That on the second day of September, A. D. 1880, in an action duly commenced and prosecuted in the superior court of the said county of San Luis Obispo, wherein A. Blochman, M. Cerf, Ernest Cerf, and L. M. Kaiser, as partners under the firm name of A. Blochman & Co., were plaintiffs, and the said plaintiff herein was defendant, a judgment was duly made and entered by said court in favor of the plaintiffs in said action, and against the said J. B. Campbell, the plaintiff herein, for the sum of \$653.68, with interest from the date of said judgment at the rate of 7 per cent. per annum, and also for \$16.65, costs of suit; that no part of said judgment has ever been paid or satisfied, except the sum of \$142.71 paid thereon; and that the said judgment was subsisting and in full force and unsatisfied at the date of the execution sale mentioned in second finding above, and still subsists and is in full force and unsatisfied, and the plaintiff has not at any time paid or tendered the amount of said judgment lien remaining so unsatisfied.

"(6) That the said judgment in said action of A. Blochman & Co. against J. B. Campbell, the plaintiff herein, was recovered on an account due to said partnership, and was and is a part of the assets of the said firm; that the said E. Cerf, at the time of his purchase at said execution sale, was, and ever since has been, and now is, a member of the said firm of A. Blochman & Co., and purchased the said property at said execution sale as such member, and in trust for the said firm, and with the firm money, and said purchase was by and on account of said firm of A. Blochman & Co.; the said Ernest Cerf holding the title acquired by said certificate of sale issued to him by said sheriff, in trust for the said firm.

"(7) That on the said eleventh day of January, 1881, the plaintiff had notice that said E. Cerf purchased said real property with and out of the partnership moneys of the firm of A. Blochman & Co., and he had, at the time, notice that said Cerf purchased the said real property for and on account of the firm of A. Blochman & Co., and that he now and did hold the legal title to said real property in trust for said firm of A. Blochman & Co."

All the foregoing findings, down to the sixth, were admitted by the parties, but it is contended that the seventh finding was not supported by the evidence.

We cannot fully understand how plaintiff knew the fact that the purchaser at the execution sale was a member of the firm obtaining the judgment in the superior court, but we think such fact was fairly deducible from the evidence in the case. But, conceding that fact, we think the court below erred in its conclusion. "The judgment debtor or redemptioner may redeem the property from the purchaser at any time within six months after the sale, on paying the purchaser the amount of his purchase, with 2 per cent. per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and, if the purchaser be also a creditor having a prior lien to that of the redemptioner,

other than the judgment under which such purchase was made, the amount of such lien, with interest." Code Civil Proc. § 702.

The court below held that the case came within the last clause of the foregoing section. In this we think the court erred, as the case was within the first clause, with the conditions of which the plaintiff fully complied. We cannot see how the firm obtaining a judgment against the same defendant in the superior court could have been prejudiced by a redemption from the sale under the second judgment, as the lien of the first judgment was in no manner affected thereby. It was simply an attempted redemption by the judgment debtor, whereby the sale under the second judgment would have been wiped out. Judgment reversed and cause remanded.

We concur: SHARPSTEIN, J.; THORNTON, J.

63 Cal. 233

BOWIE v. BORLAND. (No. 9,306.)

Filed December 23, 1885.

REFERENCE—JUDGMENT—ENTRY OF, BY CLERK ON COURT ORDER.

Under a stipulation for a reference which authorized the referee to determine the issues, and provided that upon the filing of his report judgment should be entered thereon, and in accordance therewith, and the order of the court for the reference directed that judgment should be entered in accordance with the referee's report, the clerk, upon the filing of such report, had authority to enter judgment without any further order of court.

Department 1. Appeal from superior court, city and county of San Francisco.

H. P. McKoon and George W. Towle, Jr., for appellant.

McAllister & Bergin, for respondent.

Ross, J. The parties to this suit stipulated to its reference, with power in the referee to determine all the issues in the cause, of fact as well as law, and, further, "that upon the filing of said referee's report, judgment shall be thereupon entered in this action by the above superior court in accordance therewith." Upon the stipulation the court made an order of reference, empowering the referee to hear and determine all of the issues, directing him to report his findings, and further ordering "that upon the filing of said referee's report judgment be entered in this action in accordance therewith." The case was duly tried before the referee named, who reported his findings and judgment, and upon the filing of which the judgment was entered by the clerk. The court subsequently, on motion of the losing party, made an order vacating the judgment so entered, upon the ground that the clerk was not authorized to enter it. The appeal is from that order.

If it be admitted that the entry of judgment by the clerk does not follow of course upon the report of the referee where the reference to him is to report upon the whole case, yet in this case express author-

ity was given the clerk, in the order of the court, directing the entry of judgment in accordance with the referee's report. Order reversed

We concur: McKEE, J.; McKINSTRY, J.

68 Cal. 243

WELLS v. ELLIS. (No. 9,289.)¹

Filed December 23, 1885.

ASSIGNMENT FOR BENEFIT OF CREDITORS--DISSOLUTION OF PARTNERSHIP--EXEMPTIONS.

An assignment for the benefit of creditors, by partners, of the entire firm assets, if valid, will operate as a dissolution of the partnership. Property exempt from execution, subsequently delivered by the assignees to the assignors, belongs to the partners individually, and not to the partnership; and a transfer of such property will not revive the partnership.

Department 1. Appeal from superior court, county of Benito.

Briggs & Hawkins, for appellant.

McCroskey & Hudner and G. B. Montgomery, for respondent.

McKEE, J. On the twentieth of January, 1883, the plaintiff brought the action in hand against the defendant for an accounting and settlement of the affairs of a partnership alleged to be existing between himself and defendant. But it was set up as a defense to the action, and proved, and the court finds, that the partnership, after it had been formed and operated for some years, became insolvent, when, in September, 1882, the copartners made an assignment of all the partnership property, "except what by law was exempt from execution," to three persons, in trust for the benefit of all creditors of the firm. The assignees accepted the trust, and, after they had qualified according to law, entered upon the discharge of their duties, and executed the trust by distributing the effects and proceeds of the firm *pro rata* among the creditors. All the creditors except the plaintiff, Wells, accepted the distribution in full satisfaction of all their demands against the firm, and released it from all further liability to them and from all claims on the property.

The object of the partnership was to carry on the business of blacksmithing and farming, the plaintiff, Wells, being the blacksmith, and the defendant, Ellis, the farmer of the concern. Under the exemption clause of the assignment, Wells claimed to be entitled to the blacksmith tools, and Ellis to the farming implements, used by them as members of the firm. The claim of each was recognized by the assignees, and they, with the assent of the creditors, delivered over to them the working tools which they respectively claimed.

The receipt of that property, however, neither revived nor continued the partnership, if it was dissolved by the assignment for the benefit of all their creditors, and we think it is clear that the assignment, being valid, operated a dissolution of the firm, and divested

¹See note at end of case.

the partners of their rights in and dominion over the partnership property. Necessarily a valid assignment of all partnership assets by copartners implies an entire suspension and winding-up of all copartnership affairs. By the assignment the copartners were at once deprived of all the means necessary for the transaction of the business of the partnership, and all their interest in the partnership property passed from them to the assignees, in whom title to the property and right of action therefor vested for the benefit of the creditors. *Story, Partn. § 337; Simmons v. Curtis, 41 Me. 373; Bank of Tennessee v. Horn, 17 How. 157.*

What was claimed as property exempt from taxation was conceded to be such, and, on being delivered in satisfaction of the claims, it was no part of the partnership property; it belonged to the claimants individually, and not as copartners. When, therefore, the assignors received the exempt property, and the assignees executed the trust of the partnership effects by settling the partnership debts with the creditors, the affairs of the partnership were fully wound up, and the partnership ceased to exist. Judgment affirmed.

We concur: Ross, J.; McKINSTRY, J.

NOTE.

Partnership—Assignment for Benefit of Creditors.

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| 1. HOW EXECUTED. | 9. PROVISIONS UNAUTHORIZED BY LAW. |
| 2. DISSOLUTION OF PARTNERSHIP. | 10. CONDITIONS IN. |
| 3. VALIDITY OF PARTNERSHIP ASSIGNMENT. | 11. WHEN NOT FRAUDULENT. |
| 4. INDIVIDUAL PROPERTY. | 12. RESERVATIONS VALID. |
| 5. ASSIGNMENT BY ONE PARTNER. | 13. EXEMPT PROPERTY. |
| 6. WHEN FRAUDULENT. | 14. RESERVATION OF SURPLUS. |
| 7. FRAUD MUST BE PROVED. | 15. APPLICATION OF PROPERTY. |
| 8. RESERVATION, WHEN FRAUDULENT. | 16. ATTORNEY'S FEES. |

1. HOW EXECUTED. Under the New York law a general assignment should be executed and acknowledged by all the members of the firm the same as a deed of real estate, otherwise it is void and inoperative. *In re Lawrence, 5 Fed. Rep. 349; Smith v. Tim, 14 Abb. N. C. 447.* Where an assignment is made in another state, if valid there, is valid here. *In re Paige & S. L. Co., 31 Minn. 136; S. C. 16 N. W. Rep. 700.* A partner who has withdrawn from the firm need not join in the assignment by the firm. *First Nat. Bank v. Hinman, 21 N. W. Rep. 280; Same v. Rock River Paper Co., Id.*

2. DISSOLUTION OF PARTNERSHIP. If partners dissolve the partnership in good faith, and divide the partnership assets among themselves, *Case v. Beauregard, 99 U. S. 119; Allen v. Center Valley Co., 21 Conn. 130; Kimball v. Thompson, 13 Metc. 283;* or transfer them all to one partner, *Ladd v. Griswold, 9 Ill. 25; Howe v. Lawrence, 9 Cush. 553; Robb v. Mudge, 14 Gray, 534; Shirner v. Huber, 19 N. B. R. 414; McNutt v. Strayhorn, 39 Pa. St. 269; Smith v. Edwards, 7 Humph. 106;* after such transfer a partner may use the assets to pay his individual debts, without being a violation of the rights of partnership creditors. *Case v. Beauregard, 99 U. S. 119; Hapgood v. Cornwell, 48 Ill. 68; Goembel v. Arnett, 100 Ill. 34; Armstrong v. Fahnestock, 19 Md. 58; Pirrman v. Koch, 1 Cin. 460; Sage v. Chollar, 21 Barb. 596; Dimon v. Hazard, 32 N. Y. 65; Wilcox v. Kellogg, 11 Ohio, 394; Baker's Appeal, 21 Pa. St. 76; Bullitt v. Chartered Fund, 26 Pa. St. 108.* A dissolution and division of assets among partners is not in itself fraudulent, although the object is to prevent individual creditors of one partner from levying on partnership property, *Atkins v. Saxton, 77 N. Y. 195;* but if the effect is to delay, hinder, or defraud individual creditors of one partner, it is void. *Burrill v. Lawry, 18 N. B. R. 367; Weaver v. Ashcroft, 50 Tex. 427.* If a dissolution is not made in good faith, but to divert partnership assets from partnership creditors to individual creditors, it is fraudulent, and partnership creditors are entitled to priority out of the assets, *In re Cook, 3 Biss. 122; Collins v. Hood, 4 McLean, 186; In re Byrne, 1 N. B. R. 464; In*

re *Tomes*, 19 N. B. R. 36; even though the transfer was to pay individual debts. *Tracy v. Walker*, 1 Flippin, 41; *Collins v. Hood*, 4 McLean, 186; *Sanderson v. Stockdale*, 11 Md. 563; *Flack v. Charron*, 29 Md. 311; *Phelps v. McNeely*, 66 Mo. 554; *Ferson v. Monroe*, 21 N. H. 462. In such case the insolvency of the partnership may be considered, in determining whether the dissolution was in good faith or not. *Frank v. Peters*, 9 Ind. 344; *Shirner v. Huber*, 19 N. B. R. 414. On dissolution of the partnership, the firm creditors have the right to have partnership property applied to the payment of the partnership debts in preference to those of the individual partner, *Case v. Beauregard*, 99 U. S. 119; *Evans v. Winston*, 74 Ala. 349; *Warren v. Taylor*, 60 Ala. 218, and this right cannot be impaired by any consideration with reference to the amount of capital contributed by each individual partner, *Wilson v. Robertson*, 21 N. Y. 587; and debts contracted in the name of one partner may be shown to be in reality partnership debts; *Cox v. Platt*, 32 Barb. 126; *Read v. Baylies*, 35 Mass. 497; *Marks v. Hill*, 15 Grat. 400; *Barcroft v. Snodgrass*, 1 Cold. 430; *Siegel v. Chidsey*, 28 Pa. St. 279; *Gwin v. Sedley*, 5 Ohio St. 96; *Haben v. Harshaw*, 49 Wis. 379; S. C. 5 N. W. Rep. 872; *Schaeffer v. Fithian*, 17 Ind. 463; *Wait v. Bull's Head Bank*, 19 N. B. R. 500; but where such debt was incurred by consent or privity of the other partner, proof of joint creditors against the separate estate, in competition with the separate creditors, will not be admitted. In *re Lloyd*, 22 Fed. Rep. 91; In *re McEwen*, 12 N. B. R. 11; In *re McLean*, 15 N. B. R. 333; In *re May*, 19 N. B. R. 101. An assignment by one partner of a firm operates as a dissolution of the partnership. *Conrad v. Buck*, 21 W. Va. 396.

3. **VALIDITY OF PARTNERSHIP ASSIGNMENT.** Where a voluntary assignment of partnership property was made in trust for the payment of all partnership debts that should be proved "as provided by statute," and afterwards for the payment of individual debts, it contains no unlawful preference. *Bradley v. Kroft*, 19 Fed. Rep. 295. If property is purchased in the firm name with assets of a prior firm, a transfer of part, or all of it, to secure a creditor of the prior firm, is valid. *Day v. Wetherby*, 29 Wis. 363. A debtor may prefer creditors if he make no reservation for his own benefit to the injury of creditors unprovided for. *Guggenheimer v. Brookfield*, 90 N. C. 232. At common law an insolvent may make an assignment in trust for the benefit of his creditors, and may give a preference to *bona fide* creditors. *Means v. Montgomery*, 23 Fed. Rep. 421. If the sole purpose of the maker be to discharge an honest debt, the deed is not fraudulent. *Moore v. Hinnant*, 89 N. C. 455; *Hafner v. Irwin*, 1 Ired. Law, 490. A deed which gives a preference to his sureties to prevent one creditor from obtaining full satisfaction to the injury of other creditors is not fraudulent. *Means v. Montgomery*, 23 Fed. Rep. 421; *Reed v. McIntyre*, 98 U. S. 511. A transfer of separate property, in consideration of a debt due by the firm, is founded on a good consideration. *Stewart v. Slater*, 6 Duer, 83. A deed may be valid as to *bona fide* debts, and void as to fraudulent and fictitious debts. *Market Nat. Bank v. Hofheimer*, 23 Fed. Rep. 13. The validity of an assignment is to be determined by the intent of the assignor, and his contemporaneous fraudulent acts are evidence of such intent. *Adler v. Ecker*, 2 Fed. Rep. 126. A debtor may pay or secure a creditor or number of creditors where no statute forbids it. *Carter v. Rewey*, 22 N. W. Rep. 129; *Anstedt v. Bentley*, 21 N. W. Rep. 807; *Lucas v. Clafflin*, 76 Va. 269. An assignment which does not purport to pass the title owned by the partnership making it as well as the individual property not exempt from forced sale, and owned by the individuals of the firm, cannot be sustained. *Coffin v. Douglass*, 61 Tex. 406; *Donoho v. Fish*, 58 Tex. 164.

4. **INDIVIDUAL PROPERTY.** Where a partnership assigns all its partnership property for the benefit of the creditors of the firm, and the assignment is valid in other respects, it seems that it will not be held invalid because the individual property is not also assigned. *Auley v. Ostermann*, (Wis.) 25 N. W. Rep. 657. It has been said that an insolvent debtor, making an assignment of all his property, may devote his individual property primarily to the payment of his individual debts. *Evans v. Winston*, 74 Ala. 349; *Bank of Mobile v. Dunn*, 67 Ala. 381. A sale by one partner of an insolvent partnership of his individual property, to secure an antecedent personal debt, is not fraudulent, *Schoverling v. Kovar*, (Neb.) 18 N. W. Rep. 134; and an assignment made after execution of an assignment of the firm property is not void because there is no provision for payment of debts fully provided for in the firm assignment, *Bogert v. Haight*, 9 Paige, 297; but a preference of individual debts of a partner in an assignment by the firm is void. *Schiele v. Healy*, 10 Daly, 92; *Vernon v. Upson*, (Wis.) 19 N. W. Rep. 400; *Willis v. Brenner*, (Wis.) Id. 403.

5. **ASSIGNMENT BY ONE PARTNER.** If the partnership is dissolved in good faith, and one partner takes the property and assumes the firm debts, he may subsequently assign the same for payment of his individual debts, *Robb v. Stevens*, *Clarke*, 192; *Marsh v. Bennett*, 5 McLean, 117; *Price v. De Ford*, 18 Md. 489; *Yearsley's Estate*, 1 Amer. Law Reg. 636; see *Heye v. Bolles*, 2 Daly, 231; or the debts due creditors of any new firm of which he may become a member. *Smith v. Howard*, 20 How. Pr. 121. The surviving partner of an insolvent firm may make an equitable and just assignment of partnership effects for the equal benefit of all the firm creditors; but as trustee he is not

permitted to assign and give a preference to certain creditors. *Salsbury v. Ellison*, 7 Colo. 167; S. C. 2 Pac. Rep. 906. One of two partners, with consent of the other, may make an assignment; and, the partner absconding, consent will be implied. *Sullivan v. Smith*, 15 Neb. 476; S. C. 19 N. W. Rep. 620. A partner who has not joined in an assignment of the firm assets may thereafter ratify the same, and a creditor may not question its validity because of his non-joinder, *Adee v. Cornell*, 93 N. Y. 572; but where one partner takes the firm assets, and agrees to pay the firm debts, the partnership creditors may prove against his estate, and share *pari passu* with the separate creditors, *In re Lloyd*, 22 Fed. Rep. 90; see *Smith v. Spencer*, 73 Ala. 299; as a separate creditor cannot be injured by a transfer of one partner's interest in the partnership property to his copartner, in consideration of the grantee assuming the liability of the firm: *Griffin v. Cranston*, 10 Bosw. 1; S. C. 1 Bosw. 281.

6. WHEN FRAUDULENT. An assignment which does not declare the uses, but reserves to the assignor to subsequently do so, is fraudulent and void, *Harvey v. Mix*, 24 Conn. 406; *Burbank v. Hammond*, 3 Sum. 429; *Grover v. Wakeman*, 11 Wend. 203; see *Sheldon v. Dodge*, 4 Denio, 217; *Strong v. Skinner*, 4 Barb. 546; *Moody v. Paschal*, 60 Tex. 483; it is a fraud on the creditors, as it must necessarily hinder and delay. Boardman v. Halliday, 10 Paige, 223; *Barnum v. Hempstead*, 7 Paige, 568; *Gazzam v. Poyntz*, 4 Ala. 374. Where a deed conveyed integral amounts to a series of integer creditors, and its provisions were several, and does not provide for the contingency of some of the debts being fictitious, which they in fact proved to be, the amounts intended for them, not disposed of by the deed, remained in the grantor as to assailing creditors, and subject to their lien. *Market Nat. Bank v. Hofheimer*, 23 Fed. Rep. 13. It is absolutely necessary that the equitable interests in the assigned property shall be fixed and determined by the assignment itself, *Averill v. Loucks*, 6 Barb. 470; *Mitchell v. Stiles*, 13 Pa. St. 306; so the reservation of his right to determine the preferences at some future time renders it void. *Averill v. Loucks*, 6 Barb. 470. An attempt to assign partnership property for the purpose of paying the private debts of one of the partners, when the firm is insolvent, is conclusive of an actual fraudulent design, *Keith v. Fink*, 47 Ill. 272; *French v. Lovejoy*, 12 N. H. 458; *Hurlbert v. Dean*, 2 Abb. App. 428; *Kirby v. Shoonmaker*, 3 Barb. Ch. 46; *Cox v. Platt*, 32 Barb. 126; *Knauth v. Bassett*, 34 Barb. 31; *Ruhl v. Phillips*, 2 Daly, 45; *Lester v. Abbott*, 28 How. Pr. 488; *Heye v. Bolles*, 33 How. Pr. 266; *Wilson v. Robertson*, 21 N. Y. 587; *Henderson v. Haddon*, 12 Rich. Eq. 393; but it has been held that the assignment is valid though the appropriation is void. *Read v. Baylies*, 18 Pick. 497; *Nye v. Van Huse*, 6 Mich. 329; *Kemp v. Carnley*, 3 Duer, 1; *Nicholson v. Leavitt*, 4 Sandf. 252; S. C. 6 N. Y. 510; and 10 N. Y. 591; *Lasell v. Tucker*, 5 Sneed, 1; *McCullough v. Sommerville*, 8 Leigh, 415; *Gordon v. Cannon*, 18 Grat. 387. When a power of revocation is reserved, the necessary inference is that it is made with intent to hinder, delay, or defraud creditors; for its only effect is to mask the property, *Cannon v. Peebles*, 4 Fred. Law, 204; *Murray v. Riggs*, 15 Johns. 571; S. C. 2 Johns. Ch. 565; even though only to be exercised in case any creditor refuses to assent to the assignment. *Hyslop v. Clarke*, 14 Johns. 458. A power to make loans on the security of the estate is equivalent to a power of revocation. *Sheppards v. Turpin*, 3 Grat. 373. A reservation in a chattel mortgage of the right to dispose of the goods is void with respect to creditors, *Wells v. Langbein*, 20 Fed. Rep. 183; *Crooks v. Stuart*, 7 Fed. Rep. 801; *Robinson v. Elliott*, 22 Wall. 513; *Meyer v. Gage*, 22 N. W. Rep. 892; *Liser v. Glaser*, 4 Pac. Rep. 1026; *Speigelberg v. Hersch*, 4 Pac. Rep. 705; and possession thereunder gives mortgagee no rights as against the mortgagor's creditors. *Wells v. Langbein*, 20 Fed. Rep. 183; *Chenery v. Palmer*, 6 Cal. 119; *Delaware v. Ensign*, 21 Barb. 85; *Stein v. Munch*, 24 Minn. 390; *Dutcher v. Swartwood*, 15 Hun, 31; *Parshall v. Eggert*, 54 N. Y. 18; *Blakeslee v. Rossman*, 43 Wis. 116. A firm, in law, is distinct from the members who compose it, and a transfer of firm property to pay the separate debts of one partner is a voluntary conveyance; and where the firm is insolvent, it is void, *Geortner v. Canajoharie*, 2 Barb. 625; *Burtus v. Tisdall*, 4 Barb. 571; *Dart v. Farmers' Bank*, 27 Barb. 337; *Walsh v. Kelly*, 42 Barb. 98; S. C. 27 How. Pr. 359; *Elliot v. Stevens*, 38 N. H. 311; *Ferson v. Monroe*, 21 N. H. 462; *Wilson v. Robertson*, 21 N. Y. 587; *Hartley v. White*, 94 Pa. St. 31; but see *Schaeffer v. Pithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. 55; *Schmidlapp v. Currie*, 55 Miss. 597; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511, as to creditors, and a previous division of the property will not alter the rule. *Burtus v. Tisdall*, 4 Barb. 571.

7. FRAUD MUST BE PROVED. The question whether a conveyance is made to defraud creditors in the first instance is a question of fact, *Howe Mach. Co. v. Claybourn*, 6 Fed. Rep. 438; *Spear v. Rood*, 51 Mich. 140; S. C. 16 N. W. Rep. 312, to be determined from all the facts and circumstances, *Morse v. Riblet*, 22 Fed. Rep. 501; *Livesay's Ex'r v. Beard*, 22 West Va. 585, and must be proved when the deed is alleged to be fraudulent. *Davis v. Kennedy*, 105 Ill. 300. Fraudulent intent is generally a question of fact for the jury, and not for the court, *Evans v. Rugee*, 23 N. W. Rep. 24; *Hyde v. Chapman*, 33 Wis. 392; *Barkow v. Sanger*, 47 Wis. 501; S. C. 3 N. W. Rep. 16; *Mehlhop v.*

Pettibone, 54 Wis. 656; S. C. 11 N. W. Rep. 553; Green v. Dixon, 22 N. W. Rep. 943; it is never presumed when fairly reconcilable with honesty. Mey v. Gulliman, 105 Ill. 272. The burden of proof is upon the party attacking the deed, to establish a fraudulent intent. Means v. Montgomery, 23 Fed. Rep. 421; Maish v. Bird, 22 Fed. Rep. 576; Tebbs v. Lee, 76 Grat. 744; Clemens v. Brillhart, 22 N. W. Rep. 779; Long v. West, 1 Pac. Rep. 545; First Nat. Bank v. Buck, 23 N. W. Rep. 57; it is on him who seeks to set aside the legal title. Adams v. Ryan, 61 Iowa, 733; S. C. 17 N. W. Rep. 159.

8. RESERVATION, WHEN FRAUDULENT. A debtor in failing circumstances cannot convey his property in trust and reserve to himself any benefit, Kellog v. Richardson, 19 Fed. Rep. 71; such a reservation renders the assignment null, void, and of no effect, Lawrence v. Norton, 15 Fed. Rep. 853; Baldwin v. Peet, 22 Tex. 708; Bailey v. Mills, 27 Tex. 434; Barney v. Griffin, 2 N. Y. 365; Leitch v. Hollister, 4 N. Y. 211, if made to the exclusion of his creditors, Muller v. Norton, 19 Fed. Rep. 19; Lawrence v. Norton, 15 Fed. Rep. 853; but the reservation of a secret benefit does not necessarily render such conveyance fraudulent as to creditors. Howe Mach. Co. v. Claybourn, 6 Fed. Rep. 438. There is a distinction between an express trust for the debtor and a benefit which is merely incidental to a trust created for another object. Curtis v. Leavitt, 15 N. Y. 9; Vanbuskirk v. Warren, 34 Barb. 457. To render a deed of trust fraudulent, as matter of law, there must appear upon its face some express provision for the personal benefit of the grantor, or a stipulation wholly irreconcilable with an honest and legal purpose of paying his debts within a reasonable time. Means v. Montgomery, 23 Fed. Rep. 421; McCormick v. Atkinson, 78 Va. 8. The debtor must part with his property free from any control over or interference with it, and from any contingency on which he may resume it at pleasure. Whallon v. Scott, 10 Watts, 237. See Planters' & M. Bank v. Clarke, 7 Ala. 765; Dana v. Bank of U. S., 5 Watts & S. 223; Hafner v. Irwin, 1 Ired. Law, 490; Janney v. Barnes, 11 Leigh, 100; Sheppards v. Turpin, 3 Grat. 373. An assignment differs from a mere security in passing both the legal and equitable title to the assignee absolutely, leaving no equity of redemption. Martin v. Hausman, 14 Fed. Rep. 160; State v. Benoist, 37 Mo. 500; Gale v. Mensing, 20 Mo. 461; Livesay's Ex'r v. Beard, 22 West Va. 585. Where the consideration expressed is far below the value of the property, as known to both parties, it is a strong circumstance to show fraud. Bartles v. Gibson, 17 Fed. Rep. 293. He cannot, under pretense of paying his debt, assign more property than reasonably sufficient for the purpose. McNichols v. Rubleman, 13 Mo. App. 515. Where the assignment covers a great deal of property as security for a small amount of debts, so that the resulting interest of the debtor is really the valuable consideration, and the purpose professed is so obviously a mere pretense as not to conceal the true purpose, the debtor is obviously providing for himself and not for his creditors. Moore v. Collins, 3 Dev. 126; Beck v. Burdett, 1 Paige, 305; Hastings v. Baldwin, 17 Mass. 552. Where he conveys property on consideration of his maintenance and support, the conveyance is fraudulent and void as to creditors if any part of the consideration is to be paid in the future support of the grantor, Lawson v. Funk, 108 Ill. 502; such conveyance will not be protected although full consideration was paid. Buck v. Voreis, 89 Ind. 116. In Colorado a provision for future support made in good faith will not render the conveyance fraudulent, Barnett v. Knight, 3 Pac. Rep. 747; and in Kansas the grantee may be held for the excess of the land over the consideration actually paid. Farlin v. Sook, 1 Pac. Rep. 123.

9. PROVISIONS UNAUTHORIZED BY LAW. Any stipulation in an assignment intended to hinder or delay non-assenting creditors, if not warranted by law, is null and void. Muller v. Norton, 19 Fed. Rep. 719; Jaffray v. McGehee, 2 Sup. Ct. Rep. 367; Keevil v. Donaldson, 20 Kan. 168; Bryan v. Sundberg, 5 Tex. 423; Donoho v. Fish, 53 Tex. 167. Provisions beyond the limits of the power which the law allows to be vested in the assignee render the assignment void. Rapalee v. Stewart, 27 N. Y. 310; Bagley v. Bowe, 50 N. Y. Super. Ct. 100. An assignment which authorizes the assignee to dispose of the property in a way not authorized by law is void. Schoolfield v. Johnson, 11 Fed. Rep. 297; Bartlett v. Teah, 1 Fed. Rep. 768; Sumner v. Hicks, 2 Black, 532; McCleery v. Allen, 7 Neb. 21; Rapalee v. Stewart, 27 N. Y. 310; Woodburn v. Mosher, 9 Barb. 255; Keep v. Sanderson, 12 Wis. 391. So a deed is void which requires the assignee to sell choses in action before the lapse of time sufficient to enable him to collect by legal procedure. Richardson v. Stapleton, 60 Miss. 97; distinguished in Wickham v. Green, 61 Miss. 463. Unless authorized by law, a provision which authorizes the assignees in their discretion to dispose of the property on credit vitiates the assignment, Muller v. Norton, 19 Fed. Rep. 720; Lawrence v. Norton, 15 Fed. Rep. 853; Moir v. Brown, 14 Barb. 39; Schufeldt v. Abernethy, 2 Duer, 533; Rapalee v. Stewart, 27 N. Y. 311; Hutchinson v. Lord, 1 Wis. 286; Keep v. Sanderson, 2 Wis. 42; and is a badge of fraud, Carlton v. Baldwin, 22 Tex. 731; Livesay's Ex'r v. Beard, 22 West Va. 585; so an attempt to hinder and delay all creditors, even if there is no attempt to prefer any, is unauthorized by law. Malvin v. Wert, 19 Fed. Rep. 721. An assignment which attempts to confer on the assignee power to declare future preferences in his discretion is

void; *Moody v. Paschal*, 60 Tex. 483; but a conveyance to the assignee and his successors, which merely refers to such person as may lawfully succeed him in case of resignation, removal, or death, is not void. *Langdon v. Thompson*, 25 Minn. 509.

10. CONDITIONS IN. A deed stipulating that no creditor shall participate in the proceeds of the property unless he accepts the same in full satisfaction of his debt is valid; but to be valid all the debtor's property must be conveyed. *Dodd v. Martin*, 15 Fed. Rep. 338; *Clayton v. Johnson*, 36 Ark. 406. Where a participation in the assets depends upon the release of a balance due, and there is no provision for distribution of the surplus, it is *per se* fraudulent and void, *Seale v. Vaiden*, 10 Fed. Rep. 831; and non-assenting creditors, not present when the deed was executed, are not bound by such an agreement of release. *Id.*

11. WHEN NOT FRAUDULENT. The mere fact that an assignment was voluntary and without consideration will not support a finding that it was fraudulent, *Genesee River Nat. Bank v. Mead*, 92 N. Y. 637; *George v. Kimball*, 24 Pick. 234; *Spear v. Rood*, 16 N. W. Rep. 312; but the *onus* is on the grantee to prove a valuable consideration,—recitals are not evidence in his favor. *Zelnicker v. Brigham*, 74 Ala. 598. Where the deed was made on a fair consideration it is not necessarily void, *McCanless v. Flinchum*, 89 N. C. 373; but the motive or purpose is not material. *Goodman v. Wineland*, 61 Md. 449. A conveyance is not necessarily fraudulent because its effect is to hinder and delay, unless there was a contrivance for that purpose, and the grantee participated in the design. *Daniel v. Vaccaro*, 41 Ark. 316. To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or be in some way privy thereto. *Means v. Montgomery*, 23 Fed. Rep. 422. The grantee with knowledge of the fraudulent intent makes himself a party to the fraud, *Bartles v. Gibson*, 17 Fed. Rep. 293; so a mortgage which purposely exaggerates the mortgagee's demand, if known to him, is void as to creditors, *Stinson v. Hawkins*, 16 Fed. Rep. 850, even if given for full value. *Stinson v. Hawkins*, 13 Fed. Rep. 833. So, if grantee has knowledge of facts sufficient to excite the suspicion of a prudent man and put him on inquiry, he is a party to the fraud, *Bartles v. Gibson*, 17 Fed. Rep. 297; *Atwood v. Impson*, 20 N. J. Eq. 156; *Baker v. Bliss*, 39 N. Y. 70; *Parker v. Conner*, 93 N. Y. 118; *Avery v. Johann*, 27 Wis. 251, *David v. Birchard*, 53 Wis. 492; *S. C.* 10 N. W. Rep. 557; see *Kaine v. Weigley*, 22 Pa. St. 179; but an assignee is not affected by the fraud of the assignor unless he co-operated or took with knowledge of the fraud. *Cannon v. Young*, 89 N. C. 264. If the provisions of the deed manifest a real purpose to satisfy *bona fide* creditors in a reasonable time, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, no presumption of fraud arises from a provision for the retention of the possession, with power of disposition of the property by the grantor. *Means v. Montgomery*, 23 Fed. Rep. 421. If not fraudulent at its inception, it is not invalidated by subsequent delinquencies of the assignee, *Olney v. Tanner*, 10 Fed. Rep. 101; *Hardmann v. Bowen*, 39 N. Y. 200; and subsequent acts of the debtor, or continuance of the business, is not proof of fraudulent intent. *Olney v. Tanner*, 10 Fed. Rep. 101.

12. RESERVATIONS VALID. An exception in the conveyance, whereby the property is retained by the debtor and not conveyed to the assignee, is not a reservation of a benefit to the debtor, and does not vitiate the assignment. *Moss v. Humphrey*, 4 Greene, (Iowa,) 443; *Dodd v. Hills*, 21 Kan. 707; *Bank v. Cox*, 6 Me. 395; *Ingraham v. Grigg*, 13 Smedes & M. 22; *In re Walker*, 18 N. B. R. 56; *Carpenter v. Underwood*, 19 N. Y. 520; *Knight v. Waterman*, 36 Pa. St. 258; *Spencer v. Jackson*, 2 R. I. 35; *Baldwin v. Peet*, 22 Tex. 708; *Bates v. Ableman*, 13 Wis. 644. See *Foster v. Libby*, 24 Me. 448. A declaration that notes are accommodation notes, and providing for their return to the maker, will not justify an inference of fraud. *Price v. De Ford*, 18 Md. 489. Unless the assignment is merely colorable, and made for the sake of the resulting trust, it is not void. *Wilkes v. Ferris*, 5 Johns. 335. Where one partner, with the consent of his copartner, assigns his individual estate and partnership assets to pay his private debts, there may be a reservation in favor of such copartner of a sum equal to his interest. *Mandel v. Peay*, 20 Ark. 325. A reservation to the debtor of what is left after payment of all his debts is proper, *Sangston v. Gaither*, 3 Md. 40; *Beatty v. Davis*, 9 Gill, 211; *Winttingham v. Lafoy*, 7 Cow. 735; *Lindsay v. Guy*, 57 Wis. 200; *S. C.* 15 N. W. Rep. 181; as what remains belongs to him by operation of law. *Cross v. Bryant*, 2 Scam. 36; *Finlay v. Dickerson*, 29 Ill. 9; *Hollister v. Loud*, 2 Mich. 309; *Robins v. Emury*, *Smedes & M. Ch.* 207; *Van Rossum v. Walker*, 11 Barb. 237; *Ely v. Cook*, 18 Barb. 612; *Gibson v. Walker*, 11 Ired. Law, 327; *Hoffman v. Mackall*, 5 Ohio St. 124; *In re Potter*, 54 Pa. St. 465; *Van Hook v. Walton*, 28 Tex. 59; *Farguharson v. McDonald*, 2 Heisk. 404; *Hall v. Denison*, 17 Vt. 310. The rule that there must be no provision for the benefit of the debtor does not apply to sales. A stipulation to take notes for part of the purchase money simply relates to the manner the property should be paid for by the purchaser. *Beach v. Bestor*, 47 Ill. 521.

13. EXEMPT PROPERTY. Partners who have made an assignment for the benefit of creditors cannot claim that any part of the partnership property be set apart to them

as exempt from execution. *Ex parte Hopkins*, Assignee, 2 N. E. Rep. 587. Whatever is exempt from execution may be reserved to the debtor; *Garnor v. Frederick*, 18 Ind. 507; *Hollister v. Loud*, 2 Mich. 309; *Brooks v. Nichols*, 17 Mich. 38; *Smith v. Mitchell*, 12 Mich. 180; *Richardson v. Marqueeze*, 59 Miss. 80; *Dow v. Platner*, 16 N. Y. 562; *Mulford v. Shirk*, 26 Pa. St. 473; *Heckman v. Messinger*, 49 Pa. St. 465; *Sugg v. Tillman*, 2 Swan, 208; *McCord v. Moore*, 5 Heisk. 734; *Farquharson v. McDonald*, 2 Heisk. 404; *Overton v. Holinshade*, 5 Heisk. 683; and an express reservation of such property does not render the assignment void, as creditors are not hindered or delayed thereby. *Hildebrand v. Bowman*, 100 Pa. St. 580. He cannot except from his general assignment property exempt from execution, when at the time of the assignment there were judgments against him in which he has waived the benefit of the exemption laws. *Shaeffer's Appeal*, 101 Pa. St. 45. So the right to claim the benefit of the exemption law may be waived by laches. *Chilcoat's Appeal*, 101 Pa. St. 22. The claim must be made with such promptness as to occasion no delay to the one about to sell it. *Shaeffer's Appeal*, 101 Pa. St. 45; *Bowyer's Appeal*, 21 Pa. St. 210; *Davis' Appeal*, 34 Pa. St. 256; *Morris v. Shafer*, 93 Pa. St. 489. It is too late to claim the exemption after all the property is sold, the proceeds paid out in satisfaction of debts, and the assignee about to file his account. *Chilcoat's Appeal*, 101 Pa. St. 22. An assignment is not void which excepts property exempt by law. *Bates v. Simmons*, 22 N. W. Rep. 335; *First Nat. Bank v. Hinman*, 21 N. W. Rep. 280. So the reservation of exempt property in an assignment by a firm will not invalidate the assignment. *McNair v. Rewey*, 22 N. W. Rep. 339; following *First Nat. Bank v. Hinman*, 21 N. W. Rep. 280, and *Goll v. Hubbell*, 20 N. W. Rep. 674, and 21 N. W. Rep. 288. There is no obligation on the part of an assignor to make any selection of a home-
stead claimed by him as exempt, *Batten v. Smith*, 22 N. W. Rep. 342; and the mere failure to claim the exemption until the morning preceding the sale will not waive the right. *Rice v. Nolan*, 5 Pac. Rep. 437. A merchant tailor, the head of a family and resident of the state, may exempt such portions of his stock as he may select, up to the statute limitation as to value, *Id.*; but if the reservation of what may be exempt by law gives the debtor the right to select the article, the assignment is void, as the assignee has no certain claim until selection is made. *Clark v. Robbins*, 8 Kan. 574.

14. RESERVATION OF SURPLUS. An express reservation to the debtor of the surplus remaining after payment of the debts or execution of the trust is not, as matter of law, fraudulent and void as to creditors not provided for, *Knapp v. McGowan*, 96 N. Y. 75; *Cooper v. Whitney*, 3 Hill, 95; *Curtis v. Leavitt*, 15 N. Y. 9; it raises no presumption of fraud, *Means v. Montgomery*, 23 Fed. Rep. 421; it is merely what the law would provide without the declaration, and does not interfere with or vitiate the transfer. *Means v. Montgomery*, 23 Fed. Rep. 421; *Hempstead v. Johnston*, 18 Ark. 123; *Brown v. Lyon*, 17 Ala. 659; *Graham v. Lockhart*, 8 Ala. 9; *Hindman v. Dill*, 11 Ala. 689; *Miller v. Stetson*, 32 Ala. 166; *Rowland v. Coleman*, 45 Ga. 204; *Conkling v. Carson*, 11 Ill. 503; *New Albany R. Co. v. Huff*, 19 Ind. 444; *McFarland v. Birdsall*, 14 Ind. 126; *Ely v. Hair*, 16 B. Mon. 230; *Johnson v. McAllister*, 30 Mo. 327; *Andrews v. Ludlow*, 5 Pick. 28; *Richards v. Levin*, 16 Mo. 596; *Moore v. Collins*, 3 Dev. Law, 126; *Vaughan v. Evans*, 1 Hill, Ch. 414; *Beck v. Burdett*, 1 Paige, 305; *Dickson v. Rawson*, 5 Ohio St. 21; *Floyd v. Smith*, 9 Ohio St. 546; *Dana v. Bank of U. S.*, 5 Watts & S. 223; *Dance v. Seaman*, 11 Grat. 778. *Contra*, *Truitt v. Caldwell*, 3 Minn. 364, (Gil. 257); *Banning v. Sibley*, 3 Minn. 389, (Gil. 282); *Green v. Trieber*, 3 Md. 11; *Pierson v. Manning*, 2 Mich. 445; *Maberry v. Shisler*, 1 Har. (Del.) 349; *Berry v. Riley*, 2 Barb. 307; *Barney v. Griffin*, 2 N. Y. 365; *Goodrich v. Downs*, 6 Hill, 438; *Lansing v. Woodworth*, 1 Sandf. Ch. 43; *Strong v. Skinner*, 4 Barb. 546; *Collomb v. Caldwell*, 16 N. Y. 484; *Dana v. Lull*, 17 Vt. 390; *Therasson v. Hickok*, 37 Vt. 454. The doctrine that the reserve of the surplus renders the deed void is placed on the ground that the effect is to lock up the property until the creditors provided for in the assignment are paid, *Dana v. Lull*, 17 Vt. 390; and other creditors could not sue the interest of the debtor, subject to the assignment, as they could if it were a mortgage, *Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131; *McClelland v. Remsen*, 23 How. Pr. 175; but the opposite doctrine is held in other cases. *Graham v. Lockhart*, 8 Ala. 9; *Ely v. Hair*, 16 B. Mon. 230; *Murray v. Riggs*, 15 Johns. 571; *Austin v. Bell*, 20 Johns. 442; *Skipwith v. Cunningham*, 8 Leigh, 271; *Janney v. Barnes*, 11 Leigh, 100; *Marks v. Hill*, 15 Grat. 400. The assignor's interest in a possible surplus is not an interest in the property assigned, which can be asserted in an action to determine adverse claims. *Donohue v. Ladd*, 31 Minn. 244; *S. C. 17 N. W. Rep. 381*. The assignor may make what disposition he pleases of the reserved property. *Hildebrand v. Bowman*, 100 Pa. St. 580. There may be a provision in the assignment that the surplus shall be paid to the debtor or creditors in the discretion of the assignee. *Kneeland v. Cowles*, 4 Chand. 46. Partners, in making assignment of firm property to discharge firm debts, may direct the residue to be returned to them, to be divided according to the equitable interests of each, leaving each to pay his private debts out of his own individual property, *Bogert v. Haight*, 9 Paige, 297, *Butt v. Peck*, 1 Daly, 83; *Hubler v. Waterman*, 33 Pa. St. 414; see *Goddard v. Hapgood*, 25 Vt. 351; *Eyre v. Beebe*, 28 How. Pr. 333; and such assignment is not fraudulent, Col-

lomb v. Caldwell, 16 N. Y. 434; Collumb v. Read, 24 N. Y. 505; as the law itself creates a resulting trust in their favor as to such surplus. *Bogert v. Haight*, 9 Paige, 297. Where the assignee includes both individual and partnership property, the surplus cannot be reserved without providing for individual debts. *Collumb v. Caldwell*, 16 N. Y. 434; but proof must be given that there are separate debts. *Bogert v. Haight*, 9 Paige, 297, and it is void if the surplus is reserved without providing for the separate debts. *Goddard v. Hapgood*, 25 Vt. 351; but where no surplus is expected, the omission to so provide does not affect the transfer. *Doremus v. Lewis*, 4 Barb. 124; *Bishop v. Halsey*, 3 Aob. Pr. 440; *Spies v. Jock*, 1 Duer. 669; and evidence is admissible to show that there is no surplus after payment of the partnership debts. *Turner v. Jaycox*, 40 N. Y. 476. *Contra*, *Smith v. Howard*, 20 How. Pr. 121; so where it is shown that the omission was the result of haste or inadvertence. *Hooper v. Tuckerman*, 3 Sandf. 311. An appropriation without discrimination renders the deed fraudulent; so if it authorizes the property of a solvent debtor to be applied in part to pay the debts of another, for which neither he nor his property is in any way bound, before his own just debts are satisfied. *Smith v. Howard*, 20 How. Pr. 121; *O'Neil v. Salmon*, 25 How. Pr. 246; *Kitchen v. Reinehr*, 42 Mo. 427. Where it appears that sufficient property was retained by the debtor to pay his other creditors, the conveyance is valid. *Knapp v. McGowan*, 96 N. Y. 75. The state statutes have reference only to assignments for the benefit of all creditors. *Knapp v. McGowan*, 96 N. Y. 75; *Thiemeyer v. Turnquist*, 55 N. Y. 522; and a conveyance of all property to trustees to pay a portion of the creditors, the surplus to be returned to the debtor, leaving all other creditors unprotected, is fraudulent and void as to them. *Knapp v. McGowan*, 96 N. Y. 75; but evidence may be given of no individual debts, as in one instance, of proof is on the parties claiming under the instrument. *Harbert v. Dean*, 41 N. Y. 57. *Contra*, *Lester v. Abbott*, 25 How. Pr. 438.

15. APPLICATION OF PROPERTY. Partnership property may be applied to the payment of debts not partnership debts, but for which all the partners are bound. *Smith v. Howard*, 20 How. Pr. 121. So money loaned to a stockholder may be shown to have been used for the benefit of the corporation, and is a good consideration for a transfer made by the latter to the creditor. *Calkins v. Lockwood*, 16 Conn. 276; *Candler v. Webster*, 17 Pick. 497; *Goddard v. Sawyer*, 31 Mass. 73; *T. S. v. Hoad*, 3 Conn. 73. An appropriation of the firm property to pay individual debts is not, it seems, approved for setting aside the assignment at the instance of an individual creditor, as he cannot in any manner be affected by it. *Morrison v. Arnold*, 9 Duer. 508. Where separate property assigned by each partner exceeds the amount of his separate debts, a direction that the separate debts shall be paid out of the partnership property will not void the assignment. *Hollister v. Lord*, 2 Mich. 509; *Van Nest v. Nes*, 1 Sandf. 4; *Kennett v. Bassett*, 34 Barb. 81. Debts paid for in an assignment of the individual property must be those for which the debtor is liable jointly with others, as security, and alone. If he is liable, the appropriation cannot be fraudulent. *Fox v. Heath*, 14 Ast. Pr. 162; *O'Neil v. Salmon*, 25 How. Pr. 246; *Barre v. Beebe*, 18 How. Pr. 309; *Kitch v. Schenck*, 3 Barb. Ch. 46; *Van Rensselaer v. Walker*, 11 Barb. 237; *Newman v. Bagley*, 10 Pick. 570; *French v. Lovejoy*, 12 N. H. 456; *Galsden v. Carver*, 3 Barb. 573. See also *Galsden v. Carver*, 1 Sandf. Ch. 348. A direction that property shall be distributed among creditors according to their respective equities is good. *Hickman v. Meigs*, 48 Pa. 31; 405; *Macneil v. Murdock*, 11 Mo. 264. After a partnership creditor has exhausted the firm assets he is entitled to come in equally with separate creditors under an assignment by one partner. *Galsden v. Carver*, 3 Barb. 573. See *Bank's Appeal*, 44 Pa. 37; 309; *Pellows v. Greenwood*, 43 N. H. 421; *Pennington v. Bell*, 4 Sandf. 246. A provision should be made for debts which the separate partners may have against the firm, before the firm creditors are paid. *Goddard v. Hapgood*, 25 Vt. 351; but a provision on a former partner upon his own behalf will be good. *Morrison v. Arnold*, 9 Duer. 508; *Blow v. Carr*, 44 Ill. 208; *Smith v. Howard*, 20 How. Pr. 121. The general rule now is that when all the partners are in bankruptcy the separate estate of one partner shall not stand against the joint estate of the partners, as in bankruptcy with the joint creditors, nor the joint estate against the separate estate of one partner with the separate creditors. In *re Lord*, 11 Fed. Rep. 90; in *re Lane*, 21 N. B. R. 106; but if there be some ground, firm creditors have the right to share in the separate estate. In *re Lloyd*, 21 Fed. Rep. 90.

16. ASSIGNMENT'S TRUST. It is no objection to a conveyance in trust for the benefit of creditors that a provision is made for the payment of a partnership's debts, since the trust is constituted of those assets or drawing up the assignment, over the trust cannot be contracted with creditors for further services. *Ellis v. Ames*, 11 Fed. Rep. 124. The partnership and joint claims reserved by the assignee in the assignment of all assets may be properly included in the trust of creditors. *Ames v. Brown*, 30 N. Y. 109; *Smith v. Felt*, 1 Duer. 51; *Isbell v. Buchanan*, 10 How. Pr. 377; 3, 11 Duer. 143; but the assignment having benefited the assignee or be annulled by the trustee. *Ellis v. Ames*, 11 Fed. Rep. 124. *Contra*, *Burton v. Fell*, 11 Fed. Rep. 124. The payment of partnership debts is not such a preference as will bar a discharge. In *re Boynton*, 10 Fed. Rep. 277.

2 Cal. Unrep. 595

BLISS v. CARROLL. (No. 8,732.)

Filed December 23, 1885.

BONDED WAREHOUSE RECEIPTS—STORAGE OF LIQUORS.

Where brandy manufactured for the owner by a licensed distiller is stored in a United States bonded warehouse, regulated by the act of congress of March 3, 1877, and the treasury regulations of May 15, 1877, in order to delay the payment of the revenue tax, such laws requiring brandy to be stored in a distiller's name, but not requiring the distiller to be the owner, if the warehouse receipt was issued to the distiller, and he subsequently sold the liquor to another, without authority, and transferred the receipt to him, the purchaser was a *bona fide* purchaser for value and without notice, and the owner of the liquor was entitled to a return of his property on paying to such purchaser his payments for warehouse charges and the government tax.

In bank. Appeal from superior court, city and county of San Francisco.

Latimer & Morrow and Frederick S. Stratton, for appellant.

George Cadwalader, for respondent.

Ross, J. The findings show the plaintiff, Bliss, to be the true owner of the brandy in controversy. It was manufactured by one Belden, who was a licensed United States distiller, for the assignor of the plaintiff, for a certain sum per gallon. The brandy was made of grapes belonging to plaintiff's assignor, who, in order that the payment of the government tax of 90 cents per gallon might be delayed, in accordance with the laws of the United States, caused Belden to store it in a United States bonded warehouse. The law of the United States in respect to the matter required that such brandy should be stored in the name of the distiller, and it was accordingly done; Belden receiving a warehouse receipt therefor in his name. Subsequently, without any authority from Bliss, and without his knowledge, Belden sold the brandy to the defendant, Carroll, and transferred the warehouse receipt to him, and Carroll had another issued in his own name. Carroll paid Belden value for the brandy, and purchased it in good faith, and without any notice of any interest therein on the part of Bliss. As soon as the latter learned of the sale by Belden to Bliss, he tendered the amount of the government tax due on the brandy, together with the charges of the warehousemen, and demanded of the defendants that the brandy be transferred to his name on the records of the warehouse and on the records of the office of internal revenue, and be delivered to plaintiff, or his order, upon the payment of the taxes and charges, all of which was refused. Afterwards, Carroll paid the government tax and removed the brandy.

The warehouse in which the brandy in question was stored was not an ordinary warehouse under the general commercial system of the country, but was a special bonded one, controlled and regulated by the act of congress of March 3, 1877, and special treasury regulations of date May 15, 1877. The law governing the matter—of which all persons are bound to take notice—requires that all grape brandy placed therein shall be stored in the name of the distiller, but does

not require that the distiller shall be the owner. He may or may not be. And of that fact all persons are bound to take notice. The plaintiff did not intrust Bliss with the brandy for the purpose of sale or transfer, but it was stored in the latter's name because the law said it should be so stored. We are of opinion that the facts of the case do not bring it within any exception to the general rule that a vendee acquires only the title of his vendor, and that the true owner can recover the possession of his property in the hands of a *bona fide* purchaser. But as defendant, Carroll, was required to pay the government tax and the warehouse charges upon the brandy, it is but right that a refunding of the amounts so paid be imposed as a condition to the recovery by plaintiff.

Judgment reversed, and cause remanded, with directions to the court below to render judgment upon the findings in plaintiff's favor against defendant, Carroll, for a return of the property, or its value, upon the payment or tender by plaintiff to said defendant of the amount of such tax and charges.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MYRICK, J.; MCKINSTRY, J.; THORNTON, J.

2 Cal. Unrep. 597

DOANE v. BARBER. (No. 9,336.)

Filed December 23, 1885.

FINDINGS—FACTS IN ISSUE.

Where the validity of an assessment is put in issue by the pleadings in an action, any fact or facts going to show that no valid assessment was ever levied, are within the issues and properly included in the findings.

Department 1. Appeal from superior court, city and county of San Francisco.

J. M. Wood, for appellant.

Doyle, Barber & Scripture, for respondent.

Ross, J. It was contended on behalf of the plaintiff that the third, fourth, and fifth findings of fact, on which the judgment given below rests, are not within the issues made by the pleadings, and cannot, therefore, be regarded. But the pleadings put in issue the question of assessment or no assessment, (*City & County of San Francisco v. Eaton*, 46 Cal. 100,) and any fact or facts going to show that no valid assessment was ever levied were, therefore, within the issues made by the pleadings. Judgment affirmed.

We concur: MCKEE, J.; MCKINSTRY, J.

68 Cal. 238

In re BAUM. (No. 9,185.)

Filed December 23, 1885.

INSOLVENCY—RESIDENT CREDITORS—NON-RESIDENTS, ASSIGNMENT BY.

Where non-resident creditors, without consideration, assign their claims to persons residing in the state for the sole purpose of enabling such persons to become petitioning creditors in a proceeding in involuntary insolvency against a debtor, such assignments cannot constitute the assignees "creditors, resident in the state," within the meaning of section 8 of the California insolvency act of 1880.

Department 1. Appeal from superior court, city and county of San Francisco.

Naphtaly, Freidenrich & Ackerman, for appellant.

Sawyer & Ball, Lloyd & Wood, and Mastick, Belcher & Mastick, for respondent.

Ross, J. Section 8 of the insolvent act of 1880 provides:

"An adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than \$500: provided, that said creditors, or either of them, have not become creditors by assignment within thirty days prior to the filing of said petition." St. 1880, p. 84.

The real question in the case is whether assignments made by non-resident creditors to persons residing in the state, without consideration, and solely to enable such persons to become petitioning creditors, can make of such assignees "creditors, residents of this state," within the fair meaning of the statute. The legislature has seen fit to enact that only creditors resident of the state shall institute such proceedings; and for the courts to hold that mere colorable transfers of claims to persons residing within the state will make such persons "creditors resident of the state" would be to sanction a plain evasion of the statute. Apart from the presumption which must be indulged, that when the legislature speaks of creditors it means *bona fide* creditors, the provision of the proviso would seem quite clearly to indicate an intention on the part of the law-making power to guard against assignments, even in good faith and for value, being made for the purpose of commencing involuntary proceedings. Judgment reversed and cause remanded.

We concur: McKINSTRY, J.; McKEE, J.

(2 Cal. Unrep. 593)

AGNEW v. KIMBALL. (No. 7,772.)

Filed December 23, 1885.

TRIAL—CONTRADICTORY INSTRUCTIONS—JUDGMENT REVERSED.

For misleading and contradictory instruction as to the effect of the sale of personal property which was not in vendor's possession, and not accompanied by change of possession, judgment reversed.

Department 1. Appeal from superior court, county of Mendocino.

Wilson & Otis and T. B. Bond, for appellant.

T. L. Carothers, L. D. Latimer, and C. C. Hamilton, for respondent.

Ross, J. The defendant claimed that the logs, for the conversion of which he was sued, were originally the property of Clark & Rutherford, and were by them sold to one A. H. Rutherford, and by the latter sold to the defendant. They were logs cut in the forests of Mendocino county, to be converted into lumber, and were, at the time of the sale under which the defendant claims, as well as at the time of the execution sale under which the plaintiff claims, scattered for a distance of several miles along the stream of water by which they were to be conveyed to the mill. The court below instructed the jury:

"If the jury believe from the evidence that there was a sale of the logs by Clark & Rutherford or A. H. Rutherford to the defendant, but that such sale was not followed by an immediate delivery and by an actual and continued change of possession thereof, then such sale was void as against the plaintiff. If the evidence shows that the owners of the logs sold them for a valuable consideration to Kimball, and that the logs were not in actual possession of the sellers at the time of sale, it was not necessary that the sale should have been accompanied by an immediate delivery, and followed by an actual and continued change of possession, to make the sale good and valid, and to transfer the title of them to Kimball; and, in connection with this, I will say that the sale, without such immediate possession, was a good sale, as between the seller and buyer, but might not be good as against creditors. I don't say that it would not, but it might not be. I charge you that before a sale of the logs could have been made to Kimball, the defendant, the party selling to him must have been in the actual possession thereof, and must have actually delivered them to the defendant, in order for the sale to be good against the creditors of the party selling."

These instructions were clearly contradictory and misleading. Judgment and order reversed, and cause remanded for a new trial.

We concur: McKee, J.; McKINSTRY, J.

68 Cal. 246

CASEY and others v. JORDAN and others. (No. 9,238.)

Filed December 23, 1885.

DISMISSAL OF ACTION AFTER TRIAL AND SUBMISSION.

A cause cannot be dismissed on plaintiffs' motion after it has been regularly tried and submitted for decision.

Department 1. Appeal from superior court, city and county of San Francisco.

Sawyer & Ball, for appellants.

T. J. Crowley, for respondents.

Ross, J. In this case the court below gave judgment for the defendant upon the ground that, at the time of the commencement of the action, there was another action pending between the parties for the same cause. The other action referred to is the suit entitled *Casey v. Jordan*, *post*, 99, (No. 8,766,) just decided here and remanded to the court below for a new trial. The cause of action in the two suits is substantially the same. The first action was tried in the court below, and submitted to the court for decision upon the briefs to be filed by the respective parties; and, in that condition of the case, the court, on motion of the plaintiffs, caused to be entered in the minutes an order dismissing the action without prejudice to another. Two days afterwards the order of dismissal was vacated by the court on motion of the defendants in the action. In the meantime the second action was commenced.

The order of dismissal was invalid, for, after the cause had been regularly tried and submitted for decision, it could not be dismissed on plaintiff's motion. *Heinlin v. Castro*, 22 Cal. 102. The order of dismissal was therefore rightly vacated, and the suit carried to judgment. Judgment affirmed.

We concur: McKEE, J.; McKINSTRY, J.

68 Cal. 231

MULLINS v. WIELAND. (No. 9,233.)

Filed December 23, 1885.

APPEAL—VERDICT—CONFLICT OF EVIDENCE.

Where a new trial is granted on the ground of insufficiency of the evidence to sustain the verdict, the order granting a new trial will not be reversed on appeal if such evidence is conflicting.

Department 1. Appeal from superior court, city and county of San Francisco.

Clunie & Knight, for appellant.

Loughborough & Newhall, for respondent.

McKEE, J. After the return of a verdict for \$6,000 in this ac-

tion, the defendant moved for a new trial on a statement of the case. Upon motion, the court ordered that a new trial be granted, and from the order the plaintiff appealed. The motion was made and the order entered upon the ground that the evidence was insufficient to sustain the verdict. The record shows that the action in which the verdict was rendered was brought to recover damages for personal injuries sustained by the plaintiff from the fall of an elevator, a distance of 60 feet, from the top story to the basement of a building known as the "Philadelphia Brewery," the property of John Wieland. On the trial, evidence was given sufficient to establish as incontrovertible facts that the proprietor of the brewery had contracted with the Columbia Foundry for the laying of an iron floor in the second story of the brewery; that, for the purpose of commencing performance of the contract, the foreman of the foundry, on the twenty-third of May, 1882, went to the brewery, taking with him two servants of the foundry, and about 36 square iron plates, each weighing about 400 pounds, which were to be used in the work of laying the floor. One of these servants was the plaintiff in the action, who was permanently injured by the fall of the elevator while engaged with his fellow-servant in the duty of taking up on the elevator one of the iron plates to the second story of the building.

It is conceded that the injuries to the plaintiff were caused by the gross negligence of a servant of the brewery in running the elevator. But there was evidence given which tended to show that the servant was employed only to do general work about the cellar, to mark beer barrels, and to load and unload the elevator, and that he was not employed and was not authorized to run the elevator. Yet he was the only servant of the brewery at or near the elevator when the plaintiff got on it with the iron plate to go up to the second story of the building.

The issues which were presented to the jury upon the evidence in the case involved—*First*, whether the defendant, by his foreman, granted the use of the elevator to the foreman of the foundry for the purpose for which it was used; *second*, whether the servant of the brewery that ran the elevator, in connection with that use of it, was authorized to run it; or, *third*, whether, if another was employed for that purpose, and was not present to perform his duty at the time the foundry was using it, was the servant who operated it left temporarily in charge of it, or was the foreman of the brewery negligent in not seeing that the regular operator of the elevator was present to perform his duty? These were all questions of fact for the jury, and there was evidence given for and against their existence as facts. Upon the evidence the jury found for the plaintiff. But the verdict was founded upon conflicting evidence; and, on the motion for a new trial, the court, to whose discretion the motion was addressed, determined that the evidence was wholly insufficient to sustain the verdict. That being so, we cannot say, as matter of law, that the court abused its dis-

cretion in granting a new trial. *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, Id. 419; *Blum v. Sunol*, 63 Cal. 341.

Order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

63 Cal. 243

DAHL and others v. PALACHE and others. (No. 9,347.)

Filed December 23, 1885.

RELIGIOUS CORPORATIONS—NOTICE OF ELECTION OF VESTRYMEN.

Where a canon of a church provides that the election of vestrymen shall be held on "Easter Monday of each year, or as soon thereafter as practicable," and that "notice of such election shall be given during divine service on the Sunday previous thereto," notice of an election not held on Easter Monday is requisite to its validity, and notice given at a service much earlier than the appointed time for divine service is not sufficient.

Department 1. Appeal from superior court, city and county of San Francisco.

Stanley, Stoney & Hayes, and *Philip Teare*, for appellants.

Ben Morgan, for respondents.

ROSS, J. At least one point made on behalf of the defendants is fatal to plaintiffs' claim that they are the duly-elected vestrymen of the parish in question. The bill of exceptions recites that on the trial evidence was given showing that the parish of St. Mark's is a voluntary religious association or congregation, organized under and subject in all things to the constitution, canons, regulation, and discipline of the Protestant Episcopal Church of the United States, and of the diocese of California, and was such from the twenty-ninth day of May, 1882; that said parish has never been incorporated; that on and before the said twenty-ninth of May it was known as the Bishop Berkeley mission, and was under the control of the bishop of the diocese and the board of missions thereof; that by the canons of said Protestant Episcopal Church, regulating such matters, the minister in charge of such mission was appointed by the said board of missions, on the nomination of the bishop, and was subject to removal by the bishop at any time; that on the twenty-ninth day of May, 1882, the Rev. E. S. Greene was the missionary in charge of said mission; that on that day the said mission was, with the previous consent of the bishop of the diocese, and in pursuance of the canons of the church, regularly organized into and became a parish under the name of St. Mark's parish, and at the same time the defendants were duly elected vestrymen of the parish, to serve until their successors should be duly elected; that one of the duties of the vestry was to elect a rector to take charge of the spiritual affairs of the parish, which duty was and is regulated by sections 1, 2, and 3 of canon 5, which read as follows:

"CANON 5—THE RECTOR.

"Section 1. The rector of a parish shall be elected by a majority of all the vestry, duly convened after legal notice, specifying such election to be the object of the meeting.

"Sec. 2. Upon the election of rector, or of an assistant minister, the church wardens shall give immediate notice thereof to the ecclesiastical authority of the diocese, whereupon the person elected may enter upon the duties of his calling: provided, that the said authority, and the bishop, acting by and with the consent of the standing committee of the diocese, may veto said election, in which event the election shall be null and void.

"Sec. 3. *First.* Whenever the rectorship of a parish becomes vacant it shall be the duty of the vestry to give immediate notice to the ecclesiastical authority. *Second.* The ecclesiastical authority may supply, by appointment, such vacancy until a rector shall be elected."

—That immediately after the organization of the parish, and the election of the defendants as vestrymen, a meeting of four of the five vestrymen-elect was held, without any previous notice whatever of such meeting, and without the knowledge of the other vestryman that he had been so elected, at which meeting a resolution was adopted that the Rev. E. S. Greene be elected rector of the parish, who consented thereto, he being present at the meeting; that no notice of such election was ever given to the bishop, who was then and still is the ecclesiastical authority of the diocese, nor was any action taken by the bishop with respect to such election, before the appointment by the bishop of the Rev. David McClure to supply the vacancy in said rectorship, as hereinafter stated; that on the twentieth-fourth day of July, 1883, at a meeting of the vestry of the parish, regularly held, a resolution was adopted rescinding the resolution electing the Rev. E. S. Greene as rector, and declaring the rectorship of the parish vacant, and directing the clerk of the vestry to notify the bishop of the diocese of the vacancy, and to request him to appoint a minister to supply it; that notice of such action was given to the bishop and to the Rev. E. S. Greene; that thereafter, and before the twenty-ninth day of July, 1883, the said bishop, as the ecclesiastical authority of the diocese, did authorize and direct the Rev. David McClure to supply the vacancy until a rector should be elected, notice of which was given to the said Rev. David McClure and to the vestry and to the said Rev. E. S. Greene; that according to the canons and regulations of the said Protestant Episcopal Church, the temporalities of a parish are managed by vestrymen, whose duties, time and manner of election, and term of office are prescribed by sections 1 and 2 of canon 4, which read as follows:

"CANON 4—THE VESTRY.

"Section 1. On Easter Monday of each year, or as soon thereafter as practicable, there shall be an election of not less than three, nor more than eleven, vestrymen and trustees, or vestrymen and directors, (provided, that any parish now in existence may elect such number of vestrymen as their articles of incorporation may require,) the same being at least twenty-one years of age, to

manage the temporalities of the parish, who shall have power to fill vacancies in their own body, and shall continue in office until their successors are duly elected. Notice of such election shall be given during the divine service upon the Sunday previous thereto.

"Sec. 2. The election of vestrymen shall be by ballot, and any male person of twenty-one years of age who for the previous sixty days shall have been registered a communicant, and any male person of like age who shall have been a member of the congregation for a like period, and has regularly contributed to the support of the parish, shall be entitled to vote."

—That on July 29, 1883, the hour of 11 o'clock was, and during the existence of said parish always had been, the time of commencing the Sunday morning divine service, and no other or different hour had been appointed or announced for such service for that day; that, without previous notice to the congregation of any change of the hour of service, and knowing that the bishop had appointed the Rev. David McClure to officiate as minister in said parish, and that he was expected to hold divine service in the said church at the regular hour of 11 A. M. of said twenty-ninth day of July, 1883, the said Rev. E. S. Greene did, about the hour of 9 o'clock in the morning of that day, enter the said church, and thereupon commenced to hold the services of said Protestant Episcopal Church, and intentionally continued and protracted the same to an unusual extent, and until after the hour of 11 o'clock, and after the arrival of the said Rev. David McClure, and refused to suspend said services, and prevented the said Rev. David McClure from officiating; that while the Rev. E. S. Greene was so officiating in said church, and before the said regular hour for morning service, he gave notice to the persons present and attending said services that on Monday, July 30, 1883, at 8 P. M., an election would be held in said church building of five vestrymen, to serve until their successors should be elected; that on Monday evening, July 30, 1883, said church building was locked, and the key thereof was in possession of the marshal of the town of Berkeley, and access thereto could not be had, and such election could not be held therein; that at the hour named in said notice a meeting of certain members of said parish was held at the residence of J. B. Whitcomb, on the same street with said building, but distant therefrom about two blocks; that said meeting was held in the dining-room of said residence, and the Rev. E. S. Greene presided; that the number of persons then present and taking part in the proceedings were eight or ten, including the five plaintiffs; that all of the persons so participating were qualified to vote for vestrymen of the parish; that the plaintiffs were the only persons nominated for the office of vestrymen at said meeting, whereupon a motion was made and carried, no one dissenting, that the secretary of the meeting cast the ballot for those present in favor of the plaintiffs; that the secretary did then and there prepare such ballot, and deposit the same in a hat, and thereupon the plaintiffs were declared duly elected vestrymen of said parish; that no election of vestrymen, therefore, had been held on Easter Monday, 1883, or at

any time since the election of the defendants, in 1882; that no request, at any time, was made by any one that the defendants, or any of them, as the vestry, or as vestrymen, should call an election, or cause an election to be held, for their successors, and neither of them had any notice or knowledge of said proposed election on the thirtieth of July; that on Easter Monday, 1883, and for some time thereafter, and until a short time before the alleged election of the plaintiffs, it was understood and believed by the vestrymen and congregation of St. Mark's parish that the steps taken to organize the said parish had been incomplete and inadequate, and that the parish was still a mission.

The facts above detailed were proved in the court below, according to the bill of exceptions contained in the record. Concerning the propriety of the proceedings, it is not for us to speak; and but little need be said in regard to the law applicable to the facts. As has been seen, the canon provides that an election of vestrymen shall be held "on Easter Monday of each year, or as soon thereafter as practicable," and it is expressly provided that "notice of such election shall be given during divine service upon the Sunday previous thereto." Whether an election on Easter Monday would or would not be valid without notice thereof need not be determined, but we think that it does not admit of doubt that notice of an election not so held is requisite to its validity. We need only inquire further, was the notice given by the Rev. Mr. Greene, at the services inaugurated by him at 9 o'clock in the morning of July 29th, the notice required by the canon of the church? Was the service, commenced and conducted by him at the time and in the manner stated in the proof, the "divine service" spoken of in the canon? There can be but one answer to this, and that must be in the negative. Judgment reversed, and cause remanded.

We concur: McKEE, J.; McKINSTRY, J.

(68 Cal. 235)

POUPION v. MUZIO. (No. 11,182.)

Filed December 23, 1885.

APPEAL—TIME FOR FILING TRANSCRIPT—EXTENSION OF, BY STIPULATION—DISMISSAL OF APPEAL.

An appeal will not be dismissed for failure to file the transcript within the time prescribed by the supreme court rules, if, at the time for the motion to dismiss, the appellant offers to file the transcript, and it appears that by a stipulation not filed the parties had extended the time for filing to a date beyond the hearing of the motion to dismiss.

Department 1. Appeal from superior court, city and county of San Francisco.

A. J. L. Breton, for appellant.

Gustave Touchard, for respondent.

Ross, J. The respondent moved to dismiss the appeal herein be-
v. 9p, no. 2—7

cause of the failure of appellant to file the transcript within the time prescribed by a rule of this court. Appellant, in answer to the motion, offered to file the printed transcript, and at the same time presented a written stipulation signed by the attorney of record of respondent extending the time to file the transcript to a date beyond the hearing of the motion. It is objected that the stipulation is of no effect, because not filed with the clerk. But we think that in a matter relating only to the time in which the record on appeal shall be filed here, the objection is not well taken, and that the appeal should not be dismissed. Motion denied.

We concur: McKEE, J.; McKINSTRY, J.

(68 Cal. 240)

DOUGHERTY v. FREIRMUTH. (No. 9,259.)

Filed December 23, 1835.

APPEAL—FINDINGS—STIPULATION FOR WAIVER OF.

A party stipulating in writing that findings shall be waived, is estopped to object to the want of findings, although such stipulation was not filed until after entry of judgment.

Department 1. Appeal from superior court, county of Alameda.
John J. Coffey, for appellant.

Tully R. Wise, Moultrie & McLean, and *A. L. Rhodes*, for respondent.

Ross, J. Appellant contends that the judgment should be reversed because of a failure of the court to file findings of fact. It is provided by section 634 of the Code of Civil Procedure that such findings may be waived "by consent in writing, filed with the clerk." The waiver of findings, as said by respondent's counsel, amounts to no more than waiver of objection to the rendition of judgment without findings. In the present case, the attorneys for the plaintiff, who is the appellant, signed a stipulation in writing, in which it was "agreed that findings in this case are waived." The stipulation was not filed with the clerk until some days subsequent to the entry of judgment, but we cannot see that that circumstance alters the effect of the stipulation, which we think is to estop the plaintiff from making the objection that no findings were filed. Judgment affirmed.

We concur: McKINSTRY, J.; McKEE, J.

WHITMAN v. HAY. (No. 9,144.)

Filed December 23, 1885.

APPEAL—FAILURE TO FILE POINTS AND AUTHORITIES—JUDGMENT AFFIRMED.

Department 1. Appeal from superior court, city and county of San Francisco.

Joseph D. Redding, for appellant.

McPike & Bonney, for respondent.

BY THE COURT. The record in this case shows that it was submitted for decision on the twenty-fourth of September, 1885, on briefs on file, and that no briefs have at any time been filed. For want of points and authorities, judgment affirmed.

CASEY and others v. JORDAN and others. (No. 8,766.)

Filed December 23, 1885.

APPEAL—FAILURE TO FIND ON ISSUES—JUDGMENT REVERSED.

Department 1. Appeal from superior court, city and county of San Francisco.

Sawyer & Ball, for appellants.

E. M. Gibson, *Willis Whitmore*, and *T. J. Crowley*, for respondents.

BY THE COURT. For want of findings upon the issues, the judgment and order are reversed, and cause remanded for a new trial.

(2 Cal. Unrep. 599)

DURKEE v. CENTRAL PAC. R. CO. (No. 9,067.)¹

Filed December 23, 1885.

1. PRINCIPAL AND AGENT—DECLARATIONS, ADMISSIBILITY AGAINST PRINCIPAL.

Declarations by an agent or servant employed to perform a certain duty are not admissible against the principal, unless they are part of the facts and circumstances of some act happening within the scope of the servant's or agent's employment.

2. RAILROAD—NEGLIGENCE—DECLARATIONS OF ENGINEER AS TO CAUSE OF INJURY.

In an action of damages for injury to a child by a railroad train, the declarations of the engineer concerning the accident, made from three to five minutes after the casualty happened, are admissible against the principal as part of the *res gestæ*.

Department 1. Appeal from superior court, county of Alameda.

McAllister & Bergin, for appellants.

H. F. Crane, for respondent.

McKEE, J. On the second of July, 1876, M. W. Durkee, a boy four or five years old, was run over by an engine belonging to and used at the time in the service of the corporation defendant. To recover damages for the personal injuries sustained by the boy on that occasion this suit was brought by his guardian *ad litem* against the

¹ Reversed in banc. See 11 Pac. 130, 69 Cal. 533.

Cal. Rep. 9-11 P.—3

railroad company, on the ground that the injuries were caused by the negligence of the company's engineer while driving the engine, which was attached to a train of cars running on the railroad from San Jose to Niles, in Alameda county. The evidence in the case tended to show that, on the day of the casualty, the train had arrived on the railroad track at the Warm Springs station at 4:35, and, according to schedule time, it was to leave there at 4:36. When it stopped at the station the nose of the pilot or cow-catcher just came to the south end of a trestle-work, which formed part of the railroad track across a creek at the station at a point where a county road, running east and west, crosses the trestle. The train was started on schedule time across the trestle at a speed of about six miles an hour, and, at that rate of speed, it had moved for about 20 feet on the south end of the trestle, when the engineer, seeing in front of him a human head rising up from between the ties, reversed his engine and called for brakes; but the train could not be stopped until the engine went over the boy. It was stopped within 30 or 40 feet on the trestle, and the boy was taken out from under the engine, badly mutilated.

The main issue in the case was whether the boy was in such a position on the trestle that the engineer, by looking out in front, along the trestle, before starting his train, could have seen him on the trestle, and have avoided the casualty; or whether the boy was so concealed under the trestle as to be hidden from sight until he raised up his head at the approach of the engine, when it was impossible to stop it without going over him. The jury found that there was no contributory negligence on the part of the boy or of his parents, and that the injuries to the boy were caused by the negligence of the engineer in failing to look out in front along the trestle to see that it was clear when he started his train to cross it. The verdict is sustained by the evidence. But it is founded, in part, upon testimony, given by one of the plaintiff's witnesses, of declarations as to how the casualty happened, which were made to him by the engineer about five minutes after the injury to the boy, and about three minutes after he had been taken from under the engine by one of the brakemen, who, at the time of the declarations, had the boy on his arms in the county road, a short distance from the railroad track. The declarations, as testified by the witness, were:

"I asked (the engineer) how it happened, and he said: When he started up the train he was looking up the road, towards Peacock's, to see if any one was coming down, and when he turned around he saw the boy, and he blew the whistle, but when he reversed the engine it was too late, and he said that they took him out from between the hind trucks of the tender."

The admission of these declarations against the objection and exception of the defendant is assigned as an error. The declarations of a servant or agent, who is employed to perform a duty, are not admissible against the master or employer, unless they are part of the

facts and circumstances of an act happening within the scope of the employment, for which it is sought to make the master liable. The facts and circumstances which grow, as it were, out of the act or transaction, and are contemporaneous with it, and serve to illustrate its character, are part of it. Thus, language used *at the time* of making an assault is part of the assault, (*MacDougall v. Maguire*, 35 Cal. 279,) and declarations characterizing a transaction made "*at the very time*" of the transaction are part of it. *Gerke v. Steam N. Co.*, 9 Cal. 257. So, declarations voluntarily and spontaneously made by a person about half or three-fourths of a minute *after* he was shot by another, as to the person who shot him, have been held part of the circumstances of the shooting. *People v. Vernon*, 35 Cal. 50. But declarations made *after* the fact has been fully consummated are not *res gestæ*. *People v. English*, 52 Cal. 212; *Innis v. The Senator*, 1 Cal. 459; *Mateer v. Brown*, Id. 224. The Code rule upon the subject is:

"Where the declarations * * * form part of a transaction which is itself the fact in dispute, or evidence of that fact, such declarations * * * are evidence as part of the transaction." Section 1850, Code Civil Proc.

Under this rule the main difficulty in determining the admissibility of the declarations of the engineer in the case in hand arises out of the consideration of the contemporaneousness of the casualty to the boy, and the declarations concerning it. As has been observed:

"What lapse of time is embraced in the word 'contemporaneous' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not of course required. It is enough that the two were substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially past." *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 117.

It is upon these legal principles that the American courts have generally decided the question of contemporaneousness of fact and declaration.

In *Com. v. McPike*, 3 Cush. 181, objections were made to the declaration of a woman, who, after having been stabbed in her own room, ran bleeding out of the room, up a flight of stairs and into a room occupied by another, where, having fallen on the floor, she lay until a person outside, who heard her cries, went and brought a watchman, to whom she made the declaration. The objections were overruled and the declaration admitted, and it was held, on appeal, that the time when the declaration was made was so recent after the injury as to justify receiving it as evidence. Where it appears, says the same court, that the declarations "were uttered after the lapse of

so brief an interval and in such connection with the principal transaction as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact which was the subject of inquiry before the jury, they are *res gestæ*." *Com. v. Hackett*, 84 Mass. 139.

So, in *Insurance Co. v. Mosley*, 8 Wall. 397, which was an action upon an accident insurance policy, in which the subject of inquiry before the jury was whether the deceased died from an injury caused by an accident; and the plaintiff in the action gave evidence tending to show that before the alleged accident the insured had arisen from his bed about 12 or 1 o'clock at night, went down stairs and came back, and when he came back he stated "that he had fallen down the back stairs and almost killed himself,"—it was insisted that this declaration was no part of the *res gestæ*. Exactly what time elapsed between the accident and the declaration does not appear in the case, but the supreme court of the United States held the declaration admissible. "In the complexity of human affairs," say the court, "what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. * * * The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence. * * * The tendency of recent decisions is to extend rather than to narrow the scope of the doctrine."

Hanover R. Co. v. Coyle, 55 Pa. St. 396, was an action by a peddler, who was run over by a locomotive of the defendant, to recover damages for injuries to himself, his wagon, and his goods. On the trial the plaintiff, against the objection and exception of the defendant, gave evidence of the declarations of the engineer as to the accident; and the supreme court, in passing upon the exception, say:

"We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road, by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declaration made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself."

To the same effect will be found *Waldele v. New York Cent. & H. R. Co.*, 95 N. Y. 284; *State v. Garrand*, 5 Ore. 217; *Ohio & Mississippi Ry. Co. v. Porter*, 92 Ill. 437.

Applying to the declarations of the engineer elicited in this case the doctrine of those cases, we think the lower court did not err in overruling objections to their admissibility as *res gestæ*. The declarations were voluntary statements, made by the engineer while standing in his engine at the place where the casualty occurred, just after the boy was taken out from "between the hind trucks of the tender," and while he was in view, in the arms of the brakesman, who was carrying him to his father's house. Although they were not literally

simultaneous with the casualty, yet they were obviously elicited by it, and following it in such close connection as to be apparently the spontaneous expression of the natural consciousness of it, while the engineer was still under the heat and excitement of the circumstances in which it happened. Made in such circumstances, the declarations cannot be regarded as an afterthought, nor as the expression of a mere narrative of a transaction which had been consummated and become an event of the past. They were made after the injury had been inflicted, and the transaction in which the cause of the injury occurred was in process of passing away, but had not wholly passed, and was not quite completed. They were therefore part of the transaction, and admissible as evidence.

We find no prejudicial errors in the record. Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

68 Cal. 241

YOUNGER v. BOARD OF SUPERVISORS. (No. 9,134.)

Filed December 23, 1885.

1. TAXATION—ILLEGAL TAX—VOLUNTARY PAYMENT—RECOVERY BACK.

Where taxes based upon an illegal assessment are paid in order to prevent the property assessed from being returned delinquent, such payment is a voluntary payment, and no action lies to recover back the amount thereof.

2. SAME—POWER OF SUPERVISORS TO REFUND—MANDAMUS.

The power of county supervisors to refund an illegal or erroneous tax is judicial and not ministerial, and such supervisors cannot be compelled, after hearing and refusal of a petition for the refunding of an illegal tax, to act contrary to its decision on the petition.

Application for writ of mandate.

Department 1. Appeal from superior court, county of Santa Cruz.

Chas. B. Younger, for appellant.

Lesser & Hall and *Wm. T. Jeter*, for respondent.

MCKEE, J. The petitioner shows that on the ninth of January, 1883, he applied to the board of supervisors of Santa Cruz county, on a verified petition, for an order upon the county treasurer of the county, for the payment of the sum of \$265, claimed to have been illegally collected from the petitioner by the tax collector of said county; "that the petition came on regularly for hearing before and was heard by said board of supervisors;" and that said board, after hearing the petition and the proofs given in support of the facts stated therein, denied the same. The moneys which the petitioner claims to have been illegally collected from him were collected by the tax collector for taxes levied for the state, county, and school purposes on an assessment to the petitioner, upon the assessment roll of Santa Cruz county for the year 1880, on the sum of \$12,481, money belonging to him on general deposit in the Santa Cruz Bank of Savings and Loan. Being assessed for that sum of money in connection with

other property, the petitioner claimed the assessment of the money to him was illegal, because the same money was assessed on the same assessment roll to the bank, for the same taxable purposes for the same year; and he applied to the county board of equalization to equalize his assessment by deducting from it the money on deposit in the bank, but it refused his application, "and on the last day for the payment of the taxes before delinquency he had to pay and did pay to the tax collector the taxes on said money, in order to prevent his property from being returned delinquent." This payment was voluntarily made in the year 1880. Being voluntarily paid, the money was not recoverable back by action, and the petitioner had no claim for it which he could enforce against the county.

But it is said to be immaterial whether the payment was voluntary or compulsory, because section 3804 of the Political Code makes it the duty of the board of supervisors, to order refunded taxes erroneously or illegally collected. The section reads: "Any taxes, per centum, and costs erroneously or illegally collected may, by order of the board of supervisors, be refunded by the county treasurer." The power thus granted to boards of supervisors is judicial, not ministerial; and when a board is called upon in an application before it under that section of the Code it may, in the exercise of its powers, make a refunding order only for such taxes, etc., as may have been illegally or erroneously collected. For that purpose it has the right to hear and determine the application. Such a proceeding is in the nature of an action for relief, (*Dickey v. Polk Co.*, 58 Iowa, 287; S. C. 12 N. W. Rep. 290,) and after the board in which the proceeding is pending has heard and determined, it cannot be *mandamused*; for a tribunal exercising judicial powers cannot be compelled how to act. Judgment affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 604

SMITH v. ROBERTS. (No. 9,270.)

Filed December 23, 1885.

1. BOUNDARIES—POSSESSION—MISTAKE AS TO DIVISION LINE.

Where coterminous proprietors are in possession of certain land under a mutual mistake as to the division line, such possession has no effect upon their legal rights, nor is it adverse or conclusive against the assertion of any existing rights based upon the true title.

2. SAME — DIVISION LINE — VERBAL AGREEMENT CONCERNING — STATUTE OF FRAUDS.

Where coterminous proprietors enter into a verbal agreement to have the true division line surveyed; and to abide by the line so established, such agreement is binding, and is not within the statute of frauds.

Department 1. Appeal from superior court, county of Humboldt.
J. J. De Haven and *G. W. Hunter*, for appellant.
S. M. Buch, *Cope & Boyd*, and *P. F. Hart*, for respondent.

McKEE, J. This case originated in an action commenced in a justice's court to recover damages for a trespass on real property. To the complaint in the action there was filed a verified answer, which presented issues involving title and possession of the property, and the justice transferred the action to the superior court, where, trial being had, judgment was entered for defendant. The contention is that the judgment is erroneous, because the decision on which it was given is not sustained by the evidence. But the evidence shows, and the court finds, that plaintiff and defendant were coterminous proprietors of two 80-acre tracts of land in the north-west quarter of section 3, township 2 north, range 2 west, Humboldt meridian,—plaintiff being owner and in possession of the south-west quarter, and defendant owner and in possession of the south-east quarter, of the quarter section; that the defendant entered upon the land and dug post-holes thereon for a divisional fence between the two tracts, the digging of these holes constituting the trespass of which the plaintiff complained; and that the true divisional line, run according to the United States survey, located the strip of land on which the holes were dug within the tract belonging to the defendant. The line as surveyed was therefore the true divisional line. But it also appeared in the evidence that, in the year 1871, the grantors of the respective parties established a different line, on which they built a fence, partly of posts and rails and partly of brush, which they, at the time, and for several years thereafter, recognized as the line; and, according to that line, the *locus in quo* belonged to the plaintiff. Those who established it, however, were never satisfied that the fence was on the true line; but they recognized it as on the line for several years until they both ascertained, by tape measurement, that it was not; and then, as the plaintiff's grantor testified, "when ascertained that the division made by me and Mr. Cris (the grantor of defendant) gave me more than an equal division, I was willing that it should be set back so as to make it equal." The fence, however, was allowed to stand, and the grantor of the defendant continued to cultivate up to it until 1880, when he transferred to the defendant his title to the south-east quarter of the quarter section; and the defendant, after the acquisition of title, verbally agreed with the plaintiff to have the line surveyed, and to abide by the line established by the survey. Under that agreement the line was surveyed in 1881, and the defendant built his house upon it in 1882.

In *Biggins v. Chaplin*, 59 Cal. 113, and *Cooper v. Vierra*, Id. 282, we held that the location of a doubtful divisional line, by agreement of coterminous proprietors, which has been acquiesced in for a greater length of time than that prescribed by the statute of limitations to bar a right of entry on land, was conclusive evidence of the correctness of the line. *Sneed v. Osborn*, 25 Cal. 619, is to the same effect. And in *Columbet v. Pacheco*, 48 Cal. 395, it was held that mere acquiescence, without controversy, in a fence line, which was renewed

from time to time, by the coterminous owners, for 20 years, estopped both from denying that it was the true line. But, in the case in hand, acquiescence in the fence line as the true divisional line of the respective tracts of land was not considered by the grantors of the parties in the case as binding between them. Both agreed and recognized the fact that it was a mistake, and that any portion of the land of either tract which was held by the other was held under a mutual mistake. A possession of land held under a mutual mistake has no effect upon legal rights; it is not adverse or conclusive against the assertion of any existing rights upon the true title. *Irvine v. Adler*, 44 Cal. 559; *Sheils v. Haley*, 61 Cal. 159; *Allen v. Reed*, 51 Cal. 362. Such a possession neither vests nor divests title to real property. The verbal agreement between the plaintiff and defendant to have the true line surveyed, and to abide by the line established by the survey, was therefore binding. The fixing of a boundary line is not within the statute of frauds. *Kincaid v. Dormey*, 47 Mo. 337; *Kellum v. Smith*, 65 Pa. St. 86; *Orr v. Hadley*, 36 N. H. 575.

There is no error in the record. Judgment and order affirmed.

I concur: Ross, J.

I concur in the judgment: McKINSTRY, J.

2 Cal. Unrep. 607

PETERSON v. HUBBARD. (No. 9,298.)

Filed December 23, 1885.

1. BREACH OF CONTRACT—PLEADING—ANSWER.

Where, by a stipulation in an agreement, the party agreed that, in building a certain mill, he would not let any sawdust or rubbish be put into the stream, so as to prevent the use of the stream by plaintiff's family, in an action for breach of such stipulation an allegation in the answer that the defendant prevented the sawdust and rubbish from being carried down by the stream, and that the waters thereof were not rendered impure, etc., by reason of such sawdust and rubbish, constitutes a valid defense.

2. SAME—PAYMENT.

In an action for breach of contract, settlement and payment in full is a valid defense.

3. FINDINGS—EVIDENCE.

Findings held to sustain the evidence.

4. SAME—AFFIRMATIVE DEFENSE.

Where in an action judgment is rendered for defendant, a finding upon an affirmative defense not supported by proof is unnecessary.

Department 1. Appeal from superior court, county of Santa Cruz. *Z. N. Goldsby*, for appellant.

A. E. Bolton, for defendant.

McKEE, J. In this case the appellant contends that the judgment and order appealed from should be reversed, because (1) the court below erred in overruling a general demurrer to those portions of defendant's answer designated as his second and third defenses; (2) because the decision and judgment of the court are based on the find-

ings of particular facts which were not within the issues of the case, and also upon certain facts which were not sustained by the evidence; and (3) because of a want of finding upon some of the material issues in the case. The case arises out of an action to recover damages for the breach of a contract by which the defendant agreed to build a saw-mill upon a tract of land situated on the forks of Collins creek, in Santa Cruz county, and manufacture into lumber the timber upon it, for which payment at a stipulated price was to be made to the plaintiff. Construction of the mill, the manufacture of lumber thereat, from April, 1880, until January, 1881, and payment to the plaintiff, according to the terms of the contract, were admitted. But it appears at the date of the contract the plaintiff had a flume on the land on which the contract was to be performed, by which he obtained from the creek a supply of water for domestic purposes, at his house and premises bordering on the creek. This flume extended from a point in the creek about 700 yards below the mill-site on which the mill was to be built, and the contract contained a stipulation that "the said Hubbard is not to let any sawdust or rubbish be put into said streams of water so as to injure and prevent the use of the same for his, said Peterson's, family use." This agreement, it is charged, the defendant violated by depositing, and causing to be deposited, on the banks of the creek, and in the creek, at and near the mill, large quantities of "sawdust and other rubbish," which were brought down by the creek into and through the plaintiff's flume to his house and premises, "rendering the water impure, corrupt, unwholesome, and unfit for family use," to his great damage. The answer filed by the defendant contained a general denial, and also separate statements of facts, by way of defense, showing (1) impossibility of building and operating the mill so as to stop the fall of sawdust and rubbish from the mill into the stream, and performance of the contract by lawful and proper means, which prevented the sawdust and rubbish from being carried down by the stream, or through the plaintiff's flume, so as not to injure or render impure the water which flowed through the flume to the plaintiff's house and premises: and (2) performance of the contract by settlement and payment in full.

There was no prejudicial error in overruling the general demurrers interposed to those special defenses. The object of the contract was to prevent sawdust and rubbish from the mill, which would, of necessity, fall into the creek while operating the mill, from "being put into said streams of water so as to injure and prevent the use of the same for the plaintiff's family use." That object was achievable. However inconvenient it might be, it was not impossible. Performance of the contract was therefore possible, (section 1597, Civil Code,) and defendant was bound to perform it. But he was entitled to allege and prove substantial performance of the contract, and the allegations that he did, by lawful and proper means, prevent the sawdust and rubbish from the mill from being carried down to the plaintiff's

flume, and that the water of the creek which flowed through the flume to the plaintiff's house and premises was not injured or rendered impure, corrupt, unwholesome, or unfit for use by the sawdust and rubbish from the mill, constituted a valid defense.

Settlement and payment in full also constitute a valid defense to an action for an alleged breach of the contract.

The facts found by the court were within the issues made by the answer and complaint. The finding covers the issues, and it is sustained by the evidence in the case.

There was no finding necessary upon the defense in the answer of settlement and payment, because the defense was not supported by proof. *Campbell v. Bear R. & A. W. & M. Co.*, 35 Cal. 682.

Judgment and order denying a new trial affirmed.

I concur: Ross, J.

I concur in the judgment: McKINSTRY, J.

68 Cal. 236

HAWKINS and others v. HARLAN and others. (No. 8,719.)

Filed December 23, 1885.

MORTGAGE—INTEREST UNDER SALE—FORECLOSURE.

Where a vendee's interest under a contract of sale is mortgaged by him, part of the purchase price being still due, on an action being brought to foreclose such mortgage the proceeds of the sale of the property should be applied—*First*, to the payment of the balance of the purchase money of the land; and, *next*, to the payment of the amount due on such mortgage.

Department 1. Appeal from superior court, county of San Benito.

Wm. Matthews, for appellants.

Briggs & Hawkins and *B. B. McCroskey*, for respondents.

Ross, J. Thomas Flint, L. Bixby, and Benjamin Flint, being seized in fee of the land in question, contracted in writing to sell it to one Lane for \$4,500, payable in installments. Lane subsequently assigned his contract to the defendant Harlan. Harlan then executed a mortgage to one McCloskey, and McCloskey assigned the mortgage to the plaintiff. Subsequently Flint and Bixby, who meanwhile had succeeded to all of the interest of Benjamin Flint in the property, conveyed the land by deed to Harlan, taking at the time from him his promissory note for the balance of the purchase money, to-wit, \$3,701.10, and a few days afterwards Harlan executed to Flint and Bixby a mortgage upon the land to secure the payment of the note. Shortly after this Harlan reconveyed the land by deed to Flint and Bixby in consideration of the cancellation of the note and mortgage given by him for the balance of the purchase money. In this condition of affairs the present action was brought by the holder of the mortgage executed by Harlan to McCloskey to foreclose it, and

subject the land in the hands of Flint and Bixby to the payment of the sum due the plaintiff from Harlan. Flint and Bixby answered in the cause, and also by cross-complaint set up the facts above given, and asked—*First*, that the plaintiff's complaint be dismissed; and, *second*, that if the land should be sold, the proceeds be applied first to the payment of the balance of the purchase money.

Undoubtedly the equity of the case demands that Flint and Bixby be paid the balance of the purchase money before the land, the legal title to which they hold, should go to satisfy the plaintiff's mortgage; for, when that mortgage was executed, it only conveyed the interest the mortgagor had in the land; that is to say, the rights conferred upon his assignor by the contract of sale between him, on the one part, and Bixby and the Flints, on the other,—in brief, the right to a conveyance of the title to the land upon the payment of the balance of the purchase money. But it is said that, when Flint and Bixby executed the deed to Harlan, the title thereby conveyed inured to Harlan's mortgagee. True, an after-acquired title by the mortgagor ordinarily inures to the benefit of the mortgagee; but this is by operation of the doctrine of relation, which is a fiction of the law, adopted solely for the purposes of justice, and will not be given effect when, as in the present case, it would work manifest injustice. *Gibson v. Chouteau*, 13 Wall. 101; *Shay v. McNamara*, 54 Cal. 169.

Upon the facts stated in the findings, the land should be sold and the proceeds applied, after the payment of the costs of the sale,—*First*, to the payment of the balance of the purchase money of the land; and, *next*, to the payment of the amount due upon the plaintiff's mortgage.

Cause remanded, with directions to the court below to modify the judgment to accord with these views.

We concur: MCKINSTRY, J.; MCKEE, J.

(68 Cal. 245)

ACKER v. SUPERIOR COURT. (No. 11,188.)

Filed December 23, 1885.

JUSTICE'S COURT—APPEAL—TRIAL IN SUPERIOR COURT.

If an appeal has been taken from a justice's court on questions of law and fact, the superior court must proceed with the trial of the cause *de novo*, (Cal. Code Civ. Proc. § 976,) and such court cannot reverse the judgment, and remand the cause for further proceedings.

Department 1. Application for writ of review.

Royce & Cummins, for petitioner.

Carl F. Graef, for respondent.

MCKEE, J. From the averments of the petition it appears that, on an appeal to the superior court of the city and county of San Francisco, taken on questions of both law and fact, from a judgment given in an action tried by a justice's court, the superior court ordered the

judgment reversed and the cause remanded for further proceedings. The order remanding the cause to the justice's court for further proceedings is in excess of the jurisdiction of the court, and void. For, as the case was originally tried in the justice's court, and the appeal was taken "on questions of both law and fact," appellate jurisdiction over the action attached to the superior court to try and determine the case anew. Section 976, Code Civil Proc.

In the exercise of this jurisdiction the superior court cannot delegate its power over the action to any other tribunal. It has no authority to remand the cause to the justice's court, whence it came, for trial *de novo*. It must itself proceed with the trial, (section 976, *supra*; *Coyle v. Baldwin*, 5 Cal. 75; *Hitchcock v. Freelon*, 8 Cal. 518,) and, if it refuses, it may be compelled to proceed by *mandamus*. *Beatty v. Superior Ct.*, 11 Pac. Coast Law J. 70.

Let a writ of review issue as prayed for.

We concur: ROSS, J.; McKINSTRY, J.

668 Cal. 267)

NATHAN v. SUTPHEN. (No. 9,034.)

Filed December 28, 1885.

APPEAL.—NOTICE.—SUFFICIENCY OF SERVICE.

If the attorney of a respondent refuses to receive a copy of a notice of appeal, service thereof will be sufficient, if the person making the same, in the presence and office of such attorney, places a copy on the table in front of the attorney, and leaves it there.

Department 1. Appeal from superior court, county of Santa Cruz.
J. H. Skirm, for appellant.

C. B. Younger, for respondent.

By THE COURT. A motion is made to dismiss the appeal in this case upon the ground that a copy of the notice of appeal was not served. It appears that after filing the notice of appeal, and on the same day, a copy of the notice was taken by a competent person to the office of the attorney for respondent, and there handed him in person. Respondent's attorney refused to take the notice, whereupon the person making the service, in the presence of the attorney, and in his office, laid the copy on the table in front of which the attorney was standing, and there left it. The service was sufficient.

Motion denied.

2 Cal. Unrep. 609

NISSEN v. BENDIXSEN. (No. 9,058.)

Filed December 28, 1885.

HUSBAND AND WIFE—LIABILITY FOR NECESSARIES FURNISHED TO WIFE.

In an action against a husband for necessities furnished his wife, the complaint must allege that the goods were sold and delivered to defendant, and an averment of the furnishing of such goods to the wife is not sufficient. Although no demurrer to the complaint was filed, the absence of such necessary averment may be taken advantage of on appeal.

Commissioners' decision.

Department 1. Appeal from superior court, county of Humboldt. *S. M. Buck and Cope & Boyd*, for appellant.

J. J. De Haven and Charles F. Hinton, for respondent.

FOOTE, C. This action was brought against a husband for necessities furnished his wife, under the provisions of section 174, Civil Code. A jury being waived, the court rendered judgment in favor of the plaintiff for part of his demand. From that, and from an order refusing him a new trial, defendant, Bendixsen, appeals. The testimony of the plaintiff's witnesses was all by depositions. The defendant appeared and gave evidence in open court. There is a conflict in their testimony. When this is the case, it is a settled rule of law, as declared by this court in numerous instances, that for such reason alone a judgment will not be reversed. But the further point is made that the complaint therein does not state facts sufficient to constitute a cause of action, and will not support a judgment such as the one rendered. It is claimed that although section 174 of the Civil Code gives a right of action, it confers no other or greater right than that which existed at common law, and that it did not intend to change, nor does it change, the rule of pleading as to averments which were necessary in such a case at common law. The complaint does not allege that the articles were sold to the husband, defendant, or that they were furnished his wife upon his credit.

Upon a pleading resembling the one in hand, the opinion of this court was expressed in *Jacobs v. Scott*, 53 Cal. 74, as follows:

"The complaint does not allege a sale and delivery of goods to defendant. Whether the defendant is liable for the goods furnished to the wife or not, it is certain that plaintiffs cannot recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to defendant, and the averments should have been to that effect. The averments in respect to furnishing the goods to his wife, etc., might have been omitted as mere evidence, and not the statement of ultimate facts."

In the case under consideration no demurrer to the complaint was filed, but, under section 434 of the Code of Civil Procedure, the objection now taken to that pleading may be entertained by this court.

We are of opinion that the judgment and order should be reversed,

and cause remanded, with leave to the plaintiff, if so minded, to amend his complaint.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded, with leave to plaintiff, if so advised, to amend his complaint.

(2 Cal. Unrep. 611)

MAY and others v. STEELE. (No. 9,120.)

Filed December 28, 1885.

ASSAULT AND BATTERY—EXCESSIVE DAMAGES.

In an action for damages caused by a beating, a verdict of \$1,300 will not be set aside as excessive.

Department 1. Appeal from superior court, county of Alameda.

This action was brought to recover damages for injuries sustained by a beating, inflicted on plaintiff by the defendant. Verdict was rendered in plaintiff's favor for \$1,300. Defendant appealed.

J. B. Lamar, for appellant.

J. B. Ogden, for respondents.

By THE COURT. Appeal from a judgment and order denying a new trial in an action to recover damages for personal injuries. Two assignments of error are made in the case: (1) That the verdict is not justified by the evidence; (2) that the damages awarded are excessive.

As to the first, there was a substantial conflict in the evidence. The verdict must therefore be taken as conclusive of the facts.

As to the second, we cannot say, as matter of law, that the verdict was given under the influences of passion, prejudice, or bias of any kind.

Judgment and order affirmed.

(68 Cal. 275)

DOUGHERTY v. NEVADA BANK OF SAN FRANCISCO. (No. 9,133.)

Filed December 28, 1885.

1. JUDGMENT BY DEFAULT—DISCRETION OF COURT ON MOTION TO OPEN.

A trial court may, in its discretion, grant or deny motions to open defaults, and, in the absence of an abuse of such discretion, its action will not be disturbed.

2. SAME—SURPRISE—ABSENCE OF ATTORNEY.

An order setting aside a default judgment, taken in the absence of defendant and his counsel, will not be reversed, if it appears that the absence of counsel was due to his excusable neglect, and that he was taken by surprise.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

J. C. Bates, for appellant.

W. H. L. Barnes, for respondent.

FOOTE, C. This is an appeal from an order vacating a judgment obtained against the defendant in its absence, and that of its counsel. The notice that a motion would be made to set aside the judgment stated the ground thereof to be "that the same was rendered improvidently, and that the defendant has a good and substantial defense to said action on its merits." J. C. Flood made an affidavit, which was duly served, filed, and read in support of the motion, which, among other things, contained this statement:

"That he is an officer, to-wit, the president of the said defendant in the above-entitled action; that he has fully and fairly stated the case in said action to W. H. L. Barnes, Esq., his attorney and counselor, residing in said city and county, his office being 426 California street therein, and after such statement he is advised by his counselor and verily believes that he has a good and substantial defense on the merits to said action."

F. V. Bell, the managing clerk of W. H. L. Barnes, Esq., who seems to have attended to the matter in hand for his principal, made affidavit, which showed that the plaintiff had not been active in bringing the cause on for trial, but the defendant had; that, by a mistake, this cause did not appear upon the calendar on the day set for its trial; and that, intending to serve a second notice to set the case for trial at another day, supposing the first notice had been mislaid by the clerk of the court, he found that judgment had already been entered; that he had no knowledge of any day having been set for the trial of this cause, other than the date mentioned in the notice he had given, and therefore could not and did not appear; that he was familiar with the case, and verily believes the defendant has a good and substantial defense on the merits of said action.

This court has often held that it is within the legal discretion of a trial court to grant motions to open defaults, or the contrary, and that, in the absence of an abuse of such discretion by that tribunal its action should not be reversed. It has even said this, speaking of the province of a trial court: "When the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." *Watson v. San Francisco & H. B. R. Co.*, 41 Cal. 17. See, also, *Woodward v. Backus*, 20 Cal. 138.

In the case in hand it seems to us that the judge below, from the affidavits, might reasonably have inferred that the attorney of the defendant was taken by surprise, and that the judgment was obtained through his excusable neglect; that the defendant had a meritorious defense, and had been so informed by counsel. It may be that, strictly speaking, those affidavits might have been more technically and nicely drawn, and such is the better practice, but it is not always possible. The court below exercised a reasonable and legal discretion, and did so in consonance with the heretofore expressed opinions

of this court, that section 473, Code Civil Proc., should be liberally construed to meet the ends of justice, and we are of opinion that its order in the premises should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

(2 Cal. Unrep. 612)

HARRISON *v.* MCCORMICK and others. (No. 9,215.)¹

Filed December 28, 1885.

1. PLEADINGS—CROSS-COMPLAINT AND ANSWER.

A cross-complaint in an action must be as distinct and separate from the answer thereto in as any other independent pleading in the cause, and each must rest on its own merits.

2. SAME—ANSWER AND CROSS-COMPLAINT—WAIVER OF FORMAL OBJECTION TO CROSS-COMPLAINT.

Where an answer and cross-complaint are both joined in the same pleading, an objection thereto is deemed waived if the plaintiff consented in writing to allow such pleading to be filed and stand as defendant's answer and cross-complaint.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

Castlehun & Firebaugh, for appellants.

Craig & Meredith, for respondent.

SEARLS, C. This is an action to recover a balance due on a contract for the sale and delivery of 50 tons of coal. Plaintiff had judgment, and defendants appeal therefrom, and from an order denying a new trial, and from an order refusing to strike out plaintiff's cost bill.

We think this cause must be reversed, and a new trial ordered.

Defendants filed what is denominated an "amended answer and cross-complaint," in which they first deny the allegations of the complainant, and then proceed to set up matters, some of which, at least, if not all, might have been pleaded as a defense to the action, or as a counter-claim, or as a cross-complaint. The pleading closes by demanding affirmative relief, as in an ordinary cross-complaint. We should, under ordinary circumstances, decline to treat the pleading as a cross-complaint requiring to be answered, for the want of a separate and distinct setting out of the matters contained in it. A cross-complaint should be as distinct and separate from an answer in the same case as any other independent pleadings in the cause. Each must stand or fall upon its own merits. The very objections, however, which might otherwise be urged to the pleading, seem to be waived in the acceptance of service by plaintiff's attorneys. Such acceptance reads as follows:

¹Affirmed in banc. See 11 Pac. 456, 69 Cal. 616.

"Service of within admitted made this second day of December, 1882, and we consent that the same be filed and stand as and for defendant's answer and cross-complaint herein.

CRAIG & MEREDITH,

"Plaintiff's Attorneys."

The parties having treated the pleading as a cross-complaint, we do not feel at liberty to strangle it because of its hybrid character. To this cross-complaint there is no answer on file. Treating its allegations as true, plaintiff was not entitled to a judgment. The judgment should be reversed, and leave granted the parties to amend their pleadings, if so advised, and for plaintiff to answer the cross-complaint.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with leave to the respective parties to amend their pleadings, if so advised.

Cal.Rep. 9-11 P.—4

SUPREME COURT OF CALIFORNIA.

68 Cal. 210

KELLEY v. KRIESS. (No. 9,023.)

Filed December 21, 1885.

1. JUDGMENT ON PLEADINGS—AMENDMENT OF COMPLAINT.

On motion, judgment may be given for the defendant on the pleadings, where the complaint fails to state facts sufficient to constitute a cause of action; but on such motion the court may permit plaintiff to amend, on his making application therefor.

2. STATUTE OF LIMITATIONS, DEFENSE OF—WAIVER.

A defense of the statute of limitations is waived, unless taken advantage of by demurrer or answer.¹

3. INJUNCTION RESTRAINING EXECUTION—SUFFICIENCY OF COMPLAINT.

On an application for an injunction to restrain the execution of a certain judgment, *held*, that the complaint stated facts sufficient to entitle plaintiff to such injunction.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Mateo. *Fox & Ross*, for appellant.

A. Teague and G. H. Buck, for respondent.

SEARLS, C. This is an action to obtain a perpetual injunction restraining defendant from enforcing a certain judgment held by him against plaintiff. Upon motion of counsel, defendant herein had judgment in the court below, upon the pleadings, from which plaintiff appeals.

Appellant makes the point that a motion for judgment on the pleadings, by the defendant, cannot be entertained in a case where no affirmative relief is demanded in the answer; that such is not the appropriate method of reaching the objection that the complaint does not state facts sufficient to constitute a cause of action; and cites, among other authorities, to sustain his position, *Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 524, and *De Uprey v. De Uprey*, 27 Cal. 330. We are of opinion the point is not well taken. If a complaint fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon a motion for new trial. In *King v. Montgomery*, 50 Cal. 115, it was held that when a cause is called for trial, the action may be dismissed on motion of defendant, if the complaint does not contain a cause of action, and the plaintiff declines to amend. If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so

¹For a full discussion of the question of the statute of limitations, including the defense of and waiver, see *German Sav. & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-642. And see, also, *Morton v. Bartning*, (Cal.) *post*, 146, as to pleading, and when amendment to pleading setting up statute of limitations will be allowed.

to do, permit him to amend; but, failing to make such application, there can be no good reason for proceeding to trial, in a cause where, admitting all the facts charged as true, the plaintiff is still not entitled to a judgment. A complaint which imperfectly states a cause of action, or which unites two or more causes of action, without stating them separately, or which is ambiguous, unintelligible, or uncertain, differs widely from one which utterly fails to show that plaintiff has *any* cause of action. The former presents a case in which it appears the plaintiff has a cause of action, but which is defectively set out; and there, the defect appearing on the face of the complaint, and it appearing that the court has jurisdiction, objection must be taken by demurrer, or it is waived. It is to this class of cases that the decisions quoted by appellant refer, and not to those in which it cannot be gathered from the face of the complaint that plaintiff has or can have a cause upon which to recover.

2. The only remaining question to be determined is as to the sufficiency of the complaint. Respondent claims that, as more than three years elapsed between the entry of the judgment against plaintiff and the institution of this action, the cause of action is barred by the statute of limitations prescribing three years as the limit for actions founded upon fraud. Under our system of practice, he who would avail himself of the privilege of the statute of limitations must do so by a demurrer or answer. *Grattan v. Wiggins*, 23 Cal. 16; *Smith v. Hall*, 19 Cal. 85; *Smith v. Richmond*, Id. 476; *Sublette v. Tinney*, 9 Cal. 423; *Barringer v. Warden*, 12 Cal. 311. No such objection having been taken in this cause, it is to be deemed as waived. It appears from the complaint, the allegations of which, for the purposes of the decision, must be taken as true, that one David Flynn was indebted to M. Kriess, the defendant in this cause, in the sum of \$437, for which amount he and this plaintiff gave their promissory note to defendant. Plaintiff was in reality but a surety for Flynn, and signed the note without consideration, and as an "accommodation surety" for said Flynn, all of which was well known to the defendant Kriess. Flynn afterwards sold certain personal property to Kriess, sufficient to pay all of the note except \$137, the value of which Flynn directed and Kriess agreed to indorse upon the note, but did not do so, and credited the same on other demands by him held against Flynn. Upon the maturity of the note, Kelley urged Kriess to bring suit thereon against Flynn, who at that time had property sufficient to pay the same. The complaint then recites certain efforts made by plaintiff to procure a settlement and adjustment of the note between Kriess and Flynn. On the eighteenth day of April, 1879, Kriess brought suit in the district court in and for the county of San Mateo on the note against Flynn and this plaintiff, sued out a writ of attachment, and caused the same to be levied upon sufficient property of Flynn to satisfy the demand. Plaintiff was served with summons in that cause, and thereupon called upon Kriess, who,

in a conversation, said he had sued for but did not expect to recover the whole amount of the note; that this plaintiff need give himself no uneasiness about the suit, as the claim was abundantly secured under the attachment; that he (Kriess) would settle the matter with Flynn; that plaintiff need not answer in the cause, and that he did not expect or intend to pursue him, or look to him for any portion of the claim. Plaintiff relied upon these statements, and in consequence thereof did not answer, and judgment was taken against him and Flynn by default, for the whole amount of the note. After the rendition of the judgment (May 21, 1879) Kriess did not enforce the same against Flynn, but wrongfully, and in fraud of the rights of plaintiff, discharged and released his attachment on the property of said Flynn, which would have paid the judgment in full, and ever since has held and still holds the judgment against plaintiff, and threatens to, and unless restrained will, issue execution thereon against the property of plaintiff, and enforce the same; that, plaintiff having been a surety, he is informed and believes and avers the judgment was, as against him, satisfied and discharged by the security acquired under the attachment. Plaintiff also avers his readiness and willingness to pay the sum of \$137 and interest due on said note, but does not aver a tender thereof in direct terms. It does not appear specifically from the complaint whether the plaintiff signed the note with Flynn as a joint or joint and several maker thereof, or as a surety. In view of the fact that a pleading is to be construed most strongly against the pleader, and in view of the further fact that appellant in his brief speaks of plaintiff as if a maker of the note in question, we may with propriety assume him to be such. An amendment to the complaint was filed, in which it is sought to be shown that the default of this plaintiff in the suit upon the promissory note was entered by the clerk of the court without being directed so to do by plaintiff or his attorney.

It is apparent, from the case as presented, (1) that the plaintiff was in reality a surety for Flynn, and that Kriess was well aware of that fact; (2) that by reason of the payments on account of the promissory note, which Flynn had directed should be indorsed thereon, and which Kriess had agreed to so indorse, but failed to do, there was *pro tanto* a defense to the action on the note; (3) that plaintiff, Kelley, was prevented from answering and setting up such defense by the declarations of Kriess made to him; (4) that having knowledge of the suretyship of plaintiff, he discharged his attachment lien against the property of Flynn, the principal debtor; (5) that, if permitted to satisfy his judgment out of the property of plaintiff herein, he will have an unconscionable advantage over the latter, acquired by his wrongful acts and declarations.

Under these circumstances it would seem but equitable that plaintiff should have relief. The contention of respondent is that plaintiff, at the time he was served with summons, was aware of the facts set

out in his complaint, and, having a plain, speedy, and adequate remedy by way of answer in the original action, and for six months after the entry of judgment in said original action, by application to the court for relief under the provisions of section 473 of the Code of Civil Procedure, and that having failed to avail himself of those remedies, he cannot call upon a court of equity to protect him against his own neglect. Proceedings at law will not be restrained where the party has lost his defense at law through his own negligence, or has omitted to move for a new trial within the time required by law. 3 Wait, Act. & Def. 180, and cases cited. We must assume that plaintiff had notice of all the facts existing before the time to move for a new trial expired, and of which he might have availed himself on such a motion, for the reason that it is nowhere averred that he was ignorant of such facts. He was bound, therefore, to exhaust his legal remedy before coming into a court of equity to assert his rights.

As to any relief to which plaintiff may be entitled, and which he could not obtain in the former action, or was prevented from obtaining by fraudulent acts of the defendant, he may obtain in this action, and by injunction if necessary. Injunctions may be "granted to stay trial; or, after verdict, to stay judgment; or, after judgment, to stay execution, if the execution has been effected, to stay the money in the hands of the sheriff." Story, Eq. Jur. § 874. Tested by these rules, we are of opinion the facts, as stated in the complaint, show that plaintiff was, by the wrongful acts of defendant, placed in a position from which he could only be relieved by a court having equity jurisdiction, and in an independent action instituted for that purpose.

The action upon the promissory note was pending for a much larger amount than was due. The natural course of plaintiff would have been to defend the action, but he is assured by the defendant that there is no occasion for him to do so; for the reasons, (1) that defendant does not expect to get judgment for more than is due; (2) that he has ample property of Flynn under attachment to satisfy the demand; (3) that defendant did not expect or intend to ever look to plaintiff for any portion of said claim. Plaintiff, relying upon these statements, did not answer. Judgment was taken by the defendant for the full amount of the note, but this did not concern plaintiff particularly, for he knew the property attached was ample to satisfy such judgment. Then the attachment was released, but *non constat* that defendant was going to violate his promise not to interfere with or look to plaintiff; and it was not until the threatened writ of execution upon the judgment, in violation of these promises, that his danger became imminent. It was then too late to move in the court where the former judgment was rendered for relief. He had been lulled into repose by false promises, and should not suffer by their breach.

We are of opinion that the complaint on its face stated facts sufficient to constitute a cause of action, and that the court below erred

in rendering judgment in favor of defendant on the pleadings. For which reasons the judgment should be reversed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded.

68 Cal. 254

CLUTE v. LOVELAND. (No. 9,079.)

(Filed December 23, 1885.)

SAN FRANCISCO STOCK EXCHANGE—PROPERTY IN SEATS.

The San Francisco Stock Exchange Board is a voluntary association, formed for the purpose of dealing in stocks. The company of Associated Stockbrokers is a corporation composed solely of members of the former association, each member being entitled to an equal share in its property and effects, no other qualification for membership being required than that the person shall be a member in good standing of the first-named association, and the purpose of such corporation being to receive money for and to purchase a lot and to erect a building for the use of its members. Such corporation has no capital stock, but each member's property is represented by a seat in the San Francisco Stock and Exchange Board. Under the rules of the board, members may dispose of seats, but purchasers cannot participate in the proceedings of the board until elected as members. Under such circumstances, *held*, that the property, the legal title to which stands in the corporation called the Company of Associated Stockbrokers, is, in equity, the property of the members of the San Francisco Stock & Exchange Board; that the power given to each member of the board to "dispose" of his seat includes the power to dispose of it absolutely or conditionally; that such member could assign his seat as security for an indebtedness; that the lien thereby created could be foreclosed in a judicial proceeding, and the seat sold, subject to the association rules.¹

Department 1. Appeal from superior court, city and county of San Francisco.

A. B. Hunt, for appellant.

Estee & Boalt, for respondent.

Ross, J. The findings show that during the times mentioned in the record the San Francisco Stock & Exchange Board was and yet is a voluntary association, consisting of 100 members, formed for the purpose of dealing in stocks, and buying and selling the same on commission in the city and county of San Francisco; that the Company of Associated Stockbrokers was and yet is a corporation, organized and existing under the laws of the state, with its principal place of business in the said city; that the said corporation was formed by and is composed of the members of said volunteer association solely, of both of which institutions the defendant in this action was at all times and yet is a member; that the members of the association and of the corporation are entitled to an equal share or proportion of its property, effects, and assets; that the only qualification for membership in the corporation is that such member shall be a member in good standing

¹ See note at end of case.

of the volunteer association, and shall sign the constitution and by-laws of the corporation; that the corporation was formed for the purpose of receiving donations with which to purchase land in the city of San Francisco upon which to erect a building for the use of its members as stockbrokers, and has no shares or capital stock; that the lot of land described in the complaint was purchased and the building thereon erected in 1875, with the funds belonging to the aforesaid volunteer association, at a cost of more than \$500,000, in which building the board has since held its sessions; that each member's right and title to the property, goods, effects, and assets of the association, and the privilege of participating in the meeting of the board, is represented by what is called and known as a "seat in the San Francisco Stock & Exchange Board;" that by the rules of the board each member has the right to voluntarily dispose of his seat in the same, but the purchaser, before he can participate in the proceedings of the board, must be elected a member thereof; that by the said rules the seat and privilege of every member is deemed and taken to be, from the time of his admission, and so long as he continues a member, a continuing security to all members of the board with whom he may deal, for the performance of his contracts and the fulfillment of his engagements; that the association is possessed of personal property, a portion of which is money; that the value of a seat in the board at the time of the trial of this action was at least \$6,000; that by a provision of the constitution of the board any member failing to meet his engagements therein shall be suspended until he has settled with his creditors; that the defendant to this action, in January, 1877, was unable to meet his engagements with the members of the board, for which reason his privileges as a member thereof were suspended; that thereafter the plaintiff to this action paid to the members of the board the amount of the defendant's indebtedness to them, and defendant was thereupon restored to his privileges as a member of the board. And it is at this point that the contract between the plaintiff and defendant, which forms the basis of this action, comes in. It was a contract of partnership between the parties, by which they associated themselves together to buy and sell stock on commission, the defendant herein contributing his seat in the board, which, for the purposes of the partnership, was valued at \$18,000, and which, by the terms of the agreement, was to go back to him at the same valuation at the expiration of the partnership, the term of which was fixed at one year. The contract then proceeds:

"Said Clute (the plaintiff herein) has advanced to said Loveland (defendant) for his private purposes and account the sum of \$9,000, gold coin, and until the same is repaid to him by said Loveland his said advances shall stand in lieu of his part of the capital to be contributed, and he shall have a lien for the same on the seat of said Loveland in said stock board, and on certain life policies transferred to said Clute by said Loveland, but all moneys paid by said Loveland to said Clute shall be applied on his indebtedness, and shall reduce said Clute's lien as aforesaid. Said Clute shall contribute, as capital,

sums of money from time to time to said business equal to the amounts paid him by said Loveland up to the amount of \$9,000, so that the capital contributed by both parties shall be equal."

The agreement contained other provisions not important to mention.

The complaint sets out substantially the facts above detailed, and charges that the plaintiff, on or before August 22, 1877, paid and advanced for the private uses and purposes of defendant the sum of \$9,000 in gold coin, for the repayment of which defendant mortgaged, pledged, and hypothecated his said seat in said board, and also was to transfer as future security for said advances certain life policies by him held; that defendant has never paid plaintiff said advances of \$9,000, nor any part thereof, nor has he ever transferred to plaintiff the policies of insurance; that the firm formed by plaintiff and defendant during its existence did a large business, and accumulated large profits, almost all of which defendant appropriated to his own use; that the firm is largely in debt, and has debts due it, and is owing plaintiff the sum of \$33,090.51, "for and on account of moneys and profits belonging to plaintiff, and interest upon the same, by him left in said firm, and also for and on account of moneys by said plaintiff loaned, paid out, and advanced to and for the use and benefit of said firm;" that defendant has no property and effects, except said seat in said board and his interest in said association and in said firm accounts; that plaintiff has often demanded of defendant a settlement of the firm business, and that defendant refused to plaintiff the said sum of \$9,000, all of which demands have been refused. The prayer is for an accounting and settlement of the firm accounts, and that plaintiff's alleged lien on defendant's seat in the San Francisco Stock & Exchange Board be foreclosed, and said seat sold to satisfy the \$9,000 indebtedness from defendant to plaintiff, and for such other and further relief as should be equitable.

In addition to the findings already stated, the court below found that defendant has never repaid any part of the \$9,000 paid by plaintiff on defendant's indebtedness to the members of the stock and exchange board, and that, at the commencement of this action, the same was due and unpaid. The court further found that defendant is indebted to plaintiff in the further sum of \$14,580.99, for and on account of moneys drawn by defendant from the partnership business. The court further found as a fact that the contract between the parties "in form creates a good and sufficient lien or mortgage on the seat of defendant in the San Francisco Stock & Exchange Board, to secure the repayment of said sum of \$9,000 paid by said Clute on the indebtedness of said Loveland, as aforesaid." From the facts found, the court concluded that plaintiff was entitled to a personal judgment against defendant for the aggregate amount of the sums found due and costs of suit, but that plaintiff did not acquire any lien on the seat of the defendant in the San Francisco Stock & Exchange

Board, and judgment was entered accordingly. In so far as the court refused to award the plaintiff the lien claimed, and to enforce the same, the plaintiff claims there was error, and hence appeals from the judgment.

The action of the court below was based on the nature of the property on which the parties sought to create a lien, the court being of opinion that it was of such a character as not to admit of the creation of a lien thereon as between the parties to this suit. In this we think there was error. The property, the legal title to which stands in the corporation called the "Company of Associated Stockbrokers," is in equity the property of the members of the San Francisco Stock & Exchange Board. This is plain from the facts found and the settled law as applicable thereto. *Chater v. San Francisco S. R. Co.*, 19 Cal. 246; *Shorb v. Beaudry*, 56 Cal. 450; *Cornell v. Corbin*, 64 Cal. 200; *Durkee v. Stringham*, 8 Wis. 1. Now, by the rules and regulations of the association each member is entitled to an equal share of all the property, goods, effects, and assets of the association, and his right and title thereto is represented by what is called a "seat in the San Francisco Stock & Exchange Board." The rules expressly authorize each member to dispose of his seat, subject, however, to the condition that before the purchaser can participate in the proceedings of the board he must be elected a member thereof. The power to "dispose" of the seat includes the power to dispose of it absolutely or conditionally. If a member should sell his seat to one who should not be elected a member of the board, it cannot be doubted that such purchaser would take, subject to the conditions imposed by the rules of the association, the interest of the seller in the property of the association. And if he may sell this, why not create a lien upon it, subject to the same conditions? As has been seen, the power given is to "dispose" of the seat. Whether the disposition be absolute at the beginning, or subsequently becomes so through judicial proceedings, the result is the same. The purchaser takes the interest of him who disposes, subject to the conditions imposed by the rules of the association. But we can see no reason why he may not take this. In *Durkee v. Stringham*, 8 Wis. 1, above cited, it appeared that a number of persons associated themselves together and formed what was called, in the written articles of association, the "Neshoto Lumbering Company." The declared object of the company was to raise moneys to be employed for the benefit of the members of the association in the purchase and sale of lands situated on the borders and in the vicinity of Twin rivers, in Wisconsin, to build mills, etc. The capital stock, consisting almost exclusively of real estate, was divided into 400 shares, for which the ordinary certificates were issued, declaring that the holder was proprietor of — shares in the capital stock and beneficial interests of the company, and had paid the sum of — dollars on each share, and that the same was subject to all the provisions, covenants, and charges contained in the

articles of association. These certificates of stock were made transferable by assignment, and it was provided in the articles of the association that the capital of the company, notwithstanding the conversion of any part of it into land, should be deemed and treated as personal property. The title of the real estate and of the personal property was vested in a trustee, in trust for the use of the company, who was the authorized agent to sell, bargain, and convey the personal property, to lease the lands, make conveyances, and in his name to take all conveyances as trustee for the company. "Each certificate," said the court, "represented an equitable title or interest in the property of the association. It is obvious that a stockholder who might own 100 shares would, as between him and the other stockholders, be equitably entitled to one-fifth part of the property. * * * Now, by every principle of law, it would seem that those certificates of stock, which, for convenience, were made transferable by assignment, represented a proportionable interest in the property of the company,—an interest which a court of equity would protect, and could be sold, pledged, or mortgaged by the owner like any other kind or species of property. The mortgagee of such certificates would likewise have such an equitable lien or interest in the company property as a court would recognize and protect. This proposition, to our minds, is too plain for argument, and we would not have supposed that a doubt could be entertained upon the point had not the circuit court held otherwise, as we understand their decision." There, as here, the association was unincorporated, and the title to the property was held by a trustee,—in that case, by a member of the association; in this, by a corporation composed of all the members of the association, and formed for that very purpose. In that case the interest of each member of the association was represented by a certificate of stock; in this case, by a "seat in the San Francisco Stock & Exchange Board." If in that case such certificates could be sold, pledged, or mortgaged by the owner, like any other kind or species of property, and a mortgagee thereof would acquire such an equitable lien or interest in the company property as a court of equity would recognize and protect, no reason is perceived why a pledge or mortgage of the "seat" in this case would not confer a like equitable lien, which will be recognized and protected by a court of equity, subject, of course, always to the rules of the association, the conditions of which, as was held by the supreme court of the United States in *Hyde v. Woods*, 94 U. S. 523, follow the property into whose hands soever it goes. Our conclusion is that the agreement between the parties gave to the plaintiff an equitable lien on the "seat of the defendant in the San Francisco Stock & Exchange Board," subject to the rules and regulations of the association, as security for the repayment of the sum of \$9,000 advanced by plaintiff in discharge of the indebtedness of defendant to the members of the association, and that the court below erred in refusing to enforce the same by directing a sale

of the seat, subject to the rules and regulations of the association, to satisfy the amount so advanced.

Cause remanded, with directions to modify the judgment to accord with these views.

We concur: McKEE, J.; McKINSTRY, J.

NOTE.

Seat in Stock or Mercantile Exchange.

1. IS PROPERTY.

1. IS PROPERTY. The supreme court of the United States hold that such a seat is property, but property held under certain conditions, principal among which are these: it can be acquired only in the mode prescribed by the board, and its proceeds (on a sale thereof) must be applied first towards payment of debts due to members of the board. This was held in *Hyde v. Woods*, 94 U. S. 523, a case in which the assignee in bankruptcy of a member of the San Francisco Stock Exchange claimed that such a preference was in fraud of other creditors.

Judge CHOATE, in the United States district court, New York, in *Re Ketchum*, 1 Fed. Rep. 840, took the same view, and ordered the bankrupt to make a transfer of his seat in the New York Stock Exchange to such person as the assignee should procure as a purchaser, subject to the condition that the debts to members were first paid. It was held in *Re Werder*, 15 Fed. Rep. 789, that a membership in the New York Produce Exchange is an asset of a bankrupt available to creditors. The court say: "The bankrupt is a certificated member of the New York Produce Exchange, and the only question presented by his bill is whether his membership in that institution is an asset, available to his creditors, through his assignee, or not. If it is, the order made by the district court, of which the bankrupt complains, was right. I regard the question as conclusively settled by the opinion of the supreme court in *Hyde v. Woods*, 94 U. S. 523. Mr. Justice MILLER, speaking for the court, there says: 'There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy; and that if there had been left in the hands of the defendants any balance, after paying the debts due to the members of the board, that balance might have been recovered by the assignee.' It is futile to contest the authoritativeness of this statement by the criticism that it was unnecessary to the decision of the question before the court, and therefore was only the individual opinion of the judge who spoke for the court. But it was not only proper, but necessary, to ascertain and determine the nature and character of the interest claimed by the plaintiff, that the court might pronounce judgment upon the merits of the controversy between the parties. The plaintiff was the assignee of a bankrupt member of the San Francisco Stock Exchange. If the bankrupt's membership in that institution was a mere personal privilege, and in no sense property, then it did not pass under the assignment, and the plaintiff could not maintain any action touching it for want of title. But to consider the merits at all, and to determine the legal rights of the parties in reference thereto, it was necessary for the court to define the character of the subject of the controversy, and so to pass upon the validity of the claim of the defendants to the proceeds of its sale. They therefore held it to be property, which passed under the assignment in bankruptcy, subject to the rules of the exchange, which provided for the prior appropriation of the proceeds of its sale to debts due to its members, and hence that such appropriation was not within the scope of the provisions of the bankrupt law against preferences." To the same effect are *Powell v. Waldron*, 89 N. Y. 328; *Grocers' Bank v. Murphy*, 60 How. Pr. 426; *Ritterband v. Baggett*, 42 N. Y. Super. Ct. 556; S. C. 4 Abb. N. C. 67.

But of course a judgment creditor, or assignee in insolvency, or receiver, could not purchase a seat, and thereby become a member. The courts, through the instrumentality of their equity powers, or by process in aid of execution, will compel an insolvent member to sell his seat to some person whom the association will recognize, and apply the proceeds towards the satisfaction of his debts. *Dos Passos*, Stock Brok. 91, 97.

2. IS A PERSONAL PRIVILEGE. It has been held by some courts that a seat in a stock or mercantile exchange is simply a personal privilege, and in no sense property. See *In re Sutherland*, 6 Biss. 526; *Barclay v. Smith*, 107 Ill. 349; *Thompson v. Adams*, 93 Pa. St. 55; *Panocast v. Gowen*, 93 Pa. St. 66. The decided weight of authority is in favor of the proposition that such suit is incorporeal personal property.

(68 Cal. 234)

In re Yick Wo. (No. 20,126.)

Filed December 28, 1885.

1. MUNICIPAL CORPORATIONS—SAN FRANCISCO LAUNDRY ORDINANCE—VALIDITY—REGULATING USE OF WOODEN BUILDINGS.

The board of supervisors of the city and county of San Francisco has power, under section 2 of article 11 of the California constitution, and the consolidation act, to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety; and in exercising such power they may establish fire limits, and regulate or interdict the use or construction of wooden buildings within specified bounds. Therefore an order of such board interdicting the establishment, maintenance, or carrying on of laundries except in brick or stone buildings, unless the consent of such board to do otherwise is obtained, is a valid exercise of the power of such board.¹

2. SAME—REPEAL.

Order No. 1569 and section 68 of order No. 1587 of the board of supervisors of the city and county of San Francisco, establishing fire limits, and providing for the maintenance of laundries in wooden buildings, are not repealed by the subsequent order of the board numbered 1767, and regulating the maintenance of laundries within certain limits.

3. SAME—ORDINANCES, CONSTRUCTION OF.

Ordinances of a municipal corporation are to be construed by the same rules as are statutes of the legislature.

4. STATUTES—REPEALS BY IMPLICATION.

Repeals of statutes by implication are not favored, and courts should reconcile apparent conflict between statutes if possible; otherwise of several acts the latest must govern.

5. SAME—CONSTRUCTION—REPEALS.

Where two statutes are repugnant, the latter in point of time must govern, and will operate, without any repealing clause, as a repeal of the former; or where not repugnant, if it clearly appears that the latter was intended as a revision or substitution for the former, it will repeal it so far as revised or substituted.

6. SAME—ORDINANCES—TREATY OBLIGATIONS.

If a municipal regulation applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex, or condition, and if otherwise regular and valid, it is not subject to the criticism of being in violation of the obligations of a treaty existing between the United States and another country.

Commissioners' decision.

In bank. Application for writ of *habeas corpus*.

L. H. Van Schaick and *D. L. Smoot*, for petitioner.

Alfred Clark and *O. P. Evans*, contra.

SEARLS, C. 1. Yick Wo, a native of China, came to the United States in 1861, and for 22 years last past has been engaged in the laundry business at 349 Third street, San Francisco.

2. Petitioner is an alien, and a subject of the emperor of China.

The petition for a writ of *habeas corpus* was filed August 24, 1885, and a writ issued returnable September 4, 1885. The return shows that petitioner is held by the respondent, as sheriff of the city and county of San Francisco, under a conviction and sentence for a violation of section 1 of order 1569, and section 68 of order 1587, of the board of supervisors of the city and county of San Francisco. Ordi-

¹ See note at end of case

nance or order No. 1569 of the board of supervisors, under which petitioner was convicted, is in the following language:

"ORDER NO. 1569, PRESCRIBING THE KIND OF BUILDINGS IN WHICH LAUNDRIES MAY BE LOCATED.

"The people of the city and county of San Francisco do ordain as follows:

"Section 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

"Sec. 2. It shall be unlawful for any person to erect, build or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected, or which may hereafter be erected, within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and said scaffolding shall not be used for any other purpose than that designated in such permit.

"Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$1,000, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

"In Board of Supervisors, San Francisco, May 24, 1880.

"After having been published five successive days, according to law, taken up, and passed by the following vote:

"Ayes: Supervisors Schottler, Mason, Litchfield, Drake, Whitney, Eastman, Frazer, Taylor, Doane, Bayley, Torry, Stetson.

"Approved, San Francisco, May 26, 1880.

"JNO. A. RUSSELL, Clerk.

"I. S. KALLOCH,

"Mayor and *ex officio* President Board Supervisors."

Section 68 of order 1587, passed July 28, 1880, is in substance and effect the same as section 1 of No. 1569, quoted above.

It is admitted that petitioner had a license, a certificate from the board of fire-wardens, and a certificate from the health officer, copies of which are on file. It is further admitted that petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry, but that said board refused said consent.

By section 2 of article 11 of the constitution of this state, it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By section 74 of the act of April 19, 1856, usually known as the "Consolidation Act," the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; * * * to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; * * * to regulate the sale, storage, and use of gunpowder or other explosive or combustible materials and substances, and make all needful regulations for protection against fire;

to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor KENT, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." 2 Kent, Comm. 340.

Every citizen holds his property subject to the proper exercise of the powers and restrictions above referred to.

A large proportion of the laws and ordinances relating to the comfort, safety, health, convenience, good order, and general welfare of the inhabitants of cities and towns, and which we style "Police Laws or Regulations," have the effect, in a greater or less degree, to disturb and curtail individual enjoyment and personal rights. For the injury which the citizen suffers, he is, in contemplation of law, compensated by his share in the general benefits flowing from the regulations found essential to the general welfare. It is but a reasonable restraint upon the use of property in those cases where its unlimited use or enjoyment would produce serious mischief to others.

The right to establish fire limits, and to interdict the construction of wooden buildings within certain specified bounds, is a familiar exercise of the authority usually conferred upon municipal corporations. In towns like San Francisco, constructed largely of wood, the danger from fire is ever present and overshadowing. It is not, therefore, strange that the legislature, in conferring certain powers upon the municipal authorities of the city, included, not only the authority to regulate the *erection*, but also the *use*, of buildings, so far as necessary for the safety of the inhabitants. To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. They may not destroy those already erected. But the use of wooden structures within given limits, for specific and highly dangerous purposes, may become quite as detrimental as the erection of new structures of the same character; and as the power of regulation extends to the *use* as well as to the *erection* of wooden buildings, we can discern no assumption of unwarranted authority in the order No. 1569, which interdicts the establishing, maintaining, or carrying on laundries, except by consent of the board of supervisors, save in brick and stone buildings. The business of conducting a laundry involves a constant use of fires, under circumstances, and perhaps by persons, liable to result in conflagrations. Of these facts the supervisors are the judges. In given instances, under favorable circumstances, the danger of fire from this business may be reduced to a minimum, or may not at all

jeopardize the surrounding property. In this last class of cases, no objection can be seen why permits should not be granted, as provided for in order 1569. It has been the practice in municipal corporations to vest the granting of licenses for a variety of objects in the discretion of the corporate authorities, or some of them. Without such authority, boards of health, and various other agencies by which the lives and health of citizens and the safety and due enjoyment of their property are protected, would be powerless for good.

The argument that the discretion to permit the establishment of laundries in wooden buildings by the supervisors is liable to abuse, cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged. In theory, however, as well as in ordinary practice, the persons selected to discharge governmental duties, by reason of supposed qualifications for the several positions in which they are placed, will be found to possess the capacity and integrity essential to a proper administration of the trust reposed in them. If they prove deficient in these qualifications, the evil cannot be remedied by invalidating their acts, performed by virtue of authority vested in them, or where they have exercised discretionary powers, by impugning their judgment or motives, rather than their right to exercise the discretion.

The board of supervisors, under the several statutes conferring authority upon them, has the power to *prohibit or regulate* all occupations which are *against good morals, contrary to public order and decency, or dangerous to the public safety*. Clothes-washing is certainly not opposed to good morals, or subversive of public order or decency; but, when conducted in given localities, it may be highly dangerous to the *public safety*. Of this fact the supervisors are made the judges, and, having taken action in the premises, we do not find that they have *prohibited* the establishment of laundries, but that they have, as they well might do, *regulated* the places at which they should be established, the character of the buildings in which they are to be maintained, etc. The process of washing is not prohibited by thus regulating the places at which, and the surroundings by which, it must be exercised. The order No. 1569, and section 68 of order No. 1587, are not in contravention of common right, or unjust, unequal, partial, or oppressive in such sense as authorizes us, in this proceeding, to pronounce them invalid.

It is next contended that order No. 1569, and section 68 of order 1587, are repealed by order No. 1767, adopted April 8, 1884, and which is in the following language:

“ORDER NO. 1767, REGULATING THE ESTABLISHMENT AND MAINTENANCE OF PUBLIC LAUNDRIES AND PUBLIC WASH-HOUSES WITHIN CERTAIN LIMITS IN THE CITY AND COUNTY OF SAN FRANCISCO.

[Preamble.]

“Whereas, the indiscriminate establishment of public laundries and public wash-houses, where clothes and other articles are cleansed for hire, is inju-

rious and dangerous to public health and public safety, and prejudicial to the well-being and comfort of the community, and depreciates the value of property in those neighborhoods where such public laundries and such public wash-houses are situate: Under and in conformity to the authority vested by section 11 of article 11 of the constitution of the state of California, and of subdivision 9 of section 74 of an act entitled 'An act to repeal the several charters of the city of San Francisco to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof,' approved April 19, 1856, and the several acts amendatory thereto and supplementary thereof, the people of the city and county of San Francisco do ordain as follows:

[Limits Defined.]

"Section 1. On and after the passage of this order it shall be unlawful for any person or persons to establish, maintain, or carry on the business of a public laundry or a public wash-house, where clothes or other articles are cleansed for hire, within that portion of the city and county of San Francisco lying and being within the following boundaries: Commencing at the intersection of Devisadero street with the waters of the bay of San Francisco; thence following the bay shore easterly and southerly to the easterly end of Channel street; thence along Channel street in a westerly direction to Potrero avenue; thence southerly along Potrero avenue to Army street; thence westerly along Army street to Dolores street; thence northerly along Dolores street to and across Market street to Ridley street; thence westerly along Ridley street to Devisadero street; and thence northerly along Devisadero street to the bay and point of commencement,—without having first complied with the conditions hereinafter specified.

[Persons Conducting Laundries must Obtain Certificates from Health Officer and Fire-Wardens as to the Condition of Premises.]

"Sec. 2. It shall be unlawful for any person or persons to conduct or maintain a public laundry or wash-house within the district named in section 1 of this order, without having first obtained a certificate, signed by the health officer of the city and county of San Francisco, that the premises are properly and sufficiently drained, and that all proper arrangements for carrying on the business without injury to the sanitary condition of the neighborhood have been complied with, and particularly that the provisions of section 4 of order No. 1587 of this board have been complied with; also a certificate signed by the board of fire-wardens of the city and county of San Francisco that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1752, 'to define the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county.'

[Certificate of Health Officer and Board of Fire-Wardens in Regard to Laundries, etc.—
No Charge to be made Therefor.]

"Sec. 3. It shall be the duty of the health officer, also of the board of fire-wardens, respectively, upon application from any person or persons proposing to open or conduct the business of a public laundry within that portion of this city and county designated and described in section 1 of this order, to inspect the premises in which it is proposed to carry on said business, or in which said business is being carried on, with a view to ascertaining whether the said premises are provided with proper drainage and sanitary appliances; also whether the provision of order No. 1752 of this board has been complied with; and if found in all respects satisfactory, then to issue to said applicants the certificates provided for in section 2 of this order. No charge whatever shall be made, or compensation or fee collected or received, for the performance of

any of the services required by the provisions of this order, in the inspection of premises or the issuance of a certificate, but all such services shall be performed free of charge.

[Times at which Laundry Work may not be Performed.]

"Sec. 4. No person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order shall wash or iron clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M., nor upon any portion of that day known as Sunday.

[No Person Suffering from Infectious Diseases to be Permitted to Sleep, Lodge, or Remain in any Public Laundry.]

"Sec. 5. No person or persons engaged in the laundry business within that portion of this city described in section 1 of this order shall permit any person suffering from any infectious or contagious disease to lodge, sleep, or remain within or upon the premises used by him, her, or them for the purposes of a public laundry.

[Penalty.]

"Sec. 6. Any person or persons establishing, maintaining, or carrying on the business of a public laundry or a public wash-house, where clothes or other articles are cleansed for hire, within the limits of this city and county, as described in section 1 of this order, without first having complied with the provisions of section 2 of this order, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than \$1,000, or by imprisonment of not more than six months, or by both; and any person who shall violate any of the provisions of sections 4 and 5 of this order shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$5 nor more than \$50, or by imprisonment not more than one month, or by both such fine and imprisonment.

[Certificates of Health Officer and Board of Fire Commissioners to be Exhibited in a Conspicuous Place.]

"Sec. 7. The certificates from the health officer and board of fire-wardens, as required by section 2 of this order, shall be exhibited in some conspicuous place on the premises, and the same shall be produced on the demand of any officer of the city and county of San Francisco.

[Police to Enforce Provisions of Order.]

"Sec. 8. The police authorities are hereby directed to have the provisions of this order strictly enforced.

[Repeal of all Conflicting Orders.]

"Sec. 9. Order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order, are hereby repealed.

"In Board of Supervisors San Francisco, April 7, 1884.

"After having been published five successive days, according to law, taken up, and passed by the following vote:

"Ayes: Supervisors Sullivan, Reichenbach, Shirley, Burton, Smith, Pond, Griffin, Strother, Lewis, Ranken, James, Ashworth.

"Absent: Supervisor Pond.

"JNO. A. RUSSELL, Clerk.

"Approved, San Francisco, April 8, 1884.

"WASHINGTON BARTLETT,

"Mayor and *ex officio* President Board of Supervisors."

The rule for the construction of ordinances and orders of a municipal corporation are the same as for the statutes of the legislature. The Civil Code of this state (section 20) affords no guide for determining the question of the repeal of the acts of municipal corporations, ex-

cept so far as its rules enunciate general principles, alike applicable to all statutory enactments, general and local. The law does not favor the repeal of statutes by implication; and where there is an apparent conflict between two acts, the court should reconcile them if possible; but if this cannot be done, then the last act must govern. *Scofield v. White*, 7 Cal. 401; *People v. Railroad Co.*, 28 Cal. 254. Where a subsequent statute is repugnant to a prior one, the latter operates, without any repealing clause, as a repeal of the former, or, where not repugnant, if it clearly appears from the latter that it was intended as a revision or substitute for the former, it will repeal it, so far as revised or substituted. *Pierpont v. Crouch*, 10 Cal. 315. In order for a subsequent act to repeal a former, it should appear from the last act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both. *Ex parte Smith*, 40 Cal. 419; *Estate of Wixom*, 35 Cal. 320; *People v. Burt*, 43 Cal. 560; *People v. Sargent*, 44 Cal. 430.

Section 9 of the order No. 1767 expressly repeals "order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order." It follows that order No. 1569 is not expressly repealed, unless there is a conflict between its provisions and those of the latter order or orders. We may dismiss some intermediate orders of the board from observation, for the reason that we find in them no support for the contention of petitioner not contained in No. 1767.

We fail to find in order No. 1767 evidence of any such repugnance or conflict with No. 1569 as to warrant the conclusion that the latter is repealed by implication. They may, with propriety, both stand together. No. 1767 fixes the limits within which a public laundry or wash-house shall not be carried on without complying with certain conditions therein specified. These conditions relate to certificates to be procured from the health officer as to drainage and sanitary conditions, and from the board of fire-wardens showing the stoves, washing and drying apparatus are in good condition, and not dangerous to surrounding property from fire, etc. The order also fixes and designates certain hours of the night within which washing and ironing shall not be carried on. The prominent feature of the order consists in the limits which it fixes within which certain restrictions apply. All of these provisions may with propriety be enforced, and the necessity still exist, in the densely-settled portions of the town, for this business to be conducted only in buildings of brick or stone.

As order No. 1569 is not expressly repealed by order No. 1767, and as the latter is not repugnant to or inconsistent with the former, we are of opinion it did not repeal the former by implication, and that section 1 of order No. 1569 is still in full force and effect, and applicable alike to all classes and conditions of men, engaged or to engage in the business therein indicated.

We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the constitution. 9P, no. 3—10

tion of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of *Barbier v. Connolly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, and *Soon Hing v. Crowley*, 113 U. S. 703; S. C. 5 Sup. Ct. Rep. 730.

That this class of orders is not repugnant to our state constitution need not now be discussed, as their validity, with reference to that instrument, has been sustained in *Ex parte Mount*, 6 Pac. Rep. 78; *Ex parte Moynier*, 65 Cal. 33; S. C. 2 Pac. Rep. 728; *Ex parte Wolters*, 65 Cal. 269; S. C. 3 Pac. Rep. 894.

A regulation which applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex, or condition, is not, when otherwise regular and valid, subject to the criticism of being in violation of treaty obligations existing between the United States and China.

We are of opinion the petitioner should be remanded to the custody of the sheriff.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the petitioner is remanded to the custody of the sheriff.

NOTE.

Class Legislation.

In the case of *Barbier v. Connolly*, 5 Sup. Ct. Rep. 357, it was said by the United States supreme court that class legislation—discrimination against some in favor of others—is prohibited by the fourteenth amendment to the constitution of the United States; but that the legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment; that neither the fourteenth amendment, nor any other amendment, to the constitution of the United States was designed to interfere with the power of a state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, or good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. And in *Soon Hing v. Crowley*, 5 Sup. Ct. Rep. 730, it is said that the specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind; and that it is not discriminating legislation that branches of the same business, from which danger is apprehended, are prohibited during certain hours of the night, while other branches, involving no such danger, are permitted.

(63 Cal. 306)

MORTON v. BARTNING. (No. 8,784.)

Filed December 28, 1885.

1. STATUTE OF LIMITATIONS—PLEADING BY AMENDMENT.

If a party omits to plead the statute of limitations, and goes to trial without doing so, he will be deemed to have elected to stand upon his other defenses, and will not be permitted to amend by adding the plea of limitations, although the claim proved against him is clearly barred on its face.

2. SAME—AMENDMENT, WHEN SHOULD BE ALLOWED.

Where a complaint based on an alleged written promise is amended so as

to allege a verbal promise, the defendant is entitled as a matter of right to amend his answer by setting up the statute of limitations; his application in such case is not addressed to the discretion of the court. Such defense may then be pleaded to the plaintiff's entire cause of action.¹

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

H. A. Powell, for appellant.

James Wheeler, for respondent.

BELCHER, C. C. This is an appeal by the plaintiff from an order granting the defendant a new trial. The action was commenced to recover a balance due plaintiff for services rendered as a physician and surgeon to the officers and employes of the Hormiguera Mining Company, a corporation, and which, as alleged in the original complaint, the defendant, on or about the fifteenth day of October, 1878, for value received, agreed and promised in writing to pay. The defendant, by his answer, denied that he ever agreed or promised in writing, or in any other manner, to pay the plaintiff's claim, or any part thereof. On the first day of the trial, and after the plaintiff had been upon the stand as a witness for some time, plaintiff's counsel asked and obtained leave, against the objections of defendant, to amend the complaint, by inserting "and that, by reason of a further promise by the defendant verbally to the plaintiff to answer for the said debt of said company to him, the plaintiff canceled the debt of said company to him, and accepted the defendant's promise as a substitute therefor." At the opening of court on the second day of the trial counsel for defendant asked leave to amend the answer by adding "and, for a further and separate answer to plaintiff's complaint, the defendant alleges that the plaintiff's cause of action is barred by subdivision 1 of section 339 of the Code of Civil Procedure." Without objection on the part of the plaintiff, the court refused to allow the amendment on the ground that it came too late; and the defendant reserved an exception. At the conclusion of the trial the court found, among other things, "that there was a written agreement on the part of the defendant to pay the debts of the Hormiguera Mining Company, and that in this written agreement there was a promise to pay said debt owing by said company to plaintiff; that defendant verbally promised plaintiff to pay said debt of said company to him, and in consideration thereof the plaintiff canceled the said debt of the said company to him; that said verbal promise was made upon consideration that the plaintiff should cancel said debt of the company, and that thereupon plaintiff did cancel said obligation of the company to him, and accepted the new promise of the defendant therefor." The motion for new trial was made upon the ground that the evidence did not justify the decision, and of errors of law, occurring at the trial,

¹ For full discussion of the question of the statute of limitations, and the allowance of amendment to pleadings setting up, see *German Sav. & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and *Kelley v. Kries*, (Cal.) *ante*, 129.

among which was specified the refusal to allow the amendment to the answer.

After granting the motion, the court filed a written opinion, in which it is said:

"The only error committed by the court on the trial herein, in my opinion, was in refusing to allow the defendant to file the plea of the statute of limitations on the trial. The defendant should have been permitted to plead the statute of limitations to the amendment to the complaint alleging the verbal promise."

It is now claimed for the appellant that the court erred in granting the new trial, for the reason that the application to amend the answer was addressed to the discretion of the court, and the exercise of that discretion could not become or be assigned as an error in law. There can be no question that the general rule is, as stated by counsel, that the plea of the statute of limitations is not favored by the courts, and where a party omits to plead the statute, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed to have elected to stand upon the other defenses, and will not be permitted to amend by adding the plea. Wait, Pr. 65; Ang. Lim. § 285.

But the rule invoked has no application in this case. Here the plaintiff during the trial amended his complaint, and the defendant then had a right to amend his answer, and his application to be permitted to do so was not addressed to the discretion of the court. Nor do we think the amendment was rightfully refused, as claimed for the appellant, because it was a plea to the "plaintiff's cause of action," and not to the alleged verbal promise alone. It was not refused for that reason, but because it came too late. The plaintiff's cause of action was a supposed right to recover from the defendant the amount of money claimed to be due him, and was rested upon an alleged written promise and verbal promise to pay it. When, therefore, the plaintiff, by his amendment, gave the defendant the right to amend, we see no reason why he might not make his amendment as broad as he did make it.

It is not necessary to notice the other points made.

We think the order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

68 Cal. 262

CURNOW and another v. HAPPY VALLEY BLUE GRAVEL & HYDRAULIC MIN. Co. (No. 7,572.)

Filed December 23, 1885.

1. MECHANICS' LIENS—FORECLOSURE OF—JOINDER OF ACTIONS.

In an action by two lienors to foreclose mechanics' liens, it is not prejudicial error for the court to refuse the defendant the right to separate trials of the respective claims of the plaintiffs, if, after demanding, such trials, the defendant withdrew his answer as to one of the plaintiffs.

2. SAME—FORECLOSURE—JURY TRIAL.

A party is not entitled, as a matter of right, to a trial by jury of an action to foreclose a mechanic's lien; it being a proceeding in equity, and the granting or refusing of a jury trial in such cases being entirely within the discretion of the court.

3. SAME—FORECLOSURE—DENIAL.

In an action to foreclose a mechanic's lien, where the answer admits ownership of the property, and the employment of plaintiff to perform labor upon it, a denial that plaintiff performed such labor must be positive, and a mere denial upon information and belief does not raise any issue.

4. SAME—DESCRIPTION OF PROPERTY.

The description of certain property upon which mechanics' liens were created, considered, and held to be sufficient for identification thereof.

5. SAME—DENIAL—CONCLUSION OF LAW.

In an action to foreclose a mechanic's lien, a denial that plaintiff has "at all complied with the requirements of the provisions of chapter 2, tit. 4, pt. 3, of the Code of Civil Procedure of the State of California, relating to mechanics' and laborers' liens, or that he is entitled to any lien on any property of defendant," is but a conclusion of law.

Department 1. Appeal from superior court, county of Calaveras.
F. A. Berlin, for appellant.

Wesley K. Boucher and *Severance & Travers*, for respondent.

McKEE, J. This is an appeal from a judgment of the superior court of Calaveras county, rendered in an action for the foreclosure of laborers' liens upon certain mining property, and from an order refusing to grant a new trial. The motion for a new trial was made upon a bill of exceptions, which contained specifications of errors of fact and of law, upon which the moving party relied.

The alleged errors of law are (1) that the court refused to allow the defendant a separate trial of the respective claims of the plaintiffs; and (2) that it refused to order a trial by jury.

1. The action was brought under section 1195, Code Civil Proc., which provides that any number of persons claiming liens against the same property may join in the same action. On the calling of the case for trial, upon the issues framed by the complaint and answers, defendant demanded a jury trial, and a separate trial of each cause of action. The court denied the demand for a separate trial, and, there being no jury in attendance,—the regular panel of jurors having been previously discharged,—denied the demand for a jury trial unless the defendant would make a deposit of money with the clerk sufficient to pay the clerk's and sheriff's fees for summoning a jury, and the jury fees for 20 jurors, estimated to amount to \$60 in all. This the defendant would not do, and the court thereupon proceeded

to try the case without a jury. But before the plaintiffs opened their case the defendant asked leave to withdraw its answer as to the plaintiff Sullivan, and that answer was, on defendant's motion, stricken out; and the case was tried on the issues joined by the plaintiff Curnow and defendant.

In the refusal to grant a separate trial there was no prejudicial error, even if it were conceded that the court had no power to consolidate the actions; because as the defendant after its demand for a separate trial withdrew its answer to Sullivan's cause of action, it waived the trial in that case which was previously demanded and refused, and there only remained for trial the issues joined in Curnow's case.

Nor was there any prejudicial error in denying defendant's motion for a jury trial after its refusal to comply with the condition upon which the court was willing to order the issues in the case to be tried by a jury. As the object of the action was foreclosure of laborers' liens upon real property as security for money due to persons performing manual labor on the same, the action was an equitable one. A mechanic's or laborer's lien is in the nature of a mortgage on the land, (*Ritter v. Stevenson*, 7 Cal. 389,) and an action for its foreclosure is a judicial proceeding in equity in which a party to the proceeding is not entitled as matter of right to a jury trial. The Code rule, in such cases, is that "issues of fact must be tried by the court, subject to its power to order any such issues to be tried by a jury," etc. Section 592, Code Civil Proc. Granting or refusing a demand for a jury trial in an equity case, is therefore entirely within the discretion of the court. *Societe Francaise v. Selheimer*, 57 Cal. 623.

2. The only specification of errors of facts is that the evidence was insufficient to justify the decision, and that the decision is against law, in "that there was no evidence to identify the real estate set out in the complaint as property upon which the labor was performed." But the defendant admitted its ownership of the property as described in the complaint. It also admitted employment of the plaintiffs by its superintendent, but denied that the superintendent continued in office all the time that the plaintiffs claimed to have performed manual labor on the property; and, for answer to an allegation in the complaint "that the plaintiff performed work and labor as a miner upon the [described] mining property of defendant," it averred as follows: "Defendant is not sufficiently informed to admit that the plaintiff performed work and labor as a miner upon the property of defendant, and therefore defendant denies said allegation."

Admitting ownership of the property described in the complaint, and employment of the plaintiffs by its superintendent to perform manual labor upon it, it would be rash to presume that the defendant did not know that it was the property upon which the plaintiffs performed the work and labor for which they sued. Possessing such knowledge, the defendant was bound to state it in positive terms, if it said any-

thing about it at all, (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 466; *Vassault v. Austin*, 32 Cal. 607;) and its answer, that the plaintiff did not perform the work upon the property "as a miner," is merely equivocal and evasive, and raised no issue as to the identity of the property upon which the work was done. The evidence was sufficient to justify the decision. The motion for a new trial was properly denied.

Notwithstanding its withdrawal of the answer in the case of Sullivan, the defendant insists that the judgment entered in that case and the judgment and decision in the case of Curnow should be reversed, because the complaint in the action contains two separate causes of action which are not separately stated, because the complaint does not state facts sufficient to constitute a cause of action in favor of either of the plaintiffs, because the real estate upon which the liens are alleged to have been filed is not sufficiently described, and because the decision and judgment do not correspond with the pleadings.

The court found the ultimate facts of the plaintiffs' cause of action. That was sufficient; and on these facts the legal conclusion drawn by the court was correct.

The description of the mining property upon which the liens were created is as follows:

"That certain mining property and real estate situated in Mok. Hill Mining district, in said county, in sections 8, 18, and 17 of T. 5 N., R. 12 E., M. D. B. & M., and known as the 'Happy Valley Blue Gravel & Hydraulic Mining Claim,' commencing in said section 7, in Happy Valley, at and including the placer mining claim formerly owned by Patrick Drumm, and running southerly down and along the gravel channel into said section 18, into the Sport Hill Diggings, to and including the placer mining claim formerly owned by Harry Percival, together with a tunnel commenced in said section 17 by said defendant, on the Calaveras river side of the ridge, east of said mining ground, and running westerly and towards the southern end of said mining ground, for the purpose of tapping the same and working the same through said tunnel as a hydraulic mining claim; and that said tunnel is a part of said defendant's said mining claim."

This description is sufficient for identification.

The two causes of action stated in the complaint are separately stated, and the statement of each is sufficient to constitute a cause of action. The allegations in such statement as to the making and filing of the liens sought to be foreclosed, show that the liens attached to the property; and the only denial by the defendant related to the filing of the liens, in connection with a denial that the said Curnow has otherwise or at all complied with the requirements of the provisions of chapter 2, tit. 4, pt. 3, of the Code of Civil Procedure of the State of California, relating to mechanics' and laborers' liens, or that said plaintiff Curnow is entitled to any lien on any property of defendant." This denial is but a conclusion of law.

The complaint was sufficient. *Barber v. Reynolds*, 44 Cal. 519.

There is no prejudicial error in the judgment roll. Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

(2 Cal. Unrep. 613)

WILLIAMS v. SOUTHERN PAC. R. CO. (No. 9,272.)¹

Filed December 28, 1885.

1. APPEAL—STATEMENT ON MOTION FOR NEW TRIAL.

A statement on motion for a new trial, when certified by the judge of the court in the manner provided by law, and filed with the clerk, becomes part of the record; and if the notice of motion for a new trial specifies that such motion will be based on a statement of the case, it will be presumed that such statement, prepared, settled, and filed, was used on the hearing of the motion; and on appeal, if it is part of the record certified by the clerk, it will be considered, without further identification or proof, that it was used on the motion for a new trial.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY.

One who, by his ordinary negligence or willful wrong, has proximately contributed to an injury caused by the mere negligence of another, cannot recover compensation therefor, if but for his concurring and co-operating fault the injury would not have happened, unless the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former is exposed, to avoid the injury by the use of a proper degree of care.

3. SAME—LYING DOWN ON RAILROAD TRACK.

A person is guilty of gross negligence who, in a state of intoxication, lies down upon a railroad track; and the company is not liable if he is injured by a passing train, unless, in the exercise of reasonable care after the person is discovered in his exposed position, it could have avoided the injury.

4. RAILROAD—DUTY AS TO TRESPASSER ASLEEP ON TRACK—NEGLIGENCE.

It is the duty of a railroad company and its employees, when a person is discovered asleep or helpless upon its track, to use all reasonable care by stopping its train so as to prevent injury; and, failing in this duty, it becomes liable for injury to such persons, though they may have been guilty of contributory negligence, the injury being in such cases due to the willful or wanton act of the company as the proximate cause, and not to the negligence of the injured party. No presumption arises from the absence of care to watch for trespassers upon a track; and, in order to recover, a trespasser who is injured, being himself negligent, must show, not merely that he might have been seen, but that he was in fact seen in time, and under such circumstances as to render it the duty of the company to check the progress of its train.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR COURT OR JURY.

The question of contributory negligence, when left in doubt by the evidence, should be submitted to the jury, under proper instructions; but when the evidence is clear as to the facts, the question is one of law for the court.

Commissioners' decision.

Department 1. Appeal from superior court, county of Monterey.

S. F. Geiland and *H. V. Morehouse*, for appellant.

D. M. Delmas, for respondent.

SEARLS, C. This is an action to recover damages for an injury received by the plaintiff from defendant's railroad cars. Plaintiff had judgment for \$15,000, from which judgment, and from an order denying a motion for new trial, defendant appeals.

The material averments of the complaint are that defendant is a corporation, the owner and manager of a certain railroad extending

¹Affirmed in banc. See 13 Pac. 219, 72 Cal. 120.

southerly from the town of Castroville, in the county of Monterey, to the city of Salinas, in the same county, and of the rolling stock on such road; that on the twenty-third day of July, 1882, the defendant was running a train, composed of a locomotive engine and cars, on said road; and that, through the negligence, carelessness, and fault of the defendant in running and operating such train, the same struck and ran over the plaintiff, the wheels thereof passing over and crushing the right foot of plaintiff, so that it had to be, and was on the same day, amputated above the ankle-joint. The answer denies all negligence, carelessness, or fault by or on the part of defendant, and avers that whatever injuries or damages were received, suffered, or sustained by said plaintiff, were in consequence solely of the negligence and culpable carelessness of the plaintiff, without any fault on the part of defendant.

It is urged by counsel for respondent that the statement on motion for new trial cannot be considered by this court, because, as is contended, there is nothing in the record showing that the statement was *used* on the motion. The statement was settled by the superior judge, and duly certified as true and correct on the third day of September, 1883, and thereafter, on the seventeenth day of September, the motion for a new trial was by the court denied. The record on appeal is properly certified by the clerk of the county of Monterey, and *ex officio* clerk of the superior court in and for said county. We are referred to *Nash v. Harris*, 57 Cal. 242, and *Simpson v. Ogg*, 1 Pac. Rep. 827, in support of respondent's contention.

In *Nash v. Harris*, which was a motion to set aside a judgment, certain affidavits and papers were on file, but which were not embodied in any statement or bill of exceptions, or in any way authenticated, and the court, after holding that they were in no way identified as having been used on the motion, proceeds as follows:

"We cannot indulge in presumptions of papers which were used in the court below on the hearing of a motion. To be considered, they must be made part of the record of the case, by a bill of exceptions, or be authenticated by the judge who tried the case, in such a way as to leave no doubt, when found in the transcript, that they are the papers which were before him when he acted, and upon which he decided. Unauthenticated papers in a transcript in which there is no bill of exceptions constitute no part of a record which can be considered upon appeal."

In *Simpson v. Ogg* the supreme court of Nevada held that a statement on motion for new trial, based upon a statement not agreed to by the parties or their attorneys, and not certified as correct by the judge, in accordance with the statute, could not be considered on appeal.

The object of a statement or bill of exceptions is to make that record which before was not record, but rested only in the recollection of the court or counsel, or the minutes of the clerk. *De Johnson v. Sepulveda*, 5 Cal. 149. And when a statement on motion for new trial is certified by the judge of the court in the manner provided by law,

and filed with the clerk, it becomes a part of the record. It is not the filing of a document, like that under consideration, which gives to it its character as a record, but the certificate of the judge as provided by section 659 of the Code of Civil Procedure, and the filing thereof, which impresses it with that character.

The notice of motion for a new trial in this case specified, among other things, that the motion would be based on "a statement of the case." The statement was prepared, settled, and authenticated by the judge, and filed in due time. Thus prepared, settled, and filed, it will be presumed it was used on the hearing of the motion for new trial; and, coming here as a part of the record on appeal under section 661 of the Code of Civil Procedure, duly certified by the clerk, it is entitled to consideration, without further identification or proof that it was *used* on the motion for a new trial. *Towdy v. Ellis*, 22 Cal. 651. It occupies a different position from affidavits and papers having no official sanction, and which, although filed, require official designation to identify them as having been used.

Plaintiff, being intoxicated, laid down along-side defendant's railroad, and fell asleep, with his feet so near the rail that a passing passenger train struck and crushed his right foot, rendering amputation necessary. The place of the accident was near a private crossing of the railroad, known as "Kelleher's Crossing," between Castroville and Salinas, and from one mile to one and a half miles from the latter place. The injury was caused by the engine of defendant's regular passenger train, bound south, and running from 18 to 20 miles per hour, over a straight road and level track. Defendant's engineer, in charge of the train, saw plaintiff along-side the track, and stopped his train, but not until the engine had struck him, and passed nearly or quite its length beyond the point where he lay. The case depends largely upon the question of contributory negligence by plaintiff.

He who is injured by the mere negligence of another cannot recover compensation therefor, if, by his own ordinary negligence or willful wrong, he proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former is exposed, to use a proper degree of care to avoid injuring him. The rule, as thus stated, is that laid down by Shearman & Redfield on Negligence, (section 25,) and is amply supported by authority.

When plaintiff laid down upon the line of defendant's railroad, over which, as he knew, trains were running, and in such proximity to its track that he was liable to injury from such passing trains, that he was guilty of negligence cannot be doubted. He was a trespasser upon the roadway,—was at a point thereon where he had no right to be. It is true, he had been expelled from defendant's cars

for alleged non-payment of fare some three hours previously, at or near the point where he was injured, and, for a reasonable time thereafter, may be deemed to have had a license to be upon the line of the road; but the evidence tends to show that he visited a house near at hand, and returned to the place of his injury. Such expulsion from the cars could give him no permanent right to locate and remain upon the road.

A man may contribute to his injury without affecting his right to recover. In order to defeat his right to recover he must have not only contributed to the injury, but must have contributed to it under circumstances showing negligence on his part. He must have been in fault, must have failed to use ordinary care for his own protection, and the want of such care must not only have contributed, but have contributed proximately, to the injury. "Walking along the track of a railroad, where it does not run upon a highway, is culpable negligence. * * * Lying down upon a railroad is obviously the grossest negligence, which nothing can well excuse." *Shear. & R. Neg.* § 487; *Louisville R. Co. v. Burke*, 6 Cold. 45; *O'Keefe v. Chicago R. Co.*, 32 Iowa, 467; *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408; *Herring v. Wilmington R. Co.*, 10 Ired. 402.

In *Felder v. Louisville R. Co.*, 2 McM. 403, and *Richardson v. Wilmington R. Co.*, 8 Rich. 120, slaves were asleep upon the track, and were killed, without any effort to stop the train; but it did not appear that the engineer saw them. The companies were held not to be liable. The case of *Herring v. Wilmington R. Co.*, 10 Ired. 402, was in many respects parallel with this. The plaintiff's slave lay down to sleep in the day-time, on a railroad track, where the train could have been seen for more than a mile. The cars approached at their usual speed, at the usual hour; and the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels. And it was held the company was not liable.

We think it follows that in the case at bar the negligence of plaintiff was not only the cause of his injury, but the proximate cause of such injury. By proximate cause we must be understood as meaning "that cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue." *Shear. & R. Neg.* § 10. He was not, therefore, entitled to recover, unless, notwithstanding such negligence, defendant was guilty of some wanton or willful act whereby the injury was caused to plaintiff. *Maurus v. Champion*, 40 Cal. 121.

In *Weymire v. Wolfe*, 52 Iowa, 533, S. C. 3 N. W. Rep. 541, the court said:

"If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care after the person is discovered in his exposed position."

One wrong or injury cannot justify or excuse another. A railroad company engaged in the carrying of passengers owes important duties to the public. It must use great care in furnishing all proper appliances for the safe conduct of persons confided to its care. It must transport its living freight with all reasonable speed, and its paramount duty is to look to the safety and welfare of the traveling public who may choose to patronize it. It should not be delayed in its rapid transit by trespassers upon its track, whose presence may impede and endanger its patrons.

It does not follow that it may with impunity run over, injure, and destroy persons wrongfully upon its road. The right to inflict wanton, willful, or needless harm does not exist. As to persons walking upon its track, and apparently in possession of their faculties, it is not bound to slacken the speed of its trains, but may warn them by proper signals, and rely upon their instinct of self-preservation to take them from danger. As to a person, although wrongfully upon its road, known by a railroad company to be both blind and deaf, it would clearly be its duty to stop its train, and remove the intruder. So of a person asleep or helpless or unjudging upon its track. Upon discovering him, as the presumption is that he cannot help himself, it becomes the duty of the company and its employes to use all reasonable care, by stopping its train, so as to prevent injury to one helpless to save himself from impending danger. At other than places upon its road where persons have a right to be, the company is not bound, except in behalf of its own passengers, to watch for trespassers upon its tracks; but if, at any time and at any place, it discovers persons upon its road, apparently unable to protect themselves from its passing trains, it becomes its bounden duty to use all reasonable care and diligence to prevent their being injured; and, failing in this duty, it will become liable for injury to such persons, although they may have been guilty of contributory negligence, the injury being in such cases attributed to the willful or wanton act of the company as the proximate cause, and not to the negligence of the injured party. For trespassers, a railroad company is not bound to be watchful, hence no presumption of negligence arises from the absence of such care as to such persons. As to a trespasser upon the road, who is injured, being himself negligent, the evidence should show, not merely that he might have been seen, but that he was in fact seen, in time and under circumstances rendering it the duty of the company to check the progress of its train, before it can be held liable for an injury to such wrong-doers.

The testimony on behalf of plaintiff failed to show that when he was discovered on its road defendant failed in its duty. The only testimony to that point served to show that the alarm signal was given by the usual short, sharp blasts from the steam-whistle, and that the train was suddenly stopped,—more suddenly than when passing at a station.

If we look to the evidence of defendant, plaintiff's case is not helped. The substance of the engineer's testimony is that on Sunday afternoon, July 23, 1882, as he was going south with his train, his attention was first attracted by an object ahead, and near the track, which afterwards proved to be a bundle of blankets; that a little later he saw another object further in advance, which seemed like a man, and which he discovered to be a man; that he jumped from his seat, jumped for his reverse lever, threw it off, put on the air-brakes, and, having reversed his engine, opened the throttle and gave it steam; that his fireman also applied the tender-brake. He says this was all that could be done to stop the train; that, instantly upon seeing the man, he did all in his power to stop, but was unable to do so before the engine reached him.

Where the question of contributory negligence is left in doubt by the evidence, it should be submitted to the jury, under proper instructions; but where the evidence is clear as to the facts, the question of contributory negligence is one of law for the court. *Fernandes v. Sacramento Ry. Co.*, 52 Cal. 45.

Under the rule as enunciated by this court in *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Kline v. Central Pac. R. Co.*, Id. 400; *Maunus v. Champion*, 40 Cal. 121; *Tennenbrock v. South Pac. C. R. Co.*, 59 Cal. 271,—and which we do not understand to be in conflict with the principles declared in *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513,—we are of opinion that upon the facts as presented by the plaintiff a nonsuit should have been granted, and that upon the verdict of the jury a new trial should have been awarded to defendant, and consequently that the judgment and order denying a new trial should be reversed and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

68 Cal. 277

DEMARTIN v. ALBERT. (No. 8,546.)

Filed December 28, 1885.

1. PLEADING—AMBIGUITY OR UNCERTAINTY—DEMURRER.

The fact that a complaint is divided into several counts does not, of itself, constitute an ambiguity or uncertainty which can be taken advantage of by general demurrer. The particular matter constituting an ambiguity in the pleading must be taken advantage of by special demurrer, and if this is not done a general demurrer on that ground may be disregarded.

2. SAME—CROSS-COMPLAINT—SURPLUSAGE.

A cause of action for trespass to the land of a defendant is sufficiently stated in a cross-complaint which shows actual possession by the defendant at the commencement of the action of certain land and premises inclosed by a good and substantial inclosure, unlawful entry thereon by the plaintiff with bands of sheep, with which he, against the consent of defendant, depastured the

land to his damage; and a further allegation that such trespass was committed "contrary to the provisions of an act of the legislature of the state of California, entitled 'An act to restrict the herding of sheep,' approved May 18, 1861," may be disregarded as surplusage or stricken out.

3. TRESPASS—CROSS-COMPLAINT—DAMAGES FOR PERSONAL INJURIES.

A defendant cannot file a cross-complaint to recover damages for trespass on his land, in an action to recover damages for injuries inflicted on plaintiff's sheep, if nothing in the pleadings shows that the respective trespasses related to or in any way depended on or affected each other.

Department 1. Appeal from superior court, county of Del Norte.

L. F. Cooper, for appellant.

J. D. H. Chamberlain and *W. A. Hamilton*, for respondent.

McKEE, J. In an action commenced by the plaintiff against the defendant in the court below, to recover damages for injuries to personal property, the defendant filed an answer, which contained specific denials of the allegations of the complaint, and also a cross-complaint, which contained six several causes of action against the plaintiff for distinct trespasses committed on the defendant's close. To this cross-complaint the plaintiff demurred generally on the ground of ambiguity and uncertainty; and specially (1) that the statement of each cause of action was insufficient to constitute a cause of action; (2) that the act of the legislature cited in the statement of each count does not apply to inclosed lands; and (3) that a cross-complaint for damages for trespasses upon land is not maintainable in an action for injuries to personal property. The demurrer was overruled, and on this appeal that is the only error assigned.

The general demurrer merely pointed out that the cross-complaint contains six several counts, which should have been condensed into one. But the several counts were laid for several distinct trespasses; and, even if that were not so, the number of counts contained in a complaint does not, of itself, constitute matter which renders the complaint ambiguous and uncertain and challengeable by a general demurrer. *Bernero v. Insurance Co.*, 4 Pac. Rep. 382. The particular matter constituting an ambiguity in a pleading should be pointed out by a special demurrer. If that is not done, a general demurrer on that ground may be disregarded. *Blanc v. Klumpke*, 29 Cal. 157.

The statement of facts in each count of the cross-complaint was sufficient to constitute a cause of action. It showed actual possession by defendant, at the commencement of the action, of certain land and premises "inclosed by a good and substantial inclosure;" unlawful entry thereon by the plaintiff with bands of sheep, with which he, against the consent of defendant, depastured the land to his great damage. The several trespasses, it is alleged, were committed "contrary to the provisions of an act of the legislature of the state of California, entitled 'An act to restrict the herding of sheep,' approved May 18, 1861." The last allegation did not affect the sufficiency of the statement of facts which constituted the cause of action of any of the counts so as to render them subject to a general demurrer. It may have been surplusage, or irrelevant and redun-

dant, and, as such, it would have been the duty of the court to strike it out on motion, or the court could, no motion having been made for that purpose, disregard it in construing the pleadings; and that is what it seems the court did do, for judgment was not given or entered according to the terms of the statute. At all events, in the presence of a general demurrer, the cross-complaint was sufficient to entitle the defendant to relief on any or all of the several causes of action stated therein.

But the cross-complaint was not filed in a proper case. Section 442, Code Civil Proc., provides:

"Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the * * * transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time * * * a cross-complaint," etc.

The complaint in the action avers that on certain days, "at the county of Del Norte," the defendant chased and drove about with dogs certain sheep of the plaintiff, in consequence of which some of them died and the others were greatly damaged and materially injured, to the plaintiff's damage. That was the *gravamen* of the action. There is no averment that these wrongs were done on the defendant's land; nor is there in the cross-complaint any allegation that the sheep of the plaintiff, which were driven about and chased by the defendant's dogs, were found *damage feasant* upon the defendant's land. *Non constat*, therefore, that the alleged trespasses, which constitute the *gravamen* of the causes of action stated in the defendant's cross-complaint, related to or depended upon, or in any way affected, the trespasses charged in the complaint in the action. For that reason the court erred in overruling the demurrer to the cross-complaint.

Judgment reversed, and cause remanded for further proceedings.

We concur: ROSS, J.; MCKINSTRY, J.

68 Cal. 309

LAWRENCE v. DOOLAN. (No. 8,508.)

Filed December 28, 1885.

TAX COLLECTOR OF SAN FRANCISCO—ASSESSMENTS FOR OUTSIDE LANDS, LIABILITY FOR—STATUTE OF LIMITATIONS.

The liability of the tax collector of the city and county of San Francisco for money paid to him in pursuance of an assessment under order 800 of the board of supervisors (providing for the repayment of such assessment in case the title to outside lands on which such assessment was made was not deeded by the city to such person paying the tax assessed) was a liability as tax collector, and not as an individual, and it was his duty to pay such sum to a proper claimant thereof on demand; and the statute of limitations did not commence to run against such claimant, and in favor of the sureties on the tax collector's bond, until it was judicially determined whether or not the claimant was the person to whom the city would deed the land assessed, and

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might take the money paid to the tax collector and apply it to the purpose contemplated by order No. 800, and the acts of the legislature of March 27, 1868, and of March 14, 1870.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

E. A. Lawrence, for appellant.

Joseph M. Nougues, Mastick, Belcher & Mastick, E. M. McGraw, Tully R. Wise, A. Heynemann, and J. L. Murphy, for respondents.

FOOTE, C. In the petition for a rehearing the opinion of department 2, heretofore delivered and found in 5 Pac. Rep. 484, is not controverted, in so far as it determines that there was no misjoinder of parties defendant, and that two causes of action were not improperly joined. But it is claimed that the conclusion there arrived at was not sound, in that it declared the sureties of Austin, the tax collector, were responsible for the money received by him, in his official capacity, from Mrs. Lawrence, the plaintiff, and that the statute of limitations did not bar her right of action against them.

In reference to the duties of the tax collector in a matter of this kind, where the action was brought against him alone, this language is used by this court in *Randall v. Austin*, 46 Cal. 62:

"Practically it is a mere deposit of the taxes and assessments by each to await the result of the controversy in the courts, and though it is not expressly provided that the unsuccessful party may withdraw his deposit, we have not the least doubt that such was the intention of the legislature. It could not have been intended that the taxes and assessments should be twice paid, as we think is perfectly apparent from the whole scope and spirit of the act. When it appeared from the record of the proceedings of the board that the controversy was ended, the unsuccessful party was entitled to withdraw his deposit. If the consent of the board was necessary before he could withdraw the money, the plaintiff in this case obtained it. His petition to that effect was granted, and the clerk was directed to return his papers, including the tax collector's receipts. This was a sufficient authority to the defendant to refund the money, and would have protected him from further responsibility. The rule that voluntary payments cannot be recovered back has no application to the case, nor is there any force in the argument that the action should have been brought against the city and county instead of the tax collector."

In the case in hand the demurrer admits that the money was never paid over to the city, and if it was his duty so to do, which we do not now decide, the tax collector nevertheless, by not paying it over, was responsible to the rightful owner.

Are his sureties on his official bond responsible in this action? It is alleged in the complaint, and admitted by the demurrer, that Austin entered upon his duties as tax collector on the twenty-third of November, 1868; that he executed his bond with the defendants, except the city and county of San Francisco, as sureties, on that day, and that the conditions of this bond were for the faithful performance and execution of the duties of tax collector of the city and county of San Francisco, as required by law then existing, as well as those

which might be required by any law enacted subsequently to the execution of said bond; that the moneys assessed to plaintiff under order 800 were paid to Austin on the third day of March, 1870, for which on that day his receipt was given in writing. As we have seen, the law by which the duty of collecting such assessments was imposed upon Austin as tax collector was enacted on the twenty-seventh of March, 1868. This was about nine months before he gave his bond with sureties. As we understand the decision of this court in *Randall v. Austin*, it declared, *inter alia*, that the latter's responsibility to a claimant of such moneys as those now in controversy was as tax collector, and not as an individual.

That being so, such cause of action must necessarily flow from the violation of a duty as such officer, for the due and proper performance of which his sureties have obligated themselves to be responsible. Austin, as tax collector, received the plaintiff's money, and neither paid it to the city and county treasurer, nor to her. It was his duty as tax collector, the city and county having absolved him from all responsibility, to have paid it to the plaintiff on her demand. And it makes no material difference whether this duty was imposed by the act of 1868, passed before he executed his bond, or under that of 1870, enacted after that occurrence. His sureties undertook to be responsible for the due performance of all such duties as were imposed upon Austin by virtue of his office, whether the same were attached to it, as such, before or after the bond was executed. *People v. Edwards*, 9 Cal. 292.

As to the statute of limitations, we think it very clear that the plaintiff had no right to bring an action for her money until it was judicially determined whether or not she was the person to whom the city would deed the land, and might take the money she had paid in to the tax collector, and apply it to the purpose contemplated by order No. 800, and the acts of the legislature, *supra*. When, in February, 1878, it was thus determined that she had no right to demand of the city a deed to the lands in controversy between her and Ballou, she could then have demanded her money, and her right of action accrued. The present action was commenced January 14, 1880, and was not barred by the statute of limitations.

We are of opinion that in this action the sureties were liable to the plaintiff, and concur fully in the opinion of department 2 of this court, *supra*, that the judgment should be reversed and cause remanded, with directions to overrule the demurrer, with leave to answer.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion, judgment reversed and cause remanded, with direction to overrule the demurrer, with leave to defendants to answer.

68 Cal. 267

DILLON v. SALOUDE and others. (No. 9,341.)

Filed December 28, 1885.

1. PUBLIC LANDS—STATE LANDS—CONTEST BETWEEN APPLICANTS FOR PURCHASE.

In an action, the purpose of which is to determine a contest arising in the surveyor general's office as to which of several applicants is entitled to purchase certain school lands from the state, each of such applicants for purchase is a party thereto, and must state in his pleadings the facts on which he bases his right to become the purchaser, and the steps which he has taken to secure and avail himself of such right.

2. SAME—PURCHASE OF STATE LANDS—ACTUAL SETTLERS—LANDS FIT FOR CULTIVATION.

Under the California constitution of 1879, art. 17, § 3, which provides that lands belonging to the state which are suitable for cultivation shall be granted only to actual settlers, "the sale of any land belonging to the state which is suitable for cultivation to any one who is not an actual settler thereon is prohibited, even though the application to purchase was made before the constitution was adopted, and when settlement was not required. But such provision does not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application; nor does it prevent, or in any way affect, the sale of lands which were not suitable for cultivation.

3. SAME—CONTENTS OF APPLICATION.

Under the California statute (Pol. Code, Amend. 1880, § 3495) any one desiring to purchase any portion of a sixteenth or thirty-sixth section must state in his affidavit, among other things, "that he is an actual settler thereon;" but such provision does not cancel or make void any application theretofore made, but applies to such applications as are thereafter to be made, and leaves those theretofore made as though such statute had not made such provision.

4. SAME—STATE LANDS NOT FIT FOR CULTIVATION—APPLICATION FOR PURCHASE.

Prior to the amendment of 1880 to section 3495 of the California Political Code an application to purchase state lands not fit for cultivation was not required to state that the applicant was an actual settler on the land.

Commissioners' decision.

Department 1. Appeal from superior court, county of Mendocino.
T. L. Carothers and *E. D. Sawyer*, for appellant.

J. A. Cooper, for respondent.

BELCHER, C. C. This action was commenced to determine a contest, arising in the surveyor general's office and referred to the court below, as to which of the parties was entitled to purchase from the state a certain half section of school land. In the complaint it is alleged that the plaintiff made his application to purchase the land on the thirteenth day of February, 1883, and filed therewith his affidavit, setting forth all the facts required by the statute at that time, and, among others, that he was an actual settler on the land; that the defendant Saloude filed his affidavit and application to purchase the land on the twenty-third day of October, 1875, but that he never at any time was a settler thereon, or in the occupation of any part thereof; that the defendant St. Leger filed his affidavit and application to purchase the land on the tenth day of April, 1877, but that he never was a settler thereon, never resided thereon, and never was in the occupation of any part thereof. The complaint did not allege that the land was suitable for cultivation. The defendant Saloude

demurred to the complaint, and his demurrer was overruled, and thereupon he declined to answer. The defendant St. Leger answered, setting up his application to purchase the land on the tenth day of April, 1877, and the facts stated in his affidavit, which were all the facts required by the statute then in force to be stated. He then alleged that the land was not suitable for cultivation, but did not allege that he was ever a settler thereon. The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense to the action, or to show that the defendant was entitled to purchase the land in controversy. The court sustained the demurrer, and thereupon, after hearing testimony on the part of the plaintiff, entered judgment that the plaintiff was, and the defendants were not, entitled to purchase the land from the state. The appeal is by St. Leger from this judgment.

The only question presented for decision is, did the answer of the appellant state facts which, being proved, entitled him to purchase the land? In cases of this kind each party is an actor, and "must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase;" and, failing to do that, he has no standing in court. *Cadierque v. Duran*, 49 Cal. 356; *Ramsey v. Flournoy*, 58 Cal. 260. It is not denied that appellant's application was in all respects proper and sufficient at the time it was made; but it is claimed that after the adoption of the new constitution in 1879, and the amendment of section 3495 of the Political Code, on the twenty-eighth of April, 1880, the land could only be sold to an actual settler thereon; and that, as appellant's answer failed to state that he was an actual settler on the land, it was wholly insufficient. In support of this view, counsel for respondent cites *Johnson v. Squires*, 55 Cal. 103, and *Urton v. Wilson*, 65 Cal. 11; S. C. 2 Pac. Rep. 411. The constitution provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers." Article 17, § 3. This prohibited and made unlawful the sale of any land belonging to the state, which was suitable for cultivation, to one who was not an actual settler thereon, even though his application to purchase it was made before the constitution was adopted, and when settlement was not required; but it did not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application. Nor did it prevent, or in any way affect, the sale of lands which were not suitable for cultivation. Section 3495 of the Political Code, as amended in 1880, requires that any one, desiring to purchase any portion of a sixteenth or thirty-sixth section, shall state in his affidavit, among other things, "that he is an actual settler thereon; * * * that he desires to purchase the same for his own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that he has made no contract or

agreement to sell the same." The words quoted were added to the section, "and are to be considered as having been enacted at the time of the amendment," while "the portions which are not altered are to be considered as having been the law from the time when they were enacted." Section 325, Pol. Code. While the state may sell its lands to whom it pleases, and upon such terms and conditions as it chooses to prescribe, there is nothing in the amendment showing any intention on the part of the legislature to cancel or make void any application theretofore filed. The amendment applies only to applications thereafter to be made, and leaves those before made as they would have been if the amendments had not been passed. This being so, the facts stated in appellant's answer were sufficient; and he was entitled to purchase the land, his other averments being true, if it was not suitable for cultivation. Whether it was suitable for cultivation or not was a question of fact, which should have been found by the court. The cases cited by counsel for respondent are not in conflict with the views here expressed. In neither of them was it claimed that the land was not suitable for cultivation, and the cases were, therefore, decided upon the assumption that it was suitable. We think the court erred in sustaining the demurrer to the answer, and the judgment should therefore be reversed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer to the answer.

68 Cal. 281

In re Estate of MOORE. (No. 9,320.)

Filed December 28, 1885.

1. OFFICE—VACANCY CREATED BY INSANITY.

The statute providing that a vacancy occurs in an office on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact," (Pol. Code Cal. § 996,) applies only to a commission issued out of chancery, and not to the ordinary statutory proceedings taken to send a person to the insane asylum.

2. ADMINISTRATOR, INSANITY OF—VACANCY BY.

An entire vacancy is not created in the administration of an estate by the commitment of the administrator to an insane asylum, but the administrator is incapable of executing his trust during such commitment. When, however, his incapacity has been removed, and he again enters upon the discharge of his duties, a petition comes too late which asks for the appointment of another person on account of the administrator's former incapacity.

Commissioners' decision.

Department 1. Appeal from superior court, county of Santa Cruz.

C. B. Younger and F. J. McCann, for appellant.

J. C. Hall and Arthur Rogers, for respondent.

BELCHER, C. C. This is an appeal by Helen M. Moore from an order refusing to appoint her administratrix of the estate of her de-

ceased husband. The facts, as shown by the record, are as follows: William H. Moore died intestate in the month of October, 1871, leaving a widow and five minor children, four of whom are the issue of a former marriage. He resided at the time of his death in the county of Santa Cruz, and left estate, real and personal, therein. In March, 1872, Thomas W. Moore, a brother of deceased, was appointed, at the request of the widow, administrator of the estate. He at once qualified and entered upon the discharge of his duties as administrator, and continued to act as such until the twenty-eighth day of April, 1881, when, by order of one of the judges of the superior court of the city and county of San Francisco, he was sent to the Napa state asylum for the insane as an insane person. He remained in the asylum until the twenty-eighth day of December following, when he left it with the consent of the resident physician, cured. On the twentieth of April, 1882, he received from the resident physician a certificate of discharge from the asylum, and on the twenty-fifth of July, 1882, in a proceeding commenced in the superior court of the city and county of San Francisco, under the provisions of section 1766 of the Code of Civil Procedure, he was by the court found and adjudged to be of sound mind and capable of taking care of himself and property. No other administrator being appointed, after he left the asylum he continued to act as administrator of the estate, and on the sixteenth of September, 1882, he filed his account of his administration from its commencement. To this account Willie Moore, minor son of the petitioner here, filed objections on the eleventh day of October, 1882. The issue growing out of the account and objections were subsequently tried and submitted to the court; but on the twentieth day of April, 1883, when this case was tried, had not been decided. On the sixteenth day of March, 1883, Helen M. Moore, the widow of deceased, presented her petition to the court below, setting forth, among other things, that Thomas W. Moore was committed to an insane asylum, and that since that time no order had been made appointing any person as the administrator of the estate of William H. Moore, deceased; that the estate was still unsettled and undistributed; that no account of Thomas W. Moore's administration of the estate had been settled or allowed; and praying that she be appointed administratrix of the estate, and that letters be issued to her. Thomas W. Moore answered to the petition, and upon the issues thus raised the case was tried and the prayer of the petitioner denied.

The question for decision is: Did the fact that the respondent was sent to an insane asylum create an absolute vacancy in the administratorship of the estate? If not, the appellant, having renounced her right to administer in favor of the respondent, cannot now retract her renunciation, and her petition for letters was properly denied. *Estate of Kirtlan*, 16 Cal. 162; *Estate of Hamilton*, 34 Cal. 464; *Estate of Keane*, 56 Cal. 407. In support of her contention, the appellant

cites section 996 of the Political Code, and sections 1425 and 1426 of the Code of Civil Procedure. The section cited from the Political Code provides that an office becomes vacant on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact." That section is not in point; for, conceding that it applies to officers of court,—such as administrators and receivers,—and is not confined, as claimed by respondent, to offices of a political character, still the insanity must be found by a commission of lunacy. That is a commission issued out of chancery, and is not the ordinary proceeding taken to send one to an insane asylum. Burrill, Law Dic. 318; opinion of LEWIS, C. J., in *State v. McClinton*, 5 Nev. 329. The sections cited from the Code of Civil Procedure provide that if one of several executors or administrators dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, the remaining executors or administrators must proceed to complete the execution of the will or administration; and if all the executors or administrators die or become incapable, the court must issue letters to others. Under these sections we do not think an entire vacancy in the administration of the estate was created when the respondent was sent to the asylum. He became incapable of executing the trust for the time being, and if, during that time, the appellant had petitioned for letters she would doubtless have received them. But when his incapability was removed, and he had again entered upon the discharge of his duties as administrator, and had been recognized as such by the court and others, we think the petition came too late.

The order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

68 Cal. 290

WILLIAMS v. MILLER. (No. 8,629.)

Filed December 28, 1885.

CONTRACT—AGISTMENT CONTRACT—CONDITIONS IN CONSTRUED.

Where, by the terms of an agreement, one party undertook to agist and pasture the other's cattle, and the other agreed that, in pursuance of the contract, he would pasture on the land all the cattle it was capable of grazing, and in no case less than 3,000 head, and to herd them at his own cost, and to pay one dollar for each head of cattle so pastured, *held*, that an essential condition of the agreement was that the land should be capable of grazing 3,000 head of cattle, and that, if its capacity was less than such amount, the owner of the cattle was not liable to pay the full price agreed on for pasturage.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco,

George W. Gordon, for appellant.

Robinson, Olney & Byrne, for respondents.

BELCHER, C. C. The plaintiff being the owner of about 20,000 acres of swamp and overflowed land, near the mouth of the San Joaquin river, on the twenty-first day of March, 1877, entered into a written contract with the defendants "to agist and pasture" upon his land certain cattle, belonging to defendants, for the term of one year from the date of the contract. The defendants on their part agreed "to pasture on said land, at their own risk and cost for herding, etc., all the cattle it shall be capable of grazing, over and above the sheep hereinafter mentioned, and in no case less than 3,000 head;" and to pay therefor one dollar for each and every head so pastured,—one-half of the money to be paid when the cattle were driven to the land and the other half in six months from that time. The defendants did not see the land, or know of its condition, when the contract was made; but in 1864, and again in 1871, they had pastured a large number of cattle upon it, and the land then furnished very valuable summer pasture. At that time the surface of the ground was covered by a sod from one and a half to two and a half feet thick, made of vegetable matter, half dead and half alive, and which was sufficient to sustain cattle passing over it. Between 1871 and 1877 efforts were made to reclaim the land by building levees around it, and the sod, with the exception of a few acres near Webb's Landing and a few other scattered patches, was burned off. When the contract was made the levees were broken and the tide ebbed and flowed over the whole tract, with the exception of the few places where the sod had not been burned, and this condition continued during the whole year. Grass grew on the unburned places, but, with the exception of that near Webb's Landing, the ground intervening was so miry that cattle could not be driven or taken to them. In May the defendants sent to the tract near Webb's Landing by boat 717 head of cattle, and on the seventh of June they paid the plaintiff for their pasturage \$717. The cattle remained there about three months, during which time the feed was consumed and 134 head were lost. The rest of them had to be taken away, or, as the herder testified, "we would have lost them all." This action was commenced to recover from the defendants the sum of \$2,383, which, it is alleged, is still due for the cattle which the defendants obligated themselves by their contract to send to and pasture on the plaintiff's land. The case was tried by the court, and judgment entered in favor of the defendants. The appeal is from the judgment and an order denying a new trial. The decision in the court below was made upon the theory that the contract was not a lease of the land, but an agreement on the part of the plaintiff to pasture the defendants' cattle at a certain stipulated price per head, and that, being unable to furnish the pasturage, he could not require the defendants to pay for what they did not and could not receive.

It is claimed for the appellant that this theory was wrong; that the contract was in effect a lease, and the money to be paid, rent; and

that the respondents cannot relieve themselves from the payment of the stipulated rent, because they were unable to pasture upon the land as many cattle, or for so long a time, as they supposed they could when they took the lease. We think the court was right in its construction of the contract. The plaintiff undertook to agist and pasture the defendants' cattle, and reserved the right to pasture on the land, after August 1st, 10,000 head of sheep belonging to himself, provided the sheep should not interfere with the cattle. The defendants agreed to pasture on the land all the cattle it was capable of grazing, and in no case less than 3,000 head, and to herd them at their own risk and cost. Webster defines the word "agist" to mean "to take to graze or pasture, at a certain sum;" and "agistment" as "the taking and feeding other men's cattle in the king's forest, or on one's own land, at a certain rate." No particular words are necessary to create a lease. "Whatever words are sufficient to explain the intent of the parties that one shall divest himself of the possession and the other come into it, for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease." Bac. Abr. "Leases;" Bouv. Law. Dict. "Leases." Do the words used here show that it was the intention of the parties that the one should divest himself of the possession of the land and the other take possession? If so, why did the contract provide that the defendants should bear the cost and risk of herding their own cattle? If they had a lease they were required to do that, and no such provision was necessary. We think the contract was one for the agistment of cattle, and that the condition of the defendants' agreement was that the land should be "capable of grazing" them. Both parties evidently contemplated that it would be capable of grazing more than 3,000 head, or no reservation would have been made of the right to pasture thereon 10,000 head of sheep. As they were mistaken in this, it cannot be supposed that it was intended that defendants should place their cattle there to be starved or drowned; and, failing to do that, be requested to pay the full price for their pasturage.

The judgment and order should be affirmed.

We concur, SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order affirmed.

(2 Cal. Unrep. 621)

McNALLY v. CONNOLLY. (No. 8,864.)¹

Filed December 29, 1885.

1. ACTION TO RECOVER PERSONAL PROPERTY—DEMAND.

In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown; but, if the original possession of the property was acquired by tort, no demand previous to the institution of the suit is necessary.

2. ACTION TO OBTAIN POSSESSION OF REAL PROPERTY—DEMAND.

One acquiring title to real property, who is not in possession, is entitled to be let into possession on demand, and, until such demand, he cannot maintain an action to obtain possession against a person who is lawfully in possession.

3. FIXTURES—ENGINE AND MACHINERY.

Where a tenant of real property, with the permission of the owner, erects an engine and boiler on a foundation made of brick and of timbers sunk into the ground, and attaches such engine and boiler and machinery to a building which is part of the realty by means of bolts and screws which are easily removed; *quære*, whether such boiler and engine constitute real or personal property.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

Chas. F. Hanlon and *W. C. Flint*, for appellant.

Mich. Mullany, for respondent.

SEARLS, C. This is an action to recover possession of certain personal property, if possession can be had, and, if not, the value thereof. Defendant had judgment, from which, and from an order denying a new trial, plaintiffs appeal. In 1876, Owen Connolly, the defendant, took a lease of a lot of land on Fourth street, near Berry, in the city of San Francisco, for a term which was to expire January 1, 1881. There was a brick building upon the lot, but which did not cover the whole of it. Connolly paid his rent in full for the term, formed a copartnership with Charles D. Wheat, and, as such copartners, under the firm name of Connolly & Wheat, they proceeded to place upon said lot of land, an engine, boiler, and machinery for a flouring-mill, which machinery is the subject-matter of the controversy in this action. The engine and boiler were erected in a wooden building adjoining the brick structure, and the motive-power was communicated therefrom to the machinery by means of a shaft, or shafts, extending into and through the brick structure. The foundation for the engine and boiler was made by sinking timbers in the ground from six inches to two feet, upon which a brick foundation was built, and the bed of the engine was placed upon the brick work and fastened to the wooden foundation beneath by bolts and screws. The mill-stones were bolted fast to the floor. Pieces of timber were put in the brick walls, and bolted through in the upper part of the building, to which the machinery was attached. The whole machinery seems to have been securely attached to the building, and to have been solid and substantial, but was secured and fastened, usually, by bolts and

¹ Reversed in banc. See 11 Pac. 320, 70 Cal. 2.

screws, which could be removed without material injury to the building, while some bridges were bolted directly to the walls of the building. The principal difference in securing the machinery from that ordinarily pursued consisted in using bolts with screws instead of nails. The machinery was by this means securely fastened to the building, and was solid. The machinery was placed in the buildings with the understanding that the tenant should be at liberty to remove it; and, with that end in view, it was substantially attached to the realty, but with bolts and screws, in order that it might be severed with the least possible injury to the realty. In 1877 plaintiffs herein brought an action against Connolly & Wheat to recover \$2,966.16, and caused a writ of attachment to issue, which was levied upon the right, title, and interest of defendants in and to the lot of land and premises so leased as aforesaid. The sheriff, also, by direction of plaintiffs, at the same time attached the machinery now in controversy as personal property. Plaintiffs had judgment, and thereafter caused an execution to issue, under which the sheriff levied upon the real estate or lot having the mill and machinery thereon, and afterwards, on the nineteenth day of October, 1877, sold the same in due form as *real estate*, plaintiffs becoming the purchasers, and, no redemption having been had, said plaintiffs, on the fourth day of May, 1878, received a sheriff's deed in due form of said land and premises. Defendant, Connolly, having, prior to the expiration of the lease, removed the machinery, or most of it, this action was brought. A demand of possession by plaintiffs from defendant is averred to have been made on the thirty-first day of December, 1880. The answer denies specifically that any demand for delivery or possession was ever at any time made, and the court finds that no demand was in fact ever made.

We have examined the record in vain for evidence of a demand. In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown. *Bacon v. Robson*, 53 Cal. 399. If the original possession of property is acquired by tort, no demand previous to the institution of a suit is necessary. *Sargent v. Sturm*, 23 Cal. 359; *Wellman v. English*, 38 Cal. 583.

Defendant, Connolly, as the lessee of the premises or lot of land upon which the mill and machinery were erected, was lawfully in possession. He and his copartner caused the machinery to be placed in the buildings, and owned and possessed it until, by the sale under execution and failure to redeem, the title passed by sheriff's deed to the plaintiffs. If the machinery was not attached to the realty so as to pass by a sale of such realty, plaintiffs acquired no right to it, for they sold the interest of defendants as *real estate*, and not as personal property. Treating it, then, as real property, the plaintiffs were entitled, upon presentation of their sheriff's deed, to be let into

possession. Until they did so, the defendant might lawfully remain in the enjoyment of the property. They never demanded delivery or possession, and defendant, being thus lawfully in possession, was not guilty of the unlawful detention necessary to support an action, until by demand and refusal his detention became wrongful. It follows from this view of the case that plaintiffs were not in a position at the date of suit brought to maintain an action, and the judgment and order in favor of defendant should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT: For the reasons given in the foregoing opinion, the judgment and order are affirmed.

68 Cal. 324

In re SMITH *v.* LING. (No. 11,236.)

Filed December 31, 1885.

1. PUBLIC OFFICER—CHARGING ILLEGAL FEES—NEGLECT TO PERFORM DUTIES.
An accusation or information from which it cannot be determined whether defendant is sought to be charged with charging and collecting illegal fees for services rendered as a public officer, or with refusal or neglect to perform the official duties pertaining to his office as a justice of the peace, is defective.
2. SAME—INFORMATION FOR CHARGING ILLEGAL FEES.
An information for charging illegal fees which fails, except by way of recital, to show that fees collected by defendant, a public officer, were either illegal, or that they were collected at all, and fails to charge that defendant knowingly, willfully, or corruptly charged or collected illegal fees, is defective and insufficient.
3. SAME—ACCUSATION FOR NEGLECT TO PERFORM OFFICIAL DUTY.
An accusation against a public officer, for neglect to perform an official duty, which fails to charge that defendant knowingly, willfully, or corruptly neglected to perform his official duty, is defective.
4. SAME—ACCUSATION AFTER TERM FOR NEGLECT TO PERFORM OFFICIAL DUTY.
Where a person has ceased to hold a public office, he is no longer the subject of a prosecution for refusal or neglect to perform the official duties pertaining to his office provided for by section 772 of the California Penal Code.

Commissioners' decision.

Department 1. Appeal from superior court, county of Los Angeles.

W. Smith, for appellant.

H. K. S. O'Melveney, for respondent.

SEARLS, C. The defendant, R. A. Ling, was a justice of the peace in and for Los Angeles township, county of Los Angeles, from January, 1883, to January 5, 1885. This is a proceeding under section 772, of the Penal Code, which relates to the offense of "charging and collecting illegal fees" by officers, and for the refusal or neglect to "perform the official duties pertaining to his office." The information, which was filed after the defendant ceased to be an office-holder, is quite lengthy, and contains so many statements of facts by way of recital only, and so much that is indefinite and uncertain, that we

shall not attempt a synopsis of the facts. Defendant moved the court to set aside the information upon several grounds. The motion was granted, and judgment rendered in favor of defendant.

The accusation or information was defective in these respects: (1) It cannot be determined therefrom, with any certainty, whether defendant is sought to be charged with "charging and collecting illegal fees for services rendered," or with refusal or neglect to perform the official duties pertaining to his office as a justice of the peace. (2) Treated as an information for charging illegal fees, it fails, except by way of recital, to show that such fees were either illegal, or that they were collected. (3) There is no charge that defendant, knowingly, willfully, or corruptly charged and collected illegal fees, or neglected to perform any official duty. *Triplett v. Munter*, 50 Cal. 644. (4) Defendant's term of office having expired January 5, 1885, and the accusation not having been filed until May, 1885, defendant was not an officer at the date of the institution of the proceedings.

The summary proceedings provided by section 772 of the Penal Code are aimed at officers as such, and result, where the defendant is found guilty, in his being deprived of his office. The statute also provides that a judgment of \$500 shall be entered in favor of the informer. This last provision was no doubt inserted as an inducement for persons having knowledge of official guilt to institute proper complaint, and the fine is but a sequence of the paramount object of the statute, viz., the removal from office of incumbents who knowingly, willfully, and corruptly use their official position as a medium for extortion and wrong. There are other modes provided in the criminal laws for the punishment of crimes and misdemeanors, whether committed by public or private citizens. This particular statute seems to be aimed at certain public officers, as such, with the definite and fixed object of removing them from office; and, when they cease to hold office they are no longer the subjects of a prosecution having for its main object the depriving them of that which they, as ex-officers, do not possess. There are other objections to the accusation, but we deem those already referred to conclusive of the case.

The judgment of the court below should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

68 Cal. 284

COLLINS v. LEAN. (No. 11,127.)

Filed December 28, 1885.

1. SEARCH-WARRANT OF PERSON—ISSUANCE ON INFORMATION—LOTTERY TICKETS.

A police officer may legally apply for and obtain a search-warrant to search the person of one whom he was informed and believed had lottery tickets in his possession for the purpose of sale, such possession of tickets being contrary to the penal laws; and the fact that the officer had no personal knowledge of facts showing or tending to show that the person was about to sell such tickets, and thereby commit a public offense, will not be ground for denial of such warrant.

2. LOTTERY TICKETS—SEARCH-WARRANT OF PERSON.

Under a warrant authorizing an officer to seize lottery tickets specified therein if found in plaintiff's possession, but which did not authorize the officer to search the store and premises of plaintiff, if, in making the search of plaintiff's person at his premises, without searching the premises, he discovers at the place of search a package of tickets which were the property of plaintiff, he is authorized to take such tickets into his possession.

3. SAME—DUE PROCESS OF LAW.

Where a police officer has rightfully taken into his possession, under a search-warrant, certain lottery tickets, and brought them before the magistrate issuing the warrant, such tickets are in law in the custody and under the control of the magistrate, and not in that of the officer; and the claimant of the tickets cannot, therefore, maintain an action against the officer for the return of the tickets; nor where they are retained by the magistrate, the possession of such tickets being illegal, can he complain that he is deprived of them as his property without due process of law.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

R. N. Swain, for appellant.

Alfred Clarke, for respondent.

FOOTE, C. This is a controversy submitted without action, under section 1138, Code Civil Proc., and from the judgment therein rendered, which was in favor of the defendant, an appeal is prosecuted under section 1140, Code Civil Proc.

It appears from the agreed statement of facts that on the third day of April, 1885, Collins, the plaintiff, was a merchant, residing and doing business as such in the city and county of San Francisco, and the defendant a duly appointed, qualified, and acting police officer of said city and county. That E. BURKE was then and there a duly elected, qualified, and acting justice of the peace in and for said city and county. That, on the day above mentioned, the defendant, acting upon the information which he had received from one Handly, that the plaintiff had sold him (Handly) a lottery ticket, on that day, in said city and county, and was then and there engaged in the business of selling lottery tickets to divers persons, applied to E. BURKE, as justice of the peace aforesaid, for a search-warrant to be used for the purpose of searching the plaintiff's person. That the deposition which he then and there made in due form, and filed with said justice, contained, *inter alia*, this statement: "That on the third day of April, A. D. 1885, at said city and county, certain tickets in the Louisiana State Lottery were upon the person and in the possession of

plaintiff, with the intent to use the same as the means of committing a public offense, viz., selling them for money,"—and prayed for a warrant to search for the same. That, on such making and filing of said deposition, E. BURKE, as justice of the peace aforesaid, issued under his hand a search-warrant in due form of law, directed (among others) to any policeman of said city and county, requiring them to make immediate search of the plaintiff's person for such lottery tickets, and, if any such were found, to bring them before him. That on the same day upon which said warrant was delivered to him, with instructions to serve the same, and subsequent to such delivery and instructions, the defendant did search the person of the plaintiff, but failed to find any lottery tickets; but that after such searching, and before he left the room or place where such search was made, he discovered a package of 100 such tickets, all of which were the property of and in the possession of the plaintiff. That the defendant took and carried them away, for the purpose of using them as evidence against plaintiff, in a future prosecution, on the charge of aiding in getting up and drawing a lottery. That he had no warrant to search the store of plaintiff, nor did he search the same. That after such event the tickets were no longer required as evidence, and plaintiff demanded that they be returned to him, which defendant refused, on the ground that they should be retained to prevent plaintiff from committing a public offense, viz., selling them.

It is urged by the appellant that the judgment of the court below was erroneous, for the reason that defendant could not legally apply for and obtain the search-warrant, because he had no personal knowledge of the facts showing, or tending to show, that plaintiff had or was about to commit a public offense; that the warrant was invalid, and the defendant had no right to take the tickets from plaintiff's store, as the warrant did not name it as the place to be searched, but specified that the search must be of the plaintiff's person; that the plaintiff, who claimed the lottery tickets as his property, could not be deprived thereof without due process of law, and therefore the defendant could not lawfully retain them for the purpose of preventing the commission by the plaintiff of a public offense.

The defendant was informed that the plaintiff had the tickets in his possession. He was an officer of the law, whose plain duty it was to suppress crime, if he lawfully could. He acted on this information in good faith, believing it to be true, and the result showed his belief to be well founded. The fact that the tickets, when found, were under the counter in the room where the plaintiff then was, and where he did business, did not render it at all improbable that, upon perceiving himself the object of suspicion, he had subsequent to the issuance of the warrant, and before being searched, removed the tickets from his person, and thrown or placed them where they were found; and the officer was undoubtedly justified in making the complaint and obtaining the warrant.

Under article 4 of the amendments to the constitution of the United States it is provided that no search-warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. To the same effect is section 19 of article 1 of our state constitution. As we read those instruments, we do not find existent therein any prohibition against the issuance of a search-warrant of the person of an individual in a proper case. Therefore, subject to the limitations of those constitutions, and subject also to the conditions that body may itself have prescribed, it is within the power of our state legislature to authorize the issuance of such a warrant; and this power it has exercised by the enactment, in the Penal Code, of sections 1523 to 1542, inclusive.

The deposition upon which the warrant was issued, and the warrant itself, are in due form of law, and conform both to constitutional and statutory requirements. The warrant was therefore valid, and authorized the defendant to execute it. Although it did not authorize the defendant to search the store or premises of the plaintiff, it did authorize him to seize the lottery tickets specified therein, if found in the plaintiff's possession.

The agreed statement of facts shows the tickets, which are the subject of this action, and taken by the defendant, and which may be presumed to have been removed by the plaintiff from his person, and placed where found, after the issuance of the search-warrant, were the plaintiff's property and in his immediate possession, and that defendant made no search for them anywhere save on the plaintiff's person. To admit that he could not take them into his possession, under such circumstances, would be to say that the plaintiff, after he saw the defendant coming into his store, might have stepped to the back of his counter, taken the tickets out of his pockets secretly, and dropped them thereunder, and the defendant would not have been authorized, even when searching the plaintiff, at that spot, to stoop down and pick them up. Conceding all that the plaintiff claims as to the tickets being his property, and that he cannot be deprived of them as such without due process of law under most circumstances, yet, nevertheless, it is firmly settled by the law that all rights of property are held subject to such reasonable and proper control of the mode of its keeping and use as may be deemed necessary for and in consonance with the welfare of the general public; and, in the exercise of the police power vested in the legislature under our state constitution, certain kinds of property, when held or used so as to be injurious to the general public, may be seized and destroyed.

Under article 4, § 26, of that constitution, the legislature is prohibited from authorizing lotteries for any purpose, and is directed by that clause, which is mandatory upon it, to pass laws prohibiting the sale of tickets for anything in the nature of a lottery. That body has acted in the premises, as shown by the sections of the Penal Code,

319 to 326, inclusive; and by order No. 1,587 of the board of supervisors of the city and county of San Francisco the mere possession of such tickets is made a misdemeanor, and all such laws should receive a liberal construction, with a view to carry out the constitutional policy. The defendant, therefore, was right in taking the tickets before the magistrate, as commanded by the search-warrant, under sections 1523, 1529, Pen. Code, and he is presumed to have done so, in the absence of any showing to the contrary. Having done so, they are not in law in his custody, or under his control, but in that of the magistrate, under section 1536, Pen. Code, subject to the order of the court, to which the proceedings before him must be returned.

The acts of the defendant complained of, being in accordance with law, the plaintiff has no cause of action against him, and the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 183

REYNOLDS v. LINCOLN. (No. 9,628.)

Filed December 28, 1885.

1. PLEADING—COMPLAINT IN ACTION TO QUIET TITLE—PARTIES.

In an action to quiet title to land, the complaint is to be treated as a bill in equity. One who holds the legal title to the premises in dispute in such action is a proper party to a final determination of the controversy, and may, by amendment to the complaint, be brought in as a party defendant.

2. SAME—ACTION TO QUIET TITLE—MISJOINDER.

A cause of action relating to the recovery of real property cannot be united with a cause of action against a defendant as trustee, and the joinder of such causes of action is error prejudicial to the defendants, if the evidence and findings were adapted to the issues made under such improper joinder or causes of action.

3. SAME—MISJOINDER OF CAUSES OF ACTION—ANSWER—WAIVER OF DEMURRER.

The defect of improper joinder of causes of action must be taken advantage of by demurrer, or it will be deemed waived; but where a demurrer thereto is filed, and improperly overruled, the filing of an answer by defendant does not amount to a waiver of the defect.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.

Freeman & Bates and *McKune & George*, for appellant.

John Reynolds, for respondent.

SEARLS, C. This action was originally brought under section 738 of the Code of Civil Procedure to quiet title to the premises described in the complaint. Plaintiff applied to the court for leave to file an amended complaint, in which Francis E. Lynch was made a party defendant, and in which another and separate cause of action was set out in addition to that in the original complaint. This leave was granted. Defendant Lincoln excepted to the order making Lynch a

party, and demurred to the amended complaint upon the grounds of a misjoinder of parties defendant and an improper joinder of causes of action. The demurrer was overruled by the court, and its action is assigned as error.

1. As to the alleged improper joinder of parties defendant. The amended complaint shows that the grantors of plaintiff and defendant Lincoln, in 1863, conveyed the premises in question to defendant Lynch and one Martin, in trust, to be sold and the proceeds to be divided among the grantors and a railroad company about to be organized, in certain proportions, as in the trust deed specified. The deed provided that it should become void if the railroad should not be built within two years from the date of such deed. The complaint avers that the railroad was never built, that Martin has since died, and that neither he nor Lynch have ever conveyed the property to any one. A complaint under section 738, Code Civil Proc., is to be treated as a bill in equity. *Brandt v. Wheaton*, 52 Cal. 430. The allowance of amendments is largely in the discretion of the court; and, unless it clearly appears that such discretion has been abused to the prejudice of the party complaining, this court will not interfere. Lynch held the legal title to the premises in dispute, without any beneficial interest therein, and was a proper party to a final determination of the controversy. "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested." Mitf. Eq. Pl. 164. It may and frequently does occur that, in courts of equity, persons having very different and even opposite interests are made parties defendant. It is the great object of courts of equity to put an end to litigation, and to settle, if possible, in a single suit the rights of all persons, either interested or affected by the subject-matter in controversy. Story, Eq. Jur. § 1526. In *Jenkins v. Frink*, 30 Cal. 586, it was held that in an action by one of several *cestuis que trust*, to declare and enforce an implied trust in relation to land, all the beneficiaries, or those claiming to be such, are proper parties defendant. The case of *Reynolds v. Lynch*, decided by this court and reported in 64 Cal. 442, S. C. 1 Pac. Rep. 893, is not in point. In that case the action was against Lynch as the surviving trustee of certain land under a deed of trust, and the other defendants were not shown to have any interests, except as tenants at will of Lynch, the trustee; and this court held, in sustaining a demurrer to the complaint, that their possession as tenants at will did not render them proper or necessary parties defendant. Such tenancy at will, it was said,

could be terminated by plaintiff at any time after obtaining a deed from the trustee. We are of opinion there was no error in permitting Lynch to be made a party defendant, and that that portion of the demurrer, based upon an improper joinder of parties defendant, was properly overruled.

2. Was there an improper joinder of causes of action in plaintiff's amended complaint? The first count of the amended complaint avers ownership and possession of the premises in question in plaintiff, and then proceeds in the usual manner to aver that the defendants, Lincoln and Lynch, "claim some estate or interest in the said premises adverse to the plaintiff, * * * but which plaintiff avers is unfounded; and that said defendants have no estate, right, or title, either at law or in equity, in or to said premises," etc. This is a cause of action to quiet title under section 738 of the Code of Civil Procedure. This form of action is provided for under the chapter relating to "actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate." By section 427 of the Code of Civil Procedure "the plaintiff may unite several causes of action in the same complaint, where they all arise out of," etc., and then follow seven distinct classes; after which the section proceeds as follows: "The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action." The fourth subdivision in the section relates to causes of action upon "claims against a trustee, by virtue of a contract or by operation of law." The cause of action set out in the first count of the complaint must fall under either the second subdivision of section 427, relating to the recovery of real property, or under the seventh subdivision of the same section, and cannot be held to be within the purview of the fourth subdivision. The second cause of action sets out that in 1863 certain parties were owners of the premises; that Robert H. Vance claimed some equitable interest therein; that Crouse and Hoyt were in possession, but without title; that all of said parties, with others, united in the execution of a deed of trust, for certain specific purposes, to defendant Lynch and one Martin, as trustees; that the objects of the trust have failed; that Martin, one of the trustees, died; that defendant Lincoln has succeeded to any interest Crouse and Hoyt ever had in the premises; and that plaintiff holds the entire estate of all the other beneficiaries under the trust deed. He seeks to have defendant Lynch, the surviving trustee, convey to him, etc. This last count is essentially a cause of action against Lynch, as a "trustee, by virtue of a contract, or by operation of law;" and, as such, must be classed under the fourth subdivision of section 427, Code Civil Proc. As causes of action coming under these different classes cannot be united in the same action, we think there is a misjoinder of causes of action in plaintiff's amended complaint, and that the demurrer for misjoinder should have been sustained.

Respondent claims that, by answering the complaint after his demurrer for misjoinder was overruled, defendant has waived the error, if any; and cites *Lonkey v. Wells*, 16 Nev. 271, and *Hammersmith v. Avery*, in the same court, 2 Pac. Rep. 55, in support of his contention. These cases sustain the position of respondent, and the earlier cases in this court were to the same effect. *De Boom v. Priestly*, 1 Cal. 206; *Pierce v. Minturn*, Id. 470; *Brooks v. Minturn*, Id. 481. The cases seem to proceed upon the theory that if a demurrer to a complaint be overruled, the demurrant, if he wishes to make an issue of fact, should ask leave to withdraw his demurrer, and make an issue of fact by filing an answer, and that an answer by leave will be treated as such withdrawal. *Fisher v. Scholte*, 30 Iowa, 221.

The injustice of this rule under our Code must, we think, on examination, be apparent. If a complaint improperly joins two causes of action, advantage must be taken of the defect by demurrer, or it is waived. Suppose a demurrer in such a case is interposed, and improperly overruled, a defendant thus situated may hesitate to rest upon his demurrer, lest an error of judgment on his part imperil his case and shut him out of a meritorious defense. If, however, he answers, he is under this rule forever precluded from availing himself of an error which may have worked him great injustice. It is proper to say that merely formal defects in a pleading are waived by pleading over after demurrer overruled; but, as to those which affect the substantial rights of the parties, there is no inherent justice in holding a party to have waived error by pleading after a demurrer interposed by him has been overruled, and such has not been the later practice of this court. As early as 1857, in *Bigelow v. Gove*, 7 Cal. 133, a judgment upon the merits was reversed on account of the erroneous overruling of a demurrer to a complaint which improperly joined two causes of action. In *Dyer v. Barstow*, 50 Cal. 652, and *Brown v. Rice*, 51 Cal. 489, demurrers for improper joinder of causes of action were interposed, overruled, answers filed, and judgments rendered, which were by this court reversed, upon the ground of error in overruling the demurrers. The theory that a party whose demurrer was overruled was deemed, upon an answer filed, to have withdrawn the demurrer, was, under our system of pleading, but little more than a fiction; and, when the Code was so amended that a party could both demur and answer at the same time, it became time to disregard this fiction, in the interest of justice.

It is next objected that if it be conceded that the court below should have sustained the demurrer, and that the error has not been waived, the judgment should not be reversed, because appellant was not injured thereby; that the case was tried upon the first cause of action, etc. We recognize the doctrine that *error without prejudice* is not a ground for reversal. Code Civil Proc. § 475. It seems to us, however, as we scan the testimony, that much of it applies to each of the causes of action, and that the facts as found by the court are, a portion

of them, peculiarly adapted to meet the issues made under the second cause of action. Under such circumstances, injury must be presumed to have followed upon the error of the court in overruling the demurrer, based upon the ground that two causes of action were improperly united; and, for this error, the judgment and order should be reversed, and the court below directed to sustain the demurrer to plaintiff's amended complaint, upon the second cause or ground therein specified, viz., that two causes of action have been improperly united.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with direction to the court below to sustain the demurrer to plaintiff's amended complaint.

70 Cal. 108

ROBERTS *v.* DONOVAN. (No. 9,069.)

Filed December 28, 1885.

SET-OFF AND COUNTER-CLAIM—ACTION ON JOINT LIABILITY.

In an action on a joint liability against two or more defendants, one of them cannot set up as a counter-claim a cause of action, in his favor alone, against the plaintiff.

Commissioner's decision.

Department 1. Appeal from superior court, city and county of San Francisco.

George D. Shadburne, for appellants.

E. P. Cole and *A. N. Drown*, for respondents.

SEARLS, C. On the twenty-ninth day of July, 1878, plaintiffs and defendant Thomas D. Tobin entered into an agreement in writing, by which Tobin became the agent of plaintiffs in San Francisco for the sale of their bricks, in such quantities as they might deem it for their interest to furnish, said Tobin to sell on commission, and to charge usual and customary commissions. Tobin was to account to and pay over from time to time to H. L. Miller, agent of plaintiffs, all moneys by him collected on account of bricks sold, etc. Defendants Donovan and McGrath, as sureties, and Tobin, as principal, executed to plaintiffs a joint bond in the sum of \$10,000 gold coin, conditioned for the faithful performance by Tobin of his contract with plaintiffs. This action is brought to recover \$3,662.20 on the bond, for the failure by Tobin to account and pay over moneys by him averred to have been collected on sales of brick. Defendant Donovan set up a counter-claim against plaintiffs for \$4,500, claimed as due Tobin on the brick transaction and by him assigned to Donovan before suit was brought. The cause was tried by the court, who filed written findings, upon which defendants had judgment for their costs, except defendant Donovan, who had judgment on his counter-claim

for \$2,216.82 and costs of suit. The cause is brought here on appeal by plaintiffs from the final judgment, and from an order denying a new trial.

The trial of the cause involved an investigation of lengthy and somewhat complicated accounts; and as there was evidence tending to support the result arrived at, we cannot assume to disturb the findings of fact. This being true, the respondent does not need, and the appellants would hardly appreciate, the reasons for the conclusion at which we have arrived as to the facts, were we to give them *in extenso*.

The point is made by appellant that the balance claimed to have been due to Tobin, by him assigned to Donovan, and for which judgment was rendered in favor of the latter, was not a legitimate counter-claim in this action. A counter-claim, to be available in an action, "must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising upon contract, any other cause of action also arising upon contract, and existing at the commencement of the action. Code Civil Proc. § 438. It must exist in favor of the defendant and against the plaintiff. *Chase v. Evoy*, 51 Cal. 618. A defendant cannot set up a counter-claim existing in favor of another person. The test is whether defendant could have maintained an independent action on the demand. *Bellevue v. Thompson*, 33 Cal. 495. A surety cannot set up a counter-claim existing in favor of his principal against the plaintiff, (*Gillespie v. Torrance*, 25 N. Y. 306;) nor can a counter-claim in favor of a defendant and a stranger to the action be set up, (*Hook v. White*, 36 Cal. 299;) or a claim against the plaintiff and another person. *Howard v. Shores*, 20 Cal. 277; *Hobbs v. Duff*, 23 Cal. 627.

In the present case, Donovan and McGrath were joint obligors upon a bond with Tobin. The latter had a claim against plaintiffs, growing out of transactions under the contract, for the faithful performance of which they had become sureties. Tobin assigned his claim to Donovan, one of the sureties, and his right to recover thereon is the precise question presented.

The term "counter-claim" is broader in its scope and meaning than "set-off," and includes, not only demands which were the subject of set-off and recoupment, but also, in our state, equitable demands. A set-off, prior to the Code, could in most of the states only be interposed where the demand was certain, or capable of being made certain by calculation, and could not be sustained for unliquidated damages in a court of law. The defense of recoupment was one in which the defendant was permitted, in an action upon a contract, to show that by reason of some failure of the plaintiff on his part to perform

his cross-obligations under the contract, defendant had suffered damage, which he was permitted to discount, keep back, cut off, or recoup to the extent of his damage, but not exceeding the demand of plaintiff on the same contract. This defense was allowed at law, usually, but not always, by virtue of some statutory provision; its object being to avoid circuity of action. If a defendant failed to recoup damages where he might do so, he was afterwards precluded from maintaining an action therefor, as he is now, by our Code, for counter-claims arising under subdivision 1 of section 438 of the Code of Civil Procedure. A counter-claim, under said subdivision, includes a cause of action arising out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action.

It has been held in New York, under a statute precisely like our own, that the term "transaction" is a broader one than "contract." A contract is a *transaction*, but a transaction is not necessarily a *contract*. *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372.

We do not, however, deem it necessary to enter upon a discussion of the distinctions between the several cases provided for by subdivisions 1 and 2 of section 438 of the Code of Civil Procedure, for the manifest reason that the counter-claim set up by defendant Donovan must come under one or the other of those provisions; and, for the purposes of the decision, it matters not which. If the counter-claim cannot be sustained, it must be for the reason that a several judgment cannot be had between defendant Donovan and plaintiffs.

The action is brought upon the joint bond of all the defendants. Were it a joint and several bond, no difficulty could arise; for where the cause of action is several as well as joint, a several judgment may be entered, without reference to the mere form of action. So, too, when the cause of action is against several defendants jointly, a portion only of whom are served, judgment may be taken against those served, under section 414 of the Code of Civil Procedure, and proceedings may afterwards be had in such cases against those not served under section 989, etc., of the Code of Civil Procedure. And, under section 1543 of the Civil Code, the release of a joint debtor does not discharge others.

It is submitted, however, that where all of several joint debtors are sued and served with process, all being equally liable, save in a few exceptional cases, of which this is not one, a several judgment cannot be entered, but the judgment, like the demand, must be joint.

Pomeroy, after discussing at considerable length the several questions arising under counter-claims, at section 761 of his work on Remedies, sums up as follows:

"First, when the defendants in an action are joint contractors, and are sued as such, no counter-claim can be made available which consists of a demand in favor of one or some of them; *secondly*, when the defendants in an action are *jointly and severally* liable, although sued jointly, a counter-claim, con-

sisting of a demand in favor of one or some of them, may, if otherwise without objection, be interposed."

We think this to be the true rule, applicable to the facts of the present case, and that under it the several demand of Donovan was not a proper counter-claim in the action against him and his co-defendants, upon a joint demand against them all.

Springer v. Dwyer, 50 N. Y. 19, cited by counsel for respondent, is not in conflict with the rule as stated. That was an action for a promissory note against the maker and indorsers, who were severally liable to plaintiff. *People v. Cram*, 8 How. Pr. 151, was a case of joint and several liability. *Parsons v. Nash*, 8 How. Pr. 455, was also a case of joint and several liability, and it was expressly held that where there was a several liability, a defendant severally liable could avail himself of a set-off in his favor.

We know of no well-considered case in which it has been held that one of two or more defendants jointly, and not jointly and severally, liable, has been permitted to set up a counter-claim *due to him only*. It sometimes occurs that the very facts constituting a counter-claim may be and are a defense to the action, to the extent of defeating the plaintiff's right to recover. In such cases, and for such purposes, the doctrine we have advanced, so far as the defense is concerned, has no application.

It follows that the objection to the counter-claim interposed in the court below should have been sustained, and that the judgment and order denying a new trial should be reversed and cause remanded.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

68 Cal. 321

HARMON v. ASHMEAD. (No. 9,046.)

Filed December 30, 1885.

1. MECHANIC'S LIEN—FORECLOSURE—BURDEN OF PROOF.

If the complaint in an action to foreclose a mechanic's lien alleges that the interests or claims of the defendants were subordinate or subject to the lien of the plaintiff, a denial of such allegation by defendants does not cast on the plaintiff the burden of proving that allegation. Had the defendants stated facts to show that their claim was not subordinate or subject to the lien of plaintiff they would have had the affirmative of the issue, and, as it was their business to disclose the nature of their claims when thus called upon, they cannot, by failure to do so, occupy any better position than they would had they done otherwise. If defendants, therefore, having the affirmative of the issue, fail to introduce any evidence to support such issue, the court is justified in finding that their claim was subordinate and subject to that of plaintiff.

2. SAME—STATEMENT IN, OF COMPLETION OF BUILDING.

It is not necessary to state in a mechanic's lien that the building, in the construction of which the materials have been used and labor done, has been completed.

In bank. Appeal from superior court, city and county of San Francisco.

Cowdery & McCutcheon and William H. Fifield, for appellants.

E. S. Pillsbury, for respondents.

SHARPSTEIN, J. The denial in the answer of the allegation in the complaint that the interests or claims of the defendants answering were subordinate and subject to the lien of the plaintiff did not cast on him the burden of proving that allegation. If the defendants, in their answer to that allegation, had stated facts which showed that their claim was not subordinate or subject to the lien of the plaintiff, they would have had the affirmative of the issue; and it was their "business, when thus called upon, to disclose" the nature of their claim. *Anthony v. Nye*, 30 Cal. 401. By not doing so they certainly occupy no better position than they would if they had done so. Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative; and as they introduced no evidence to support it, the court was justified in finding that their lien was subordinate and subject to the plaintiff's.

It is stated in the lien, and alleged in the complaint, that the defendant Ashmead agreed to pay for the materials furnished by plaintiff, upon the completion of the building; and it is further alleged in the complaint that, at the date of the commencement of this action, the building had not been completed, and that said defendant did not intend to complete it, and that he had notified plaintiff to that effect. Thereupon the sum which said defendant had agreed to pay for said materials doubtless became due. It is unnecessary to state in a lien that a building, in the construction of which materials have been furnished and labor performed, has been completed. But the lien filed in this case did so state. That was doubtless done for the purpose of showing that the sum which the owner had agreed to pay for said materials had become due. The sum had become due, but not for that reason. There was a misstatement, but not of a material fact. In either event the sum claimed would be due, was due; and that was the material fact. Whether due for the reason stated in the lien, or for the one stated in the complaint, the rights of the parties would be the same. The law was sufficiently complied with, and nothing more should be required.

We think the name of the owner of the premises is stated in the lien as fully as the law required it to be.

In other respects we think the liens filed were substantially in conformity with the statute.

Judgment and order affirmed.

We concur: MCKEE, J.; THORNTON, J.; MYRICK, J.

68 Cal. 317

MARTIN v. WALKER. (No. 8,209.)

Filed December 30, 1885.

PARTITION—RIGHTS UNDER CONVEYANCE PENDENTE LITE—STATUTE OF LIMITATIONS.

Where a co-tenant, pending an action for partition, conveys his undivided interest to one who is not and does not become a party to the partition proceedings, the statute of limitations does not commence to run against the right of such grantee to possession after the determination of such partition suit until he has made a demand to be let into possession of the land allotted to his grantor, and such demand has been refused.

Department 2. Appeal from superior court, county of Marin.

E. S. Lippitt and C. V. Grey, for appellants.

A. W. Thompson, for respondents.

MORRISON, C. J. Ejectment for lands embraced within the Rancho Laguna de San Antonio, in Marin county, California. The lands in controversy are a portion of the tract of land included in the partition suit of *Gates v. Salmon*, commenced in the year 1860, and finally determined in the Fourth district court, March 28, 1877. In the partition suit referred to, the lands described in the complaint in this action were set apart and allotted to Walker, the defendant in this action, who was also a party defendant in the suit for partition of the rancho. The plaintiffs here claim title as tenants in common with Walker under certain deeds executed by him to them and their grantors; and the defendant, Walker, he being in fact the only defendant in the case, claims to own the lands in severalty by virtue of a long adverse and exclusive occupancy and possession of the same. Defendant's plea of the statute of limitations was sustained by the court below, and this is the only question presented for consideration on appeal. On the trial the defendant testified as follows:

"I know the land described in my answer in the case of *Gates v. Salmon*, * * * and also that described in the complaint in this action. The land described in this complaint is the same thing as that described in that answer. I have occupied that land for over twenty years. No one has occupied it with me. Neither of the plaintiffs have ever had possession of any of that land. The land is fenced both by an exterior and a cross fence. I have used the whole of the land for farming and grazing. The description in the answer includes the old *potrero*, which I occupied for a number of years, and sold off to Davis and another, and it also includes the first five described tracts in the complaint. I ain't going to be too sure about that, I want you to understand; but I think that at the time that description in the answer was made, that I owned that *potrero*. I would not be too positive about it, however. I owned special locations 14 and 12 when the partition suit was commenced, and at the time I became a member of the league the tract described as No. 1 in the complaint was within the boundaries of special location No. 14, and the tract described as No. 2 in the complaint was within the boundaries of special location No. 12."

And the following were the findings of the court:

"(2) In the year 1865 plaintiffs and defendant, Walker, were tenants in common in a certain large tract of land called the Rancho Laguna de San Antonio, each having an undivided interest therein. Of this rancho, the land

described in the complaint is a parcel. (3) The defendant, Walker, in 1865, ousted plaintiff from said parcel, took exclusive possession thereof adversely to plaintiffs and all other persons, claimed to own the same in severalty, and has ever since then continuously remained and now is in the exclusive possession thereof, adversely to plaintiffs and all other persons, and has ever since then claimed, and now claims to be, the owner thereof in severalty. (4) Of the facts that Walker had so ousted them from said parcel, that he claimed to own the same in severalty, that he had taken the exclusive possession thereof adversely to plaintiffs and all other persons, the plaintiffs herein were notified in the year 1865, and they have ever since then been aware that he was in the exclusive possession thereof, adversely to plaintiffs and all other persons, and claimed to be the owner thereof in severalty.

"From the foregoing facts, as conclusions of law, the court finds that plaintiffs ought not to take anything by this action; but that defendants should have judgment herein against plaintiffs for their costs of suit; and judgment is so ordered."

It was also shown that the plaintiff, Martin, on the twenty-fifth day of May, 1878, made a demand of Walker to be let into the possession of the land in controversy, in the following language:

"PETALUMA, May 25, 1878.

"To L. W. Walker, Esq.: I hereby demand to be let into possession of the property hereinafter described, by virtue of a deed made and executed by you to me, dated August 24, 1864, and conveying one-forty-first part of the Rancho Languna de San Antonio, and also a deed made and executed by you to William Robson, dated August 24, 1864, conveying one-eightieth part of said rancho, said Robson having conveyed the same to me by deed dated August 26, 1864. I make this demand as tenant in common with you in said land now in your possession, and to the extent of my said interest in said rancho, the same having been set apart to you by a decree made and entered in the district court of the Fourth judicial district of California, in the case of *Gates v. Salmon and others*, in connection with your interests in said rancho. Said lands, comprising our joint tenancy, are described as follows: The tracts, lots, and parcels of land known and designated upon the partition map, and in the decree of partition of said rancho made and entered into the Fourth district court, as tracts Nos. 1, 2, 3, 4, 5, 6, and 7 of L. W. Walker's subdivision of said rancho, containing 1,646 acres. C. MARTIN."

The demand was refused by the defendant, Walker.

The plaintiff offered in evidence on the trial a deed from Walker, the defendant, to William Robson, dated August 24, 1864, for a part of the land sued for; a deed from Walker to Charles Martin and Giuliano Moretti, bearing date August 24, 1864, for a portion of the premises; also a deed from Robson and Moretti to Charles Martin, dated August 26, 1864, and a deed from Martin to Moretti. These last-named deeds were for a portion of the lands sued for.

As already remarked, the only question before us is the correctness of the judgment sustaining the defendant's plea of the statute of limitations. We are of the opinion that the evidence was not sufficient to establish the plea of the statute of limitations. The partition case of *Gates v. Salmon* was commenced in 1860 and did not end until the year 1877. The defendant, Walker, was a party to that proceeding, and while it was pending deeded an undivided part of the land

claimed by him to the plaintiffs. The plaintiffs did not become parties to the proceeding in partition. We think the statute of limitations did not commence to run until the demand was made by Martin in 1878 to be let into possession as a co-tenant with the defendant. The action was brought in 1879, so that five years had not run from such refusal and ouster before the action was brought. We therefore think the statute had not run, and the judgment and order below should be reversed. It is so ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

68 Cal. 326

SHARON v. SHARON. (No. 9,984.)

Filed December 31, 1885.

1. APPEAL—NOTICE—SUFFICIENCY OF—ORDER FOR ALIMONY.

In an action for a divorce, and to establish a marriage, a notice of appeal from an order directing the payment of alimony and counsel fees is not insufficient because notice of an appeal from a judgment in said case is embraced in the same paper, nor because the appellant, by way of precaution, inserted in the notice a paragraph to the effect that, on the appeal from the judgment, the supreme court would be asked to review and set aside the order directing the payment of alimony, such paragraph being surplusage which does no injury.

2. SAME—SEVERAL NOTICES IN SAME INSTRUMENT.

Where there are several appeals in a case, the different notices of appeal may be contained in one instrument, if the several appeals are distinctly designated.

3. SAME—UNDERTAKINGS ON APPEAL—SEVERAL IN SAME INSTRUMENT.

Where, in the same transcript, there are several appeals, an undertaking should appear for each appeal; but the several undertakings may be contained in the same instrument, if the objects for which they are executed, and the several appeals to which each applies, can be clearly distinguished.

4. SAME—APPEALS FROM JUDGMENT AND ORDER DENYING NEW TRIAL—UNDERTAKING.

One undertaking is sufficient on an appeal from a judgment and from an order denying new trial, where embodied in the same notice and transcript; but, in all other cases, a separate undertaking is required for each appeal.

5. SAME—ONE TRANSCRIPT FOR SEVERAL APPEALS—SUFFICIENCY.

One transcript is sufficient for several appeals in a case, if the record on each appeal is as clearly distinct as if set forth in separate transcripts.

McKEE, J., dissents.

In bank. Appeal from superior court, city and county of San Francisco.

W. H. L. Barnes, O. P. Evans, and Stewart & Herrin, for appellant.

Tyler & Tyler, D. S. Terry, George Flournoy, and Walter Levy, for respondent.

THORNTON, J. This is the second motion to dismiss the appeal in this case from the order granting alimony and counsel fees. The motion is made on the following grounds:

"(1) That no notice of appeal from the order mentioned has been filed, as required by section 940 of the Code of Civil Procedure; (2) that no undertak-

ing on appeal has been filed, as required by the same section; (3) that no transcript on appeal has been filed, as required by rule 2 of this court."

The notice of appeal is printed in the record, and is as follows:

"You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the state of California from the judgment declaring a marriage to exist between the said plaintiff, Sarah Althea Sharon, and the said defendant, William Sharon, and awarding certain relief therein, entered in the said superior court on the nineteenth day of February, A. D. 1885, in favor of the plaintiff in said action, and against the said defendant, and from every part thereof. And you will also take notice that the said defendant hereby appeals to the said supreme court from the order directing the payment of the sum of fifty-five thousand dollars counsel fees, and the sum of twenty-five hundred dollars per month to the plaintiff as alimony, from the eighth day of January, 1885, and directing execution to be issued therefor pursuant to section 1007 of the Code of Civil Procedure of the state of California, unless the sum of sixty-two thousand five hundred dollars (\$62,500) be paid on or before the ninth day of March, 1885, and from every part thereof. And that on the appeal from the judgment herein declaring a marriage to exist between the said plaintiff and said defendant, and awarding other relief, the said supreme court will be asked to review and set aside the order for the payment of money above referred to, made and entered herein on the sixteenth day of February, A. D. 1885, and every part thereof."

The second paragraph of this notice refers to the rule directing the payment of alimony and counsel fees above mentioned. This notice of appeal is amply sufficient, and is in compliance with section 940, Code Civil Proc. It is no less sufficient because notice of appeal from a judgment between the same parties, and in the same case, is embraced in the same paper, nor because the defendant, as a measure of precaution, has inserted in the notice the last paragraph, referring to the order directing the payment above mentioned. This paragraph is surplusage, which does no injury. "*Utile per inutile non vitiatur.*" Broom, Leg. Max. 603. The undertaking on appeal from the order above mentioned is also in the record which comes to this court. The following is a copy of it:

"Whereas, William Sharon, the defendant in the above-entitled action, is about to appeal to the supreme court of the state of California from the judgment made and entered against him in said action, in the said superior court, on February 19, A. D. 1885, in favor of Sarah Althea Sharon, plaintiff in said action, declaring a marriage to exist between said plaintiff and defendant, and awarding her other relief, and for costs of the action: Now, therefore, in consideration of the premises, and of said appeal from said judgment, we, the undersigned, Lloyd Tevis, of the city and county of San Francisco, state of California, and E. J. Baldwin, of the same place, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the said appeal; or, on a dismissal thereof, not exceeding three hundred dollars, (\$300,) for which amount we acknowledge ourselves jointly and severally bound. And whereas, the appellant is desirous of staying the execution of said judgment for costs, we, the undersigned sureties, do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound,

in the farther sum of three thousand dollars, (\$3,000,) being more than double the amount of money or costs awarded to said plaintiff by said judgment, and that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by such judgment, or the part of such amount as to which said judgment is affirmed, if affirmed only in part, and all costs which may be awarded against the appellant upon said appeal. And that if the appellant does not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which said appeal is taken, judgment may be entered in said action, on motion of the respondent, in her favor, against the undersigned sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant on said appeal. And whereas, the said defendant is about to appeal to the said supreme court of the state of California from the order or judgment made and entered by said superior court in said action on February 16, A. D. 1885, against the defendant, requiring him to pay to plaintiff or her order, on or before March 9, A. D. 1885, the sum of seven thousand five hundred dollars (\$7,500) as alimony; and the further sum of twenty-five hundred dollars (\$2,500) on or before April 8, A. D. 1885; and two thousand five hundred dollars (\$2,500) on or before the eighth day of each and every month thereafter, as alimony in said action; and further requiring the defendant to pay as counsel fees in said action, on or before March 9, A. D. 1885, the sum of fifty-five thousand dollars, (\$55,000,) apportioned among and payable to the several counsel of plaintiff, as in said order or judgment is designated; and further directing execution to issue pursuant to section 1007 of the Code of Civil Procedure of the state of California, in default of the payment of said sums, or any of them, as in said order specified: Now, therefore, in consideration of the premises, and of said appeal from said order or judgment, we, the undersigned, Lloyd Tevis, of the city and county of San Francisco, state of California, and E. J. Baldwin, of the same place, do hereby, jointly and severally, undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the said appeal, or on a dismissal thereof, not exceeding three hundred dollars, (\$300,) for which amount we acknowledge ourselves jointly and severally bound. And whereas, the appellant is desirous of staying the execution of the said order or judgment directing the payment by him of alimony and counsel fees, as aforesaid, and every part thereof, we, the undersigned sureties, do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound, in the sum of three hundred and five thousand dollars, (\$305,000,) being double the amount named in said order or judgment, and directed to be paid on or before March 9, A. D. 1885, and also double the amount of all alimony awarded to the plaintiff, and directed to be paid to her for the full period of three years from the said ninth day of March, A. D. 1885, and that if the said order or judgment for alimony and counsel fees appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay to the plaintiff, and to the persons named in said order or judgment, and each of them, the several amounts directed to be paid by said order or judgment, or the part of such several amounts as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal. And that, if the appellant does not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered in said action on motion of the respondent, or the person or persons entitled to said judgment, in her, his, or their favor, against the undersigned sureties, for the whole amount which may then be due, pursuant to the terms of said order, together with the interest that

may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

"Witness our hands and seals this twenty-sixth day of February, 1885.

"LLOYD TEVIS. [Seal.]

"E. J. BALDWIN." [Seal.]

It is manifest that this paper contains four undertakings. Two of them are those usually styled undertakings on appeal, and the remaining two are the undertakings given to stay execution. All these undertakings are executed by the sureties for the appellant. We see no reason why any number of undertakings should not be contained in the same instrument. In the document under consideration the undertakings, and the objects for which they are executed, can be clearly distinguished. It is the common practice in this state, and has been from an early period in our jurisprudence, to embrace several undertakings in one instrument. This is well known to both bench and bar. Judge HAYNES, who seems to have examined this whole subject with great care, remarks, in his book on New Trial and Appeal, that "there can be no doubt but that several undertakings can be in the same instrument." Haynes, N. T. & App. § 211, *645. Where there are several appeals in the same transcript, there should no doubt be an undertaking on appeal for each one of the appeals, and each appeal should be recited in the undertaking. So held in *Horn v. Volcano Water Co.*, 18 Cal. 142, and *Bornheimer v. Baldwin*, 38 Cal. 671. The only exception to the rule that on each appeal there should be a \$300 undertaking is where there is in the same notice and transcript an appeal from a judgment with an appeal from an order denying a new trial. In such case, one undertaking on appeal was held sufficient in *Chester v. Bakersfield Town Hall Ass'n*, 64 Cal. 42. This was so held in consequence of the long and well-settled practice, which this court very properly declined to disturb.

It is contended that the foregoing is inconsistent with what is held in *People v. Center*, 61 Cal. 191. We cannot concur in this contention. In this case, which was an action to annul a patent, C. C. Webb and Green and Jackson were parties, and a contest arose between Webb on the one hand and Green and Jackson on the other. This contest was tried by the court without a jury, and resulted in a special decision and judgment in favor of Webb against the other parties just named, (Green and Jackson.) The court stating the case says:

"The special finding of facts and conclusions of law were made August 28, 1878, and filed October 11, 1878, and judgment thereon was given November 5, and entered November 9, 1878. A general finding of facts and conclusions of law in favor of the sixty odd persons who had filed answers claiming specific portions of the lands under the act of the legislature were also made and filed September 17, 1878, and a general judgment containing separate judgments in favor of each of them was filed September 17, 1878, and entered November 8, 1878. On November 17, 1879, Green and Jackson appealed from portions of the general judgment entered November 8, 1878, and from portions of the special judgment entered November 9, 1878; and also from the order made and entered on October 3, 1879, denying a motion which

they had made to set aside an order which had been made and entered on the fifth of November, 1878, for the issuance of an execution upon the special judgment under which Webb had been put in possession of the land described in the judgment. These appeals were taken by one notice and on one undertaking; and on December 27, 1879, they also appealed from an order made and entered October 31, 1879, denying a motion for a new trial in the contest, and also from an order made and entered November 15, 1879, striking from the files a notice of intention to move for a new trial, which had been filed after the motion for a new trial had been decided; and these last appeals were taken by one notice and one undertaking, so that four appeals have been taken by two notices of appeal and on two undertakings on appeal."

As to this the court said:

"An appeal cannot be taken from parts of two judgments, and from a special order made after final judgment, by one notice of appeal and on one undertaking on appeal."

The report of the case does not set forth either the notice of or undertaking on appeal; but these papers are found in the record in this court.

The undertaking on appeal in the first set of appeals mentioned above, after reciting the taking by the appellant of the three several appeals, concludes with the promises of the undertakers, as follows:

"Now, therefore, in consideration of the premises, and of *such appeal*, we, the undersigned, do hereby jointly and severally undertake and promise, on the part of the said appellants, that the said appellants will pay all damages and costs which may be awarded against them, or either of them, *on said appeal*, or on a dismissal thereof, not exceeding \$300, to which amount we acknowledge ourselves jointly and severally bound." [Then follow date and signatures.]

In the undertaking on appeal in the second set of appeals above mentioned, after reciting the taking by appellants of such appeals, the promise of the undertakers is stated in these words:

"Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeals, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound;" [the date and signatures of the undertakers then following.]

It will be observed that in the promissory part of the first undertaking mentioned reference is made to only one appeal. "Such appeal" and "said appeal" are the expressions used to signify the intent of the signers. Three hundred dollars, the amount of one undertaking, is the only amount mentioned in the papers. The signers make themselves responsible for this sum only and no more. This is certainly but one undertaking on three appeals, which is not admissible, as shown above in this opinion, except in the single case of an appeal from a judgment and an order denying a motion for a new trial. This was allowed by the court because of the long-continued and well-established practice of giving but one undertaking in such a case. The second undertaking above mentioned differs a lit-

tle from the first. The forms of expression used are "such appeal" and "on the appeals," thus leaving it doubtful whether the signers of the undertaking refer to one or two appeals. But the amount for which the parties bind themselves is only the amount of one undertaking, viz., \$300, and no more. This, then, is but one undertaking on two appeals, and is insufficient for the reasons given as to the undertaking first noticed. The above sufficiently shows the correctness of the action of the court in dismissing the appeals in *People v. Center*, and is in accordance with the sentence above quoted from the opinion.

As to the notice of the appeals, if such notice is in one and the same paper in which the several appeals are distinctly designated, we cannot see that such notice is insufficient. Nor do we think that the majority of the court intended so to hold in *People v. Center*, inasmuch as such holding would be in conflict with the settled practice and the ruling of this court in all cases in which it has been called on to express any opinion. Some expressions are used in the opinion of the court which appear ambiguous, but there is nothing which indicates that a notice of more than one appeal may not be in one and the same paper, where the matters appealed from are so designated that it can be seen from what the appeal is taken. The statute as to notice of appeal in this state has been substantially the same ever since the enactment of the practice act of 1851.

In *Lower v. Knox*, 10 Cal. 480, two appeals were taken by one paper, viz., one from the judgment and the other from an order denying a motion for a new trial. The latter appeal was dismissed because taken too late. The court passed on the appeal from the judgment and affirmed it.

In *Horn v. Volcano Water Co.*, 18 Cal. 143, there were appeals from two or more orders. The court says in the opinion: "*The notice of appeal* recites that the plaintiff will appeal from all these orders." We infer from the form of expression, "the notice of appeal," adopted by the court, that these appeals were noticed in one paper. The appeals were dismissed, but not on the ground that they were noticed in the same paper.

In *Carpentier v. Williamson*, 25 Cal. 168, the court said: "An appeal from the judgment may be taken without waiting for the determination of the motion for a new trial, or the two appeals may be, and usually are, prosecuted together."

In *Estate of Pacheco*, 29 Cal. 224, the court held a notice of appeal from an order of the probate court made September 3, 1864, denying the petition of Penniman and others for the removal of Emeric, and refusing to appoint Penniman, and from all orders and decisions made by the court in that behalf on that day, sufficient. It appears that there were two orders appealed from.

In *Peck v. Vandenberg*, 30 Cal. 21, there were appeals from the interlocutory judgment and the final judgment, and from an order deny-

ing a new trial in an action for partition. The court held the former not appealable, (this was before the statute allowing it,) but dismissed the appeal from the order denying the new trial, because not taken in time, and considered the appeal from the final judgment, and passed on the point raised on it. The court says: "The appeal is from both judgments, and from the order overruling Vandenberg's motion for a new trial."

In *Hihn v. Peck*, 30 Cal. 287, there was an appeal from the judgment and the order denying a new trial. The latter was dismissed, because not taken in time; the former was considered.

In *Peck v. Courtis*, 31 Cal. 208, there were four appeals. All were dismissed. The first was dismissed because from an order which was non-appealable; the second, because not taken in time; the third, because not appealable; the fourth, as not taken in time.

In *Genella v. Relyea*, 32 Cal. 159, there was an appeal from the judgment, and from all orders of the district court made and entered in the action, jointly and severally, either before or after the judgment. As to the latter, the notice was held insufficient. The former was dismissed as not taken in time.

In *Flateau v. Lubeck*, 24 Cal. 366, there were two appeals noticed in one paper. The notice was objected to as insufficient, because it did not sufficiently show that the judgment and order mentioned in the notice were the same as those appealed from. The court held the contrary. No point was made that the notice was insufficient because it recited two appeals in one instrument.

In the cases above cited we have but little doubt that in most of them the notice of the appeals in the cause was contained in one instrument. The court, in its comments on the sentence from the opinion in *People v. Center*, above quoted, says:

"Every judgment and order subsequent to judgment entered against a party is the subject of a distinct and separate appeal, and must be appealed from as an entirety. No separate appeal lies from parts of two judgments; each should be appealed from by a notice and an undertaking of its own, (Code Civil Proc. § 936; *Sweet v. Mitchell*, 17 Wis. 129; *Skidmore v. Davies*, 10 Paige, 316;) and while one notice is sufficient for taking an appeal from a judgment and an order subsequent to judgment, yet each should be reviewed on a complete record of its own, to be made up and filed according to section 950, Code Civil Proc., if the appeal be from a judgment, or according to section 956, *supra*, if from an order subsequent to the judgment. The judgment roll on appeal from an order subsequent to judgment is entirely different from the judgment roll of an appeal from the judgment. *Bodley v. Ferguson*, 25 Cal. 584; *Wetherbee v. Carroll*, 33 Cal. 554; Code Civil Proc. § 951. And if the undertaking and transcript belonging to each are not filed in due time, the respondent is entitled to a dismissal of the appeal."

The proposition announced in the first sentence of the foregoing paragraph is not exactly correct, as there can be an appeal from parts of a judgment or order. Code Civil Proc, § 940. The second sentence in the paragraph is correct. When it is said that no separate appeal lies from parts of two judgments, the meaning, we suppose, is

that there cannot be one appeal from parts of two judgments. Certainly there must be an appeal from each judgment, or a specific part of it. We cannot construe this to mean that the notice of the two appeals may not be in one and the same instrument. The notice of appeal was so drawn in *Horn v. Volcano Water Co.*, 18 Cal. 143, and no objection was taken to it on that ground. There certainly should be a notice and undertaking on appeal on each appeal, but this is not saying that they cannot be given in the same instrument of writing. The court then proceeds to discuss the matter of the record, and remarks that "while one notice is sufficient for taking an appeal from a judgment, and order subsequent to judgment, yet each should be reviewed on a complete record of its own, to be made up and filed according to section 950, *supra*, if the appeal be from a judgment, or according to section 956, Code Civil Proc., if from an order subsequent to the judgment."

But it is not said, nor is it intended, that the record of each appeal may not be in one transcript. If it is intended to say that there must be one transcript for each, it is contrary to the practice of the court from the earliest existence of a supreme court in this state to the present time. Since the decision in *People v. Center*, the case of *Emmeric v. Alvarado*, 64 Cal. 529, S. C. 2 Pac. Rep. 418, has been before this court and decided, in which there were five appeals, and there was but one transcript. A motion was made to dismiss appeals in that case, but not on the ground that there was not a transcript for each appeal. It is said further by the court that "if the undertaking and transcript belonging to each are" [each] "not filed in due time, the respondent is entitled to a dismissal." But, according to the practice of this court from the beginning, an undertaking belonging to each appeal was filed in time, though there were several appeals, and the undertaking for each was in one paper. The same may be said of the transcript. The transcript of each appeal is filed in time, though one transcript contains the record of several appeals. The transcript must, however, comply with the rules of this court.

What is said in paragraph 4 of the opinion in *People v. Center* pertains to one of the printed rules (No. 6) of this court. We say that it is a decision under the rule, for the reason that we know of no authority to dismiss an appeal for confusion in the transcript, when there can be found in such transcript all that the statute requires, except this rule. A practice continued for many years in the highest court of the state, passed without observation impugning its correctness, is very strong and cogent, if not conclusive, evidence that such practice is in accordance with law. It should not be considered as overruled by expressions in an opinion which can be readily reconciled with it, especially when the court does not expressly refer to the former practice, and announce a change. For the reasons above given, we cannot construe *People v. Center* as holding there must be in any case a separate transcript for each appeal taken.

In the case before us there is a notice of appeal for each appeal. There is but one transcript, but the record upon which each appeal shall be heard is as clearly distinct as if set forth in separate transcripts for each. We cannot think that the court intended, by its judgment in *People v. Center*, to introduce a new rule of practice as to the notice of appeal, undertakings, and transcript. The transcript in that case was peculiar, *sui generis*, from the confusion apparent on the face of it, and the remarks of the court concerning the transcript apply to such a case. We are more convinced that the court did not intend to introduce any new rule as to the notice of appeal from one of the cases cited in the paragraph last quoted following the words: "Each should be appealed from by a notice and undertaking of its own." We refer to the case of *Skidmore v. Davies*, 10 Paige, 316. The court in the case cited says:

"When several distinct decisions and orders have been made by the court below in the same suit, and between the same parties, it is sometimes permitted to the party who considers himself aggrieved by such decisions to contain them all in the same notice of appeal. But when the proceeding is in the nature of a separate and distinct appeal from each order, as in this case, the appellant must either execute a separate appeal-bond upon the appeal from each order, or he must give one bond on the appeal, with a penalty sufficiently large to cover the appeals from both orders, and with a condition to embrace the damages and costs of both;" citing *Tyler v. Simmons*, 6 Paige, 127.

The above language justifies the practice in this state, both as to notice of appeal and undertaking. The appeal was dismissed in this case because there were two orders appealed from, and but one bond for \$100 was given. Such a bond was required on each appeal, and not being given, the appeal was dismissed. So in *Bornheimer v. Baldwin* and *Horn v. Volcano Water Co.*, *supra*. The notice of appeal referred to two subjects of appeal, and only one undertaking was given, referring to *one appeal*. All the appeals were dismissed, but only one of them, the one not referred to in the undertaking, was dismissed for lack of such undertaking.

In the other case cited from Wisconsin, the ruling turned on the peculiar statute of that state as to a return to each order appealed from. The statute of Wisconsin requires a separate return to each order. This appears from the opinion. The court in Wisconsin is of course well acquainted with their practice, but we cannot perceive from what is said in the case why the record in each appeal may not be printed in one transcript. If more than one transcript is required of appeals made from the judgment and other orders in a case, it seems to us that it must constitute an exception among the appellate tribunals of the several states where the reformed procedure has been adopted.

The only point made by respondent's counsel on the motion to dismiss the appeals was that two separate and distinct appeals cannot be brought to this court on a single notice and undertaking, and on a single transcript. It will be observed, notice, undertaking, and a

single transcript are connected by the copulative conjunction. If either one was defective, the point was well taken.

Now, when the court made the remark embraced in the sentence commencing with the words "an appeal cannot be taken from parts of two judgments," etc., it had really decided that the appeals must be dismissed, and on grounds sustained by the uniform ruling of this court. There were five appeals, (not four, as stated in the opinion,) —one from the final judgment of November 8, 1878; another from portions of the special judgment entered November 9, 1879; still another from an order made October 3, 1879. There was a fourth appeal from an order entered October 31, 1879, denying a motion for a new trial, and still another from an order made and entered November 15, 1879, striking from the files a notice of intention to move for a new trial. In these appeals one undertaking for \$300 had been filed on the three appeals, and one undertaking for a like sum on last appeals mentioned. The undertakings, as we have seen, were ambiguous in their reference to the appeals, and the appeals were dismissed for want of a proper undertaking on appeal. It was unnecessary to say anything in regard to the transcript.

We will add here that there are rarely two transcripts brought up to this court in any one cause. We recollect of none, unless where there are cross-appeals. We would be setting form above substance were we to hold that the notice and undertakings on appeal in this case are not sufficient. The rule of law is imperative in requiring that form shall yield to substance.

The order denying the motion to dismiss the appeals in this cause heretofore made will stand unchanged. So ordered.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.; MYRICK, J.

ROSS, J. I concur in the judgment and in the opinion of Mr. Justice THORNTON, except in so far as it approves what is said in the case of *People v. Center*, 61 Cal. 191. I was unable to agree with the court in that case.

McKEE, J., (*dissenting*.) I adhere to the views expressed in the opinion which I came to on the former hearing in this case, (7 Pac. Rep. 465,) and, for the reasons therein set forth, I think that the appeals taken from the decretal order awarding alimony, and from the final judgment of divorce, were improperly taken, and should be dismissed.

68 Cal. 272

SUPREME COURT OF CALIFORNIA.

GEORGE v. SILVA. (No. 9,239.)

Filed December 28, 1885.

1. EJECTMENT—EQUITABLE DEFENSE—WAIVER OF.

Where an equitable defense is set up in an action of ejectment, if the defendant fails to ask that such defense be first tried, but assents to a trial of the whole cause, he cannot thereafter object because the equitable defense was not tried prior to entering upon the trial of the issues of law.

2. EVIDENCE — PRIVILEGED COMMUNICATION — STATEMENT MADE TO ATTORNEY AT LAW.

A statement made to an attorney at law by parties to an action, such person not being their attorney or legal adviser, is not a privileged communication.¹

3. JUDGMENT—REVERSAL—COSTS—ERROR WITHOUT PREJUDICE.

Where one joined as party plaintiff answers a cross-complaint in an action of ejectment, he is entitled to a judgment for costs upon findings made in his favor; and it is error for the court to add such costs to the original plaintiff's cost-bill, and to enter judgment for the full amount thereof against defendant; but such error is not prejudicial to defendant, and therefore will not warrant a reversal of the judgment.

Commissioners' decision.

Department 1. Appeal from superior court, county of San Benito. *Briggs & Hawkins* and *McCroskey & Hudner*, for appellant.

W. G. Lee, Burchard & Cothran, and *G. B. Montgomery*, for respondent.

SEARLS, C. This is an action of ejectment, to recover possession of certain rooms or portion of a house and lot in Hollister, county of San Benito. Plaintiff had judgment, and defendant appeals as well from the judgment as from an order denying a motion for new trial, and from an order refusing to strike out costs. The complaint counts upon a lease to defendant by one Maria Lenar Serpa, the grantor of plaintiff, for a term of five years, from April 15, 1882, at a nominal rent of one dollar per year. The lease contained a proviso that the lessor should have the right at any time to sell the property, and upon such sale being made, the lease was to become void, and defendant was to deliver up and surrender the property at once. The complaint avers a sale of the property to plaintiff, demand and refusal of defendant to surrender possession, etc. The answer, after denying most of the allegations of the complaint, and attacking the good faith of the purchase by plaintiff, proceeds, by way of cross-complaint, to set out that the property was purchased in part with the funds of defendant, and a deed taken in the name of Maria Lenar Serpa, for the joint benefit of herself and defendant, and avers an equitable title in defendant to the extent of one-half of the premises, and seeks to have a trust in defendant's favor declared to the extent of said one-half of

¹ See note at end of case.

the premises. Maria Lenar Serpa, who has since intermarried with one Benevides, was, on petition of defendant, made a party to the action. The answer contains some matters not important to the ownership of the property. The cause was tried by the court, a jury having been expressly waived. No demand being made for a trial as to the equitable defenses set up, the whole was tried together, and the facts as found are in favor of plaintiff and against defendant upon all the material issues presented by the complaint and answer, and cross-complaint and answer thereto.

Defendant cannot, after having been silent when he should have spoken, and after having thus assented to a trial of the whole cause, be heard, after trial, to urge that the equitable defense should have been first tried. His conduct amounted to a waiver of his right to have the court test the merits of his equitable defense before entering upon a trial of the issues of law.

There was no error in the ruling of the court permitting W. G. Lee to testify. He was not the attorney or legal adviser of the parties, and what was said to him by them, or either of them, did not constitute privileged communications.

There was ample evidence to support the findings, and the errors complained of at the trial are either not valid, or upon questions of no importance, the merits considered. Mrs. Benevides was, on the application of defendant, made a party plaintiff, and as such answered the cross-complaint of defendant. The findings were in her favor, and she was entitled to have and recover her costs of suit against the defendant. She filed her cost-bill in due time, which the court refused on motion to strike out, and ordered the clerk to add the amount thereof, \$55.50, to the cost-bill of plaintiff, and to enter judgment for the full amount against defendant, to which action counsel for defendant excepted in due form, and appeals from such order. The course pursued by the court was erroneous. A judgment in her favor for her costs was the proper course to pursue. But as this was an error by which appellant, who ought to pay her costs, cannot suffer, the judgment will not for that cause be reversed. "When the judgment plainly appears by the record to be right, it will not be reversed for a technical error which could not possibly have worked any injury to the plaintiff in error." *Mobile & M. R. R. v. Jurey*, 111 U. S. 593; S. C. 4 Sup. Ct. Rep. 570; Code Civil Proc. § 475.

To modify the judgment by directing the court below to so amend it as to make the judgment for the costs of Mrs. Benevides payable by the defendant to her, instead of to the other plaintiff, would be technically correct, but would not in the least benefit the defendant.

The judgment and orders appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

NOTE.

To make a communication from a party to an attorney privileged, the relation of attorney and client must exist between them. *Romberg v. Hughes*, (Neb.) 26 N. W. Rep. —. When an attorney is employed for a particular purpose, and before such employment he informs his client that he has been employed against him, in a case not connected with the employment, and, with full knowledge of such fact, the employment is made for the purpose required, the relation of attorney and client does not exist, so far as the purpose of the first employment is concerned; and statements made to the attorney, with reference to any fact in dispute in the controversy in which the first employment is made, is not a privileged communication. *Clay v. Tyson*, (Neb.) 26 N. W. Rep. 240. It seems that statements made in the presence and hearing of an attorney employed as counsel in the transaction to which they relate, but not to him, are not privileged. *Shaffer v. Mink*, (Iowa,) 14 N. W. Rep. 726.

(70 Cal. 380)

LAFARGUE v. HARRISON. (No. 8,535.)

Filed December 30, 1885.

1. LETTER OF CREDIT—GENERAL AND SPECIAL LETTER—DEFINITIONS.

Letters of credit are instruments whereby one person requests another to advance money or give credit to a third person, and promises to repay or guarantee the payment of the same to the person making the advancement. When addressed to all persons in general, requesting such advance to a third person, it is called a general letter; and, when addressed to a particular person by name, a special letter.

2. GENERAL LETTER OF CREDIT—LIABILITY OF WRITER.

Where a general letter of credit is accepted and acted upon, the contract immediately springs up between the person making the advancement and the writer of the letter; and it is, in effect, the same thing as though the name of the former had been inserted in the letter at the time of writing.

3. SPECIAL LETTER OF CREDIT—LIABILITY OF WRITER.

When the person to whom a special letter of credit is addressed accepts it, and the person for whose benefit it was written is given credit in accordance with the letter, a contract springs up between the writer of the letter and the person to whom it was addressed which binds the former. Such contract is auxiliary to the principal contract between the party addressed and him for whose benefit the letter was written, and, upon default of the latter, the writer becomes liable to him who gave credit in accordance with its terms.

4. SPECIAL LETTER OF CREDIT—CONSTRUCTION OF CONTRACT.

The instrument which was the subject of the controversy considered, and *held*, that it constituted a special letter of credit, and that a contract was created between the party to whom it was addressed and the writers, upon which the latter were liable upon failure of the party for whose benefit the letter was written to honor drafts made on account of the credit given in accordance with the letter of credit.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

Wilson & Wilson, for appellants.

McAllister & Bergin, for respondents.

FOOTE, C. From the record in this action, it appears that, in the year 1877, John Mel & Sons, being engaged in a general commission business in the city of San Francisco, having a branch house in the city of Bordeaux, France, and doing their banking business with Lafargue & Co., the plaintiffs in this action, obtained from the defendants, then doing business under the name and style of Falkner, Bell & Co., a letter of credit, as follows:

"SAN FRANCISCO, September 20, 1877.

"*The Merchants' Banking Company of London, Limited*, 112 Cannon street, London—DEAR SIR: At the request of Messrs. John Mel & Sons, of this city, we hereby authorize Messrs. A. Lafargue & Co. of Bordeaux, to draw on you at sixty days' sight for our account, to the amount of three thousand pounds sterling (£3,000.) All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months, from thirty-first October, 1877, to thirty-first October, 1878.

"We are, dear sirs, yours, faithfully, FALKNER, BELL & Co."

Of the issuance thereof Lafargue & Co. and the bank above mentioned were duly advised. Mel & Sons deposited the letter in the bank of Lafargue & Co. as a guaranty or security for advances that might be made by that bank to them, and upon the faith and credit of such guaranty, and of another on the part of some ladies, the relatives of the Mels, which was also at the same time so deposited, Lafargue & Co., between the times mentioned in the letter of credit as the period during which it was to remain in full force and effect, made advances to Mel & Sons of the sum of 99,645 francs and 60 centimes, equivalent to the sum of \$19,231.53 of the money of the United States of America, of which sum the other guarantors above mentioned paid plaintiffs 30,000 francs, leaving unpaid 69,645 francs and 60 centimes, equivalent to the sum of \$13,441.54 in money of the United States.

On the tenth day of October, 1878, on the faith of the said letter of credit, and for liabilities contemplated by the parties at the time of the issuance thereof, the plaintiffs drew a bill of exchange, which, translated into the English language, reads as follows:

"B. P. £3,000.

BORDEAUX, October 10, 1878.

"At sixty days' sight pay on the single of exchange to our order the sum of three thousand pounds sterling, value received by us, which charge according to the letter of credit of Messrs. Falkner, Bell & Co., dated San Francisco, September 20, 1877.

[Signed]

"A. LAFARGUE & Co.

"*The Merchants' Banking Co. of London, Limited*, 112 Cannon street, London."

This draft the pleadings admit to have been accompanied by a letter of advice and notice. It was presented on the fourteenth of October, 1878, to the London bank for acceptance, which was refused. On the sixteenth December, 1878, it was presented to that bank for payment, which was also refused. Thereupon it was protested for both non-acceptance and non-payment. Lafargue & Co. brought this action to recover from the defendants the amount of that draft, basing their demand upon the obligations imposed upon Falkner, Bell & Co., by virtue of the terms of the letter of credit. Judgment for the amount claimed was rendered in favor of the plaintiffs. The defendants entered their motion for a new trial, and it was denied. From the order made in the premises and the judgment the defendants appealed.

Letters of credit are general or special, and whether one partakes

of the characteristics of the former or the latter class depends upon the reasonable construction to be placed upon the language specially employed therein. Daniel on Negotiable Instruments, at page 666, vol. 2, says:

"A letter of credit may be defined to be a letter of request, whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guaranty the same to the person making the advancement. It is called a general letter of credit when it is addressed to all persons in general, requesting such advance to a third; and a special letter of credit when addressed to a particular person by name. When addressed to all persons it is, in effect, a request made to any person to whom it may be presented, and any one may accept and act upon the proposition contained in it, and when he does so, that which before was indefinite and at large becomes definite and fixed. A contract immediately springs up between the person making the advancement and the writer of the letter, and it is thenceforward the same thing, in legal effect, as though the name of the former had been inserted in the letter in the beginning." *Birkhead v. Brown*, 5 Hill, 643.

And the same legal effect follows action by the person to whom a special letter of credit is addressed. He has the right to act upon it, and, when he accepts the letter placed in his hands by the person for whose benefit it was written, and gives him credit in compliance with it, there springs from the letter and its acceptance a distinct contract, which is auxiliary to the principal contract, between the person for whose benefit the letter was written and the person to whom it was addressed, which is binding upon the writer of the letter. And this writer is, upon the default of the debtor, liable to those who gave credit in accordance with its terms. Section 2860, Civil Code. It is contended by counsel for the defendants that the one in hand is a special letter of credit, and that no privity exists between the writers thereof and the plaintiffs. The question, then, to be determined is whether or not the proposal or proposition contained in that letter was intended to be made, or, what is the same thing in legal effect, could from its verbiage reasonably be construed to be intended to be made, to Lafargue & Co. "To construe the words of such instrument with wise and technical care, would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world." *Lawrence v. McCalmont*, 2 How. 426. We must look, then, at the letter itself, and give to its terms and the language employed a reasonable interpretation, according to the intent of the parties, as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made. If there is anything ambiguous in it, it should be taken most strongly against the parties who have induced Lafargue & Co. to act upon and give credit to their supposed intent. *Belloni v. Freeborn*, 63 N. Y. 383.

What was the proposition fairly deducible from the language of that letter? It is this: "We guaranty the credit of Mel & Sons for

12 months, from October 31, 1877, until October 31, 1878, to the amount of £3,000 sterling, and for that amount we authorize Lafargue & Co., at Bordeaux, to draw on the Merchants' Bank of London, Limited, for our account by 60 days' sight draft, or drafts, the same to be drawn at Bordeaux." In other words, Falkner, Bell & Co. said to Lafargue & Co.: "Give Mel & Sons credit in your bank to the extent of £3,000, and draw for it draft or drafts, at Bordeaux, upon the Merchants' Bank of London, Limited, and we will guaranty their acceptance and payment at that bank, provided they are drawn at 60 days' sight, are accompanied with due advice and notice to that bank, and are drawn between the thirty-first October, 1877, and the same date in 1878." This proposition, thus made and accepted by Lafargue & Co., was, we think, sufficient to create a contract between the writers and Lafargue & Co. "If A. says to B., 'Advance so much money to C., and I will repay you,' it is an original promise; and if the money is paid upon the faith of it, it has been always held an obligatory promise." *Townsley v. Sumrall*, 2 Pet. 182. Where the evidence showed the credit to have been given upon the faith of a letter by the person for whom the letter was intended, Chief Justice MARSHALL said:

"The writing was certainly intended by the defendants to give a credit to another. The defendants are bound by every principle of moral rectitude and good faith to fulfill the expectations which they thus raised, and which induced the plaintiffs to part with their property." *Lawrason v. Mason*, 3 Cranch, 492.

If one of two must suffer, it should be the one from whose act the injury results. If Lafargue & Co., acting in good faith, had a right reasonably to infer from the language of Falkner, Bell & Co.'s letter that they were authorized to give credit to Mel & Sons, as they did, and that the drafts specified in that instrument would be paid by the London bank, then common justice requires the defendants should make good their guaranty, and since, by their act in revoking the letter of credit, the bank failed to pay the plaintiffs' draft, they should assume the place of the bank and pay it. There is no case which we have had cited to us, or which we have been able to find, which, in all respects, is similar to the one under consideration. But that which most closely resembles it is *Carnegie v. Morrison*, 2 Metc. 381. There a Boston merchant was indebted to some merchants in Gottenburg, Sweden, and procured from the agent in Boston of a bank-house in London a letter of credit as follows:

"BOSTON, March 4, 1837.

"Messrs. Morrison, Cryder & Co., London: Mr. John Bradford of this city, having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gottenburg for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions.

Respectfully, your obedient servant,

"FRANCIS J. OLIVER."

The London bankers were advised of the issuance of the letter, and that it would be forwarded to Carnegie & Co., and it was forwarded to them by the party in whose favor it was written, and he requested them "to value for the amount of £3,000 at ninety days' sight, and pass the same to his credit." Relying upon this letter of credit, and in compliance with its terms, Carnegie & Co. drew a bill on the London bankers, which was presented for acceptance and payment, and both refused. Carnegie & Co. then instituted an action to recover the amount of that draft, basing their right of recovery on the letter of credit. The defendants alleged that they were under no obligation to pay Carnegie & Co.; that no contract existed between them. Chief Justice SHAW said upon that point, among other things:

"The objection to such an action and the grounds of this defense are that the immediate parties to the transaction were Bradford (the person in whose favor the letter was written) on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers, and that, as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others who may subsequently assent to and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee that he will pay him the amount, if the drawee does not accept and pay the bill. The law creates the privity. So, in the familiar case of money had and received, if A. deposits money with B., to the use of C., the latter may have an action against B., though they are in fact strangers. But if C., not choosing to look to B. as his debtor, calls upon A. to pay him, notwithstanding such deposits, (as he may,) and A. pays him, A. shall have an action against B. to recover back the money deposited, if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded." *Hall v. Marston*, 17 Mass. 575.

On page 403 (2 Metc.) the learned judge continues as follows:

"The court are of opinion that the promise of the defendants, made by the letter of credit, in the present case comes within the principle of the cases cited. Bradford was indebted to the plaintiffs, and was desirous of paying them; and he must resort to some mode of remittance. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs; and upon the faith of that undertaking, he forebore to adopt other measures to pay the plaintiffs' debt. He gave the plaintiffs notice of what he had done, and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it, as an act done in their behalf, and gave the defendants notice thereof, and conformably to the terms of the letter of credit, drew their bills on the defendants. The refusal to accept was a breach of the promise thus made; and, in the event that happened, (the insolvency of Bradford,) the plaintiffs lost their debt. It would be in vain to say that this promise was not made for the benefit or (according to the terms of some of the cases) for the *interest* of the plain-

tiffs. The result shows that, by a compliance with the plain, literal terms of their promise, on the part of the defendants, the plaintiffs would have received their debt. By a refusal to perform that promise, they have lost it. They are therefore damnified to the full amount of the sum for which the credit was given."

To much the same effect is the reasoning of the courts in *Russell v. Wiggin*, 2 Story, 213; *Lonsdale v. Lafayette Bank of Cincinnati*, 18 Ohio, 126; *Barney v. Newcomb*, 9 Cush. 46; *Scott v. Pilkington*, 15 Abb. Pr. 281.

We have examined with great care, and much admiration for their research, perspicuity of expression, and strength of argument, the various briefs of the distinguished counsel in this cause. We rise from their study profoundly impressed with the belief that the plaintiffs, from the terms of the letter of credit under consideration, had a legal right to expect that the drafts drawn by them on the London bank would be paid by that bank, or that, this failing, the defendants must make good to them the loss thus incurred, as they had promised. "By a refusal to perform that promise" on the part of the defendants the plaintiffs lost their debt. "They are therefore damnified to the full amount of the sum for which the credit was given."

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

68 Cal. 343

LITTLE v. JACKS. (No. 9,839.)

Filed January 16, 1886.

REHEARING GRANTED.

In bank. Appeal from superior court, county of Monterey.

Application for a rehearing in bank, after the appeal had been dismissed by the court in bank, as reported in 8 Pac. Rep. 856.

S. O. Houghton, for appellant.

D. M. Delmas, for respondent.

By THE COURT. The court is satisfied with its opinion as rendered on the point considered in it. 8 Pac. Rep. 856. It accords with several former decisions, and there is none contrary to it brought to our notice or of which we are aware. But there is a point which the court wishes argued again; that is, whether respondent waived his right to object to the irregularity in filing the undertaking on appeal before service of the notice of appeal, by a stipulation in writing that the cause be placed on the calendar of this court for hearing for a day referred to in it, in the place of another case entitled *Bucknall v. Huntsman*. To this point the reargument will be limited. And it is ordered that the cause be placed on the calendar of the first Monday in February, 1886, for such reargument.

SUPREME COURT OF CALIFORNIA.

68 Cal. 246

CASEY v. JORDAN. (No. 9,238.)

Filed January 22, 1886.

JUDGMENT MODIFIED.

Department 1. Appeal from superior court, county of Alameda. The opinion, modified by the court as below, is reported in 9 Pac. Rep. 92.

Sawyer & Ball, for appellants.

T. J. Crowley, for respondent.

BY THE COURT. It is ordered that the following sentence be added, at the end of the opinion herein: "The judgment, however, is a general judgment in favor of defendants. It should only have adjudged that the action abate." It is further ordered that the judgment heretofore given be modified so as to read: "Cause remanded, with directions to the court below to modify the judgment as above indicated."

68 Cal. 348

HAGELY v. HAGELY. (No. 9,168.)

Filed January 19, 1886.

1. PLEADING—DEMURRER—DEFENSES NOT SEPARATELY STATED.

The fact that defenses are not separately stated in an answer is not ground for demurrer; such defect can only be reached by a motion to strike out, or some other appropriate proceeding.

2. SAME—ANSWER—AMBIGUITY, UNCERTAINTY, OR UNINTELLIGIBILITY IN ANSWER.

Where an answer is ambiguous, uncertain, and unintelligible, in that it is left uncertain thereby whether defendant intended to set forth the facts as a plea of the statute of limitations, or as an equitable defense to plaintiff's cause of action, a demurrer thereto is properly sustained.

3. SAME—SEPARATE DEFENSES—DEMURRER—WAIVER OF ERROR.

Where separate defenses are set up in an answer, and a demurrer is sustained to one or more of such defenses, and the defendant subsequently filed an amended answer, it will amount to a waiver of error as to such defenses as are pleaded anew in such amended answer, but not as to defenses to which the demurrer was sustained, and which are not again pleaded in the amended pleading.

4. STATUTE OF LIMITATIONS.—ALLEGATION AND PROOF.

Under section 458 of the California Code of Civil Procedure, a party pleading the statute of limitations, by referring to the section of the Code in relation thereto, pleads what stands in lieu of and warrants the proof of every essential fact necessary to establish such possession, precisely as though set out in the answer; and therefore, in an action of ejectment, where the defendant pleads the statute of limitations, by setting up as a defense to the action that it is barred by the provision of section 318 of the Code of Civil Procedure, which provides that "no action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action," she may introduce evidence by herself and other wit-

nesses to show that for more than five years she has been in the continuous, open, and notorious possession of the property sued for; that she has fenced and cultivated the same, paid the taxes thereon, and in short show all facts necessary to constitute an adverse possession.

Commissioners' decision.

Department 2. Appeal from superior court, county of Napa.

Spencer & Henning, for appellant.

Joy & Ham and *J. N. Young*, for respondent.

SEARLS, C. This is an action of ejectment, to recover land situate in the county of Napa. Plaintiff had judgment, from which, and from an order denying a new trial, defendant appeals.

The amended answer of defendant sets up several separate defenses. A demurrer was interposed thereto by plaintiff, which was sustained by the court to the second cause of defense in such answer, and the ruling is assigned as error. The portion of the answer at which the demurrer was aimed, and to which it was sustained, averred that plaintiff's cause of action was barred by the statute of limitations, to-wit, by the provisions of sections 318, 319, and subdivision 3 of section 323 of the Code of Civil Procedure of the state of California, and then proceeds to state that defendant and plaintiff for many years lived and cohabited together as man and wife; that children were born to them; that the land in question was purchased with the funds of defendant for the benefit of herself and children; that a deed was taken therefor in the name of plaintiff, and other facts tending to show that plaintiff held the title in trust for defendant.

At least two separate defenses were contained in this portion of the answer, which were not separately stated. This, however, is not one of the causes for which a demurrer to an answer may be interposed. Code Civil Proc. § 444. Such a defect can only be reached by motion to strike out, or by some other appropriate proceeding. Some of its allegations are also subject to the charge of being ambiguous, unintelligible, and uncertain, in this: that it is left uncertain thereby whether defendant intended to set forth the facts as a plea of the statute of limitations, or as an equitable defense to plaintiff's cause of action. The demurrer was properly sustained.

It is proper to state, also, that subsequent to the order sustaining the demurrer, defendant filed an amended answer, in which she interposed the plea of the statute of limitations. Her counsel insist in their brief that the facts set out in the defense demurred to were stated as a plea of the statute of limitations. If this be true, the subsequent amended answer, setting up substantially the same defense, was a waiver of the error, if any, in sustaining the demurrer. Where separate defenses are set up in an answer, and a demurrer is sustained to one or more of such defenses, and the defendant subsequently files an amended answer, it will amount to a waiver of error as to such defenses as are pleaded anew in such amended answer, but not as to defenses to which the demurrer was sustained, and which are not again pleaded in the amended pleading. In other words, it

is not the new pleading which operates as a waiver, but the pleading anew of the same defense.

It is but just to counsel for appellant to state that they claim, and may be correct in their assumption, that the answer subsequently filed is but an engrossed copy of the previous answer, with the portions to which the demurrer had been interposed eliminated. As this question cannot alter the conclusion hereafter reached, or impair the rights of appellant, we have preferred to treat the answer filed March 23, 1883, as an amended answer.

2. At the trial, plaintiff introduced in evidence, a patent from the government of the United States to one Charles H. Fitch, deeds of conveyance from Fitch to Joseph Reed, and from Reed to himself, and a stipulation admitting defendant in possession, and thereupon rested his cause, whereupon the defendant, for the purpose of sustaining the issues on her part, as made by the pleadings, took the stand as a witness in her own behalf, and offered to prove and show in evidence, by herself and other witnesses, that she had been continuously since June 8, 1872, in the open, notorious and exclusive and continued adverse possession of the premises in dispute, claiming the same as her own as against the plaintiff and all the world, and during said time had the same inclosed by a substantial fence; that a greater portion thereof had been during all of said time cultivated; that she had paid all taxes assessed thereon, and, in short, all the facts necessary to constitute an adverse possession.

Plaintiff objected to the introduction of the evidence, on the ground that it was incompetent, irrelevant, and not responsive to the issues, and because defendant had only set up a claim of adverse possession in her answer founded upon a written instrument, etc., and therefore cannot prove an adverse possession not founded upon such written instrument, etc. The court sustained the objection and excluded the testimony. The offer of defendant was made in various forms, and a like ruling was had and exceptions taken, but the above sufficiently explains the real question involved.

The amended answer sets up as a defense that plaintiff's cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of the state of California. It then, as another and separate defense, sets out that the cause of action is barred by section 319, and in like manner pleads as a bar section 323, and in like manner subdivision 1 of section 323, and also subdivision 3 of section 323, of the same Code, all of which are severally stated as separate defenses in the manner provided by section 458, Code of Civil Procedure, for pleading the bar of the statute.

Section 318 of the Code of Civil Procedure was properly pleaded in bar of plaintiff's right to recover. It provides that "no action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the prop-

erty in question, within five years before the commencement of the action." Under this plea, defendant was entitled to introduce in evidence any and all testimony tending to establish her right under the statute.

It is true that defendant also pleaded section 319 of the Code of Civil Procedure as a bar to the action. This last section has no application to actions to recover possession of real estate, but applies to personal actions founded upon the title to real property, as actions to recover rent, damage to real property, etc. *Richardson v. Williamson*, 24 Cal. 290; *Bissell v. Henshaw*, 1 Sawy. 559.

She likewise pleaded section 323 of the same Code, and the first and third subdivisions of the same section. Section 323 simply defines what, for the purpose of constituting adverse possession, shall be deemed possession by one claiming title founded upon a written instrument, etc. It relates to the character of evidence necessary, under the given circumstances, to sustain an adverse possession,—relates to testimony by which a right to possession under section 318 may be sustained,—but does not in itself define the consequences to follow the adverse possession. It need not be pleaded, but, like the payment of taxes provided for by the proviso to section 325, and any other facts going to show an adverse holding, may be given in evidence, under the general plea, by reference to section 318. Section 323 was also separately referred to in the answer as a bar to the action. This did not, however, in any way impair the plea of the statute by reference to section 318, or limit the right of defendant to introduce all proper evidence under the last-mentioned defense.

The allegations and proofs must correspond. *Maynard v. Fireman's F. Ins. Co.*, 34 Cal. 48. But under section 458 of the Code of Civil Procedure, giving the right to plead the statute of limitations by referring to the section prescribing the time within which an action may be brought, the reference to the section, when thus made, stands in lieu of and warrants the proof of every essential fact, precisely as though set out in full in the answer.

It follows that the court below erred in excluding the proffered evidence, and that the judgment and order appealed from should be reversed and a new trial granted.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

68 Cal. 359

COUNTY OF FRESNO v. FOWLER SWITCH CANAL Co. (No. 11,092.)

Filed January 22, 1886.

1. WATER AND CANAL COMPANIES—DUTY TO KEEP AND REPAIR BRIDGES OVER HIGHWAYS.

Section 2737 of the California Political Code, providing that "all persons excavating * * * ditches across public highways are required to bridge said ditches at such crossing, and, on neglect to do so, the road overseer for that road-district shall construct the same, and recover the cost of construction of such persons by action, as provided in this section," does not repeal or render inoperative section 551 of the Civil Code, which provides that "every water or canal corporation must construct and keep in good repair, at all times, for public use, across their canal, flume, or water-pipe, all of the bridges that the board of supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways, and necessary for public use in connection with such highways; and all water-works must be so laid and constructed as not to obstruct public highways." Both statutes are in force, and impose the duty, and the Political Code provides a consequence on a failure to perform, which may be enforced at the option of the road overseer and supervisors of a county.

2. SAME—OFFICER—STATUTORY DIRECTION, WHEN MANDATORY—ROAD OVERSEERS—BRIDGES.

A direction to an officer cannot be said to be mandatory when the law furnishes him no means of obeying the direction. Road overseers have control of no money wherewith to build bridges, except such as may be appropriated by a board of supervisors; and therefore the statute, (Pol. Code Cal. § 2737,) which provides that the road overseer shall erect bridges over highways in case water or canal companies fail to do so, is not read as commanding him to erect bridges at his own expense, "shall" being read as "may," and the meaning being that he shall build such bridges under the direction of a board of supervisors, in case the supervisors shall provide for it.

3. MANDAMUS—DUTY OF CANAL OR WATER COMPANIES TO BRIDGE HIGHWAYS.

Mandamus is a proper remedy to compel a water and canal company to bridge a highway, as provided by section 551 of the California Civil Code.

Department 1. Appeal from superior court, county of Fresno.

E. S. Edwards and Sayle & Harris, for respondent.

E. C. Winchell, for appellant.

McKINSTRY, J. This was a proceeding in the court below to compel by *mandamus* the defendant, a water and canal corporation, to perform the duty imposed by section 551 of the Civil Code, which provides:

"Every water or canal corporation must construct and keep in good repair, at all times, for public use, across their canal, flume, or water-pipe, all of the bridges that the board of supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways, and necessary for public use in connection with such highways; and all water-works must be so laid and constructed as not to obstruct public highways."

Appellant claims the section of the Civil Code to be no longer operative, because repealed by section 2737 of the Political Code. Amend. 1883, p. 17. The section of the Civil Code requires every such corporation to construct and keep in good repair, over their canals, at points where they cross a public highway, the bridges which the board of supervisors may require. The section of the Political Code reads:

"All persons excavating * * * ditches across public highways are required to bridge said ditches at such crossing, and, on neglect to do so, the road overseer for that road-district shall construct the same, and recover the cost of construction of such persons by action, as provided in this section."

We think the word "persons" includes canal corporations. But the provisions of both Codes are in force, because they are not necessarily contradictory. The attention of the legislature was not addressed to the same subject. The section of the Civil Code is in a chapter which treats of corporations; that of the Political Code, in a chapter which is headed "Obstructions and Injuries to Highways." The defendant is not relieved of the duty imposed by the Civil Code by the section of the Political Code. On the contrary, the duty is reasserted. The claim is that the Political Code limits and defines the consequences which shall follow upon a failure to perform the duty. The Civil Code does not affix any penalty; but both Codes impose the duty from the moment the ditch is dug across the highway. It cannot be presumed that it was the intention of section 2737 of the Political Code that a canal across the highway should remain unbridged for a "reasonable time," (any time would be unreasonable,) until the corporation should determine whether or not it would perform its plain duty by building the bridge. The only thing that seems to militate against this view is the use of the word "shall" in the Political Code. But "shall" can be read "may," and "may," "shall," in a statute, if the evident intent of the legislature require it.

If appellant is correct in its construction, such corporation obstructing the highway may refuse to perform a duty imposed by the Civil Code; leave it to the "road overseer" to build its bridges, at the expense, in the first instance, of the county or road-district; and then, perhaps, afford that officer the privilege of a lawsuit to recover the moneys advanced for the constructions. Both Codes impose the duty; the Political Code provides a consequence on a failure to perform, which may be enforced at the option of the road overseer and supervisors. Other provisions of the Political Code indicate that the erection of a bridge, in case the owner of a ditch or canal shall neglect to build it, is in the option of the supervisors. The money for the erection must be appropriated out of the general county road fund, or out of the road fund of the district in the county treasury. While it is said in the section of the Political Code that, if the owner of a ditch crossing a highway shall neglect to bridge it, the road overseer "shall" construct a bridge, the meaning is that he shall do so under the direction of the supervisors, in case the supervisors shall provide for it. A direction to an officer cannot be said to be mandatory when the law furnishes him no means of obeying the direction. The road overseer has the control of no money wherewith to build bridges, except such as is appropriated by the board. The statute cannot be read as commanding him to erect the bridge at his own expense. *Mandamus* is a proper remedy. Plaintiff had not "a plain, speedy,

and adequate remedy in the ordinary course of law." Judgment affirmed.

We concur: ROSS, J.; McKEE, J.

68 Cal. 362

PEOPLE v. AH TOON. (No. 20,144.)

Filed January 22, 1886.

ASSAULT WITH INTENT TO MURDER—INFORMATION—CHARGING UNLAWFUL INTENT—MALICE.

An information charging the defendant with "the crime of assault with the intent to commit murder, committed as follows: The said A. did willfully, and with malice aforethought, with a hatchet, then and there cut one B. with intent to kill her, the said B.," sufficiently charges that the act was unlawful. Malice implies the intent to do a wrongful act, and such an act is unlawful, and therefore not justifiable.

In bank. Appeal from superior court, Trinity county.

W. J. Tinnin and *Jo. Hamilton*, for appellant.

E. C. Marshall, for respondent.

MYRICK, J. The information in this case charges the defendant with "the crime of assault with the intent to commit murder, committed as follows: The said Ah Toon * * * did willfully, and with malice aforethought, with a hatchet, then and there cut one Nun Keow, with intent to kill her, the said Nun Keow."

1. As section 187, Pen. Code, defines murder to be "the unlawful killing of a human being, with malice aforethought," and as the defendant was accused of the crime of an assault with intent to commit murder, it is urged that the information should have charged the act to have been done unlawfully; that the act may have been done willfully, and with malice aforethought, and yet have been justifiable. It is true a justifiable act may be done willfully, and it may be none the less justifiable because willful; but we find in 2 Bouv. Law Dict. the definition of "malice" to be, as to criminal law, "the doing a wrongful act intentionally, without just cause or excuse;" and the writer continues:

"Malice is never understood to denote general malevolence or unkindness of heart, or enmity towards a particular individual, but it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification. * * * It is not confined to the intention of doing an injury to any particular person, but extends to an evil design,—a corrupt and wicked notion against some one at the time of committing the crime."

In the light of this language, when the defendant was accused of having, with malice aforethought, with a hatchet, cut Nun Keow with intent to kill her, it is equivalent to saying that he did the act unlawfully. If malice implies, as is above stated, the intent to do a wrongful act, it follows that the act must be unlawful, and therefore not justifiable. We find authority for this conclusion in section 7, sub. 4, Pen. Code; also in *Maynard v. Fireman's F. Ins. Co.*, 34 Cal.

48, and *People v. Taylor*, 36 Cal. 255, in which cases it is affirmed that "malice, in common acceptance, means ill-will against a person; but, in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse."

We find no error in the record. The judgment and order are therefore affirmed.

We concur: McKEE, J.; MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.; ROSS, J.; THORNTON, J.

2 Cal. Unrep. 624

PEOPLE v. PHILLIPS. (No. 20,124.)

Filed January 22, 1886.

FORGERY—EVIDENCE OF DAMAGE.

In a prosecution for forgery for having feloniously issued and passed to one E. a counterfeit writing as a genuine promissory note of one F., with intent to damage and defraud said E., it is not error to admit evidence of the fact that by reason of the passing of the paper E. was damaged by being induced to make a journey, and to go to expense therefor.

Department 2. Appeal from superior court, county of Napa.

Coghlan & Coombs, for appellant.

E. C. Marshall, for respondent.

MYRICK, J. The information in this case accused the defendant of the crime of forgery, in having feloniously, willfully, and unlawfully uttered, published, and passed to one Elgin a counterfeit paper in writing as a genuine promissory note of one Fitch, with the intent to prejudice, defraud, and damage the said Elgin. Elgin, as the agent of Fitch, was endeavoring to collect from Phillips a debt due Fitch of \$55.50. In so far as Phillips attempted to pass, and did pass, the paper in payment of that debt, the evidence would not have justified a conviction, because the information charged the act to have been committed with intent to defraud Elgin instead of Fitch. But there is evidence that in consequence of the passing of the paper, Elgin in person was prejudiced, defrauded, and damaged, viz., by his being induced to make the trip from St. Helena to Napa, and pay the expense of recording the mortgage. The making of that trip, and the payment of that expense, were parts of the one transaction, viz., imposing upon Elgin by the uttering of the false paper; and the court committed no error in admitting proof of those facts. No error appears in the record. Judgment and order affirmed.

We concur: MORRISON, C. J., SHARPSTEIN, J.

68 Cal. 369

CALIFORNIA BEET SUGAR COMPANY v. PORTER. (No. 9,276.)

Filed January 26, 1886.

FRAUDULENT JUDGMENT AND EXECUTION SALE—ACTION TO SET ASIDE.

An action is maintainable in equity for the annulment of a judgment, execution sale thereunder, and certificate of purchase of real property levied on and sold under such judgment and execution, on the ground of fraud in the taking of such judgment.

Department 1. Appeal from superior court, county of Santa Cruz.
Wm. Matthews, for appellant.

A. S. Kittredge, for respondent.

McKEE, J. The object of the action in hand is the annulment of a judgment, an execution sale thereunder, and a certificate of purchase of real property levied on and sold under the judgment and execution. The court sustained a general demurrer to the complaint in the action, and that is assigned as error.

The cause of action, as stated in the complaint, is this: On the twenty-fourth of February, 1879, defendant, Porter, claimed that the corporation plaintiff was indebted to him in a large sum of money, for recovery of which he commenced an attachment suit against the corporation in the then district court of Santa Cruz county. Pending the suit, on the second of March, 1879, the parties to it compromised and settled the demand; and the defendant then stipulated and promised to dismiss the action. Upon that stipulation and promise the defendant relied, and took no further steps or proceedings in the matter, fully believing that the defendant in this action would keep his promise and dismiss that action; but instead of dismissal, he, in disregard of his stipulation, proceeded without notice to the corporation and took judgment therein for the amount demanded in the complaint, and which had been settled and satisfied, had an execution issued upon the judgment, and caused it to be levied upon the real property of the corporation, which had been attached in the action, and sold at execution sale, defendant himself being the purchaser.

It is alleged that the cause of action was settled and satisfied on the second of March, 1879; that the judgment was taken on the tenth of July, 1879, and it appears that the action in hand was commenced on the fifth of April, 1880, six months after the sale, and nearly nine months after the judgment.

The contention is that the action is not maintainable, because the corporation plaintiff had a plain, speedy, and adequate remedy by motion, under section 473, Code Civil Proc., to set aside the judgment; and, as it neglected to avail itself of that remedy, equity will not interfere. Section 473 provides:

"The court may, * * * upon such terms as may be just, relieve a party, or his legal representative, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect: provided, that application therefor be made within a reasonable

time, but in no case exceeding six months after such judgment, order, or proceeding is taken."

It has been held in *Bibend v. Kreutz*, 20 Cal. 109; *Ketchum v. Crippen*, 37 Cal. 223; and *Ede v. Hazen*, 61 Cal. 360,—that, so long as the statutory remedy by motion to set aside a judgment exists, the assistance of a court of equity cannot be invoked. But none of those cases involved the question of judgment fraudulently taken against an injured party and executed by a sale of his real property. Besides, the time for making such a motion against the judgment involved in this case had passed when the action was commenced, and the complaint shows that the judgment was taken after satisfaction of the cause of action, in violation of a stipulation and promise to dismiss the action, and without knowledge or notice of the subsequent proceedings in which it was taken, until after the sale of the property. Such being the case, there would seem to be no fault or laches imputable to the plaintiff which would operate to bar its right to relief in equity against the judgment obtained in such circumstances.

In *Lapham v. Campbell*, 61 Cal. 296, we held that where a complaint in an original action for relief against a judgment fraudulently taken shows sufficient reasons why the statutory remedy by motion has not been resorted to the action is maintainable. And subsequently, in *Baker v. O'Riordan*, 65 Cal. 368, S. C. 4 Pac. Rep. 232, it was held that a judgment taken by fraud, and without notice to the injured party, is absolutely void. A judgment taken in such circumstances is not taken through mistake, inadvertence, surprise, or excusable neglect, within the meaning of section 473 of the Code, and the party against whom such a judgment is taken has the right to an original action to have it annulled by the judgment of a court of equity.

It is a general rule that, if relief be obtainable against mistakes or errors of law or fact committed in a judicial proceeding, the statutory remedies for relief must be resorted to in the proceeding itself. "But," as the supreme court of the United States says in *U. S. v. Throckmorton*, 98 U. S. 65, 66, "there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent,—as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party, and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See

Wells, Res Adj. § 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Kent v. Richards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. Ch. 320; *De Louis v. Meek*, 2 G. Greene, 55. In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud, practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

The court below erred in sustaining the demurrer and dismissing the action.

Judgment reversed and cause remanded, with direction to overrule the demurrer and allow the defendant time to answer.

We concur: ROSS, J.; MCKINSTRY, J.

68 Cal. 394

ESTATE OF MOORE. (No. 9,319.)

Filed January 27, 1886.

PROBATE COURT—APPEAL FROM ORDER REFUSING TO REMOVE ADMINISTRATOR.

No appeal lies to the supreme court from an order of the superior or probate court refusing to remove an administrator.

Department 1. Appeal from superior court of Santa Cruz county. *Chas. B. Younger* and *F. J. McCann*, for appellant.

John C. Hall, for respondent.

Ross, J. This is an appeal from an order of the probate court refusing to remove an administrator. In probate matters this court has such jurisdiction as may be provided by the legislative department of the government. Const. art. 6, § 4. There being no provision of the statute authorizing an appeal from an order of the probate court refusing to remove an administrator, the appeal herein taken is dismissed.

We concur: McKEE, J.; MCKINSTRY, J.

68 Cal. xix

AMES v. WILSON. (No. 9,344.)

Filed January 28, 1886.

JUDGMENT AFFIRMED, WITH DAMAGES.

Department 1. Appeal from superior court, city and county of San Francisco.

M. Lynch and *Gunnison & Booth*, for appellant.

Wilson & Wilson, for respondent.

Ross, J. There is no merit in this appeal. The evidence is ample to sustain the verdict and findings. Other points do not require special mention. Judgment and order affirmed, with \$100 damages.

We concur: McKEE, J.; MCKINSTRY, J.

SUPREME COURT OF CALIFORNIA.

48 Cal. 353

GLENN v. SAXTON. (No. 11,161.)

Filed January 21, 1886.

STATUTE OF LIMITATIONS—STOCKHOLDERS IN CORPORATION, LIABILITY FOR UNPAID SUBSCRIPTIONS.

Where a resident of the state of New York subscribed to the stock of a Virginia corporation, the laws of the latter state requiring that on every subscription for shares in any joint-stock company there should be paid on every share two dollars at the time of subscribing, and the residue thereof when required by the president and directors, the subscriber's liability did not become fixed, for the unpaid portion on the contract of subscription, until a call by the president and directors; but in a chancery suit, a decree that such unpaid portion should be, and was thereby, called for, was equivalent to a call by the officers of the corporation, and the statute of limitations would run against the subscriber's liability from the date of such call under the decree. Under the California Code of Civil Procedure, § 339, such a liability is barred in two years.¹

Department 1. Appeal from superior court, county of Los Angeles. *Glassell, Smith & Patton*, for appellant.

Graves & Chapman, for respondent.

Ross, J. *Glenn v. Williams*, 60 Md. 93, was an action similar to the present one, and it is insisted by the appellant's counsel that every point involved on this appeal was decided in appellant's favor by the court of appeals of Maryland in the case there. If the fact were true, it would deservedly have great weight with us. But, in respect to the statute of limitations, the two cases differ materially. The decree of the chancery court of Richmond, Virginia, by virtue of which the plaintiff in both actions proceeded, was given on the fourteenth of December, 1880. The Maryland suit was commenced April 9, 1881. The action here was commenced August 12, 1884. In Maryland the statute of limitations provides that "all actions of account, actions of *assumpsit* or on the case, actions of debt on simple contract or for rent in arrear, detinue and replevin, all actions for trespass for injuries to real or personal property, shall be commenced or sued within three years from the time the cause of action accrues; * * *" (Code Md. § 1, art. 57;) and that three years' statute was pleaded in bar of the action there. Here the provisions of the Code prescribing the periods for the commencement of actions other than for the recovery of real property are, among others, as follows:

"Within five years: (1) An action upon a judgment or decree of any court of the United States, or of any state within the United States. * * * Within three years: (1) An action upon a liability created by statute, other than a penalty or forfeiture. * * * Within two years: (1) An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state. * * * Code Civil Proc. §§ 335, 336, 338, 339.

¹ See note at end of case.

By section 343 of the same Code it is further provided:

"An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

If the cause of action in the Maryland case did not accrue until the passing of the decree of the chancery court of Richmond, as was held, and we think correctly held, by the court of appeals of Maryland, of course the action there could not be barred by the three years' statute of limitation; for the suit was commenced within a few months after the making of the decree. Here, however, the action was not commenced until more than three, but less than four, years after the making of the Richmond decree; and the question is whether it is barred by the provisions of the statute of this state, which are pleaded by the defendant in bar thereof. A statement of the case, therefore, becomes necessary.

The action is to recover from defendant, who held certain stock of the National Express & Transportation Company, a corporation organized under the laws of the state of Virginia in the year 1865, an assessment levied upon his stock by a judgment of the chancery court of the city of Richmond. The complaint contains two counts, both identical in their allegations, except by the one plaintiff seeks to recover the assessment on 50 shares of stock originally subscribed by defendant, and by the other to recover the assessment on 50 shares of which he became the owner by assignment. The National Express & Transportation Company, according to the averments of the complaint, was a body corporate, duly incorporated under the laws of the state of Virginia, for 50 shares of the capital stock of which the defendant, on the first day of November, 1865, in the state of New York, subscribed, and thereby undertook and promised to pay to the corporation for each and every share so subscribed the sum of \$100 in such installments and at such times as he might be lawfully called upon to pay according to the legal tenor and effect of the law under which the corporation was organized. In September, 1866, the corporation executed a deed of assignment of all of its property and effects to certain trustees for the benefit of its creditors. Subsequently a suit was instituted in the chancery court of the city of Richmond, Virginia, by one Wright and other persons, claiming to be creditors of the corporation, against the corporation, its officers and the trustees, in which cause a judgment was made and entered on the fourteenth day of December, 1880, whereby the plaintiff in the present action was appointed and constituted trustee in the place and stead of the trustees to whom the assignment was made by the corporation, and whereby it was further adjudged and decreed that a large amount of debts secured by the trust deed remained unpaid and entitled to be paid out of the property conveyed by the deed; and that, of the sum of \$100 for each and every share of the stock of the corporation undertaken and promised to be paid by the subscribers thereof in such installments and at such times as such subscribers and their assigns might

be lawfully required to pay the same according to the legal tenor and effect of the law under which the corporation was organized and the stock subscribed for, the sum of \$80 per share had never theretofore been called for, or required to be paid, by the president and directors of the corporation, and that said sum of \$80 per share, for each and every share of the stock subscribed for, still remained liable to be called for and required to be paid by the subscribers and their assigns; and whereby it was further adjudged and decreed that it was necessary and proper that 30 per cent. of the par value of each share of said stock should be called for and required to be paid by the subscribers and their assigns, for the purpose of paying the debts of the corporation under the provisions of the trust deed; and it was accordingly further adjudged and decreed that a call and assessment be, and the same thereby was, made upon the stock and stockholders of the said corporation and their assigns, of 30 per centum of the par value of said stock, being \$30 on each and every share thereof, and that the stockholders of the corporation, and each and every one of them, and their legal representatives and assigns, be, and they thereby were, severally required to pay the several amounts by the decree called for and assessed to the plaintiff as trustee.

It is also averred in the complaint herein that the plaintiff accepted the trust, and duly qualified as trustee, and that the defendant has failed and refused to pay, etc. Appropriate allegations are also made as to the jurisdiction of the chancery court of Richmond, and as to the laws of the state of Virginia. Among the provisions of those laws there is one which declares that, upon every subscription for shares in any joint-stock company there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors; and if any money which any stockholder has to pay upon his shares be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant or action, according to amount, etc.

"All subscriptions to the stock of this corporation," said the court of appeals of Maryland in the case already cited, "had reference to that provision of the statute, and the conditions or requirements there prescribed formed terms in the contract of subscription. After the payment of the two dollars per share, there was nothing due from the subscriber to stock until an authorized call was made for the residue. The contract contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholder until such amounts were determined on, and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay, or how much he would be required to pay. The subscription therefore, was conditional, as to the times and amounts of payment; and consequently there was no fixed obli-

gation of the stockholder to pay, and no right of action against him, until an assessment and call made, either by the president and directors, or by the order of a court of competent jurisdiction. It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for; and it is only from the time of the assessment and call made that the statute of limitations runs in favor of the defendant."

In this we entirely agree. The terms of the statute became a part of the contract of subscription. The subscriber undertook to pay two dollars per share at the time of subscribing, and the residue of the subscription price as required by the president and directors. The call made by the chancery court was the same in effect as if it had been made by the president and directors of the corporation, and, when made, the contract of the defendant to pay became absolute, and a cause of action against him for the amount of his assessment accrued in favor of the trustee appointed by the court. The foundation of this cause of action was the defendant's contract to pay the residue of his subscription as required, and, having been made without this state, the action should have been brought within two years after the right of action accrued. Code Civil Proc. § 339, *supra*. If correct in this view, and we have no doubt of its correctness, it is quite clear that the case in hand is not founded on a judgment or decree within the meaning of section 336 of the Code of Procedure. Judgment affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

NOTE.

It was held in case of *First Nat. Bank of Garrettsville v. Greene*, (Iowa,) 17 N. W. Rep. 86, (affirmed on rehearing, 20 N. W. Rep. 754,) that, in an action against a stockholder to subject his unpaid shares of stock to satisfaction of a judgment against a corporation, the statute begins to run when the cause of action against the corporation accrued.

For a general discussion of the subject of the statute of limitations, when they begin to run, etc., see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-641.

RENTON and others v. CANNON and others. (No. 9,173.)

Filed January 30, 1886.

NEW TRIAL—PRESUMPTION AS TO GROUND OF.

No other reason appearing, if a new trial is granted, it will be presumed to have been granted on the ground that the evidence did not sustain the findings, and, in the absence of abuse of discretion, the order will not be reversed.

Department 1. Appeal from superior court, city and county of San Francisco.

C. H. Parker, for appellant.

Frank O'Connor, T. L. Skinner, and A. Craig, for respondent.

BY THE COURT. The order granting a new trial in this case must have been made upon the ground that the evidence was insufficient to sustain the finding of facts. There is no abuse of discretion apparent on the record, and the order is not reversible. Order affirmed.

BATH v. VALDEZ. (No. 9,938.)

Filed January 30, 1886.

SUBMISSION SET ASIDE.

In bank. Appeal from superior court, county of Los Angeles.

J. Brousseau and Graves & Chapman, for appellant.

Bicknell & White, G. M. Holton, Howard & Roberts, H. A. Barclay, and H. Allen, for respondent.

BY THE COURT. The submission in this case is set aside, and the cause will be placed on the calendar for the April session, 1886, at Los Angeles, for oral argument. The special attention of counsel is called to the fact that the judgment of the court below awards certain interests in the property to Vicente Valdez and Maria de los Angeles Valdez, who are not parties to the action, and assumes to pass on the title to property not mentioned in plaintiff's complaint; and that Jose Valdez is a party to the action, and the case as to him is not disposed of in the decree.

2 Cal. Unrep. 635

SANKEY v. SOCIETY OF CALIFORNIA PIONEERS. (No. 11,430.)

Filed February 2, 1886.

MANDAMUS—RULE OF COURT.

Application for *mandamus* denied on the ground that the petition fails to state sufficient reasons for not applying to the superior court in the first instance.

In bank. Application for *mandamus*.

The petition fails to state any special reason for not applying to the superior court in the first instance, other than a saving of time, for the reason that, whatever the decision, an appeal would be taken to the supreme court. Rule 28 of the supreme court, on which the decision is based, is as follows.

"In any application made to the court for a writ of *mandamus*, * * * for which an application might have been lawfully made to some other court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this court, and not from such other court. The sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application."

Samuel Sankey, for petitioners.

By THE COURT. The application for a writ of *mandamus* is denied upon the ground that the petition fails to state sufficient reasons for not applying to the superior court in the first instance. Rule 28 of the supreme court.

(2 Cal. Unrep. 625)

BROWN v. GRIFFITH. (No. 9,974.)¹

Filed January 26, 1886.

WITNESSES—CREDIBILITY—WEIGHT OF TESTIMONY—INSTRUCTIONS.

An instruction to the jury that, "if you believe any witness has sworn falsely as to any material fact, you must disbelieve such false statement, and may disbelieve the whole of his or her testimony," is good as far as it goes, and a refusal of it is erroneous; but an instruction that, "if you believe that any witness has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard or entirely discard any part of the testimony of such witness," is erroneous, as it is not in accord with section 2061 of the California Code of Civil Procedure, which provides that "a witness false in one part of his testimony is to be distrusted in others."

Department 1. Appeal from superior court, county of Fresno.

Wharton & Shaw and *J. R. Webb*, for appellants.

W. D. Tupper and *Sayle & Harris*, for respondents.

Ross, J. Counsel for defendants requested the court below to give this instruction to the jury:

"If you believe any witness has sworn falsely as to any material fact, you must disbelieve such false statement, and may disbelieve the whole of his or her testimony."

The court refused to give the instruction, but instead gave this:

"If you believe that any witness who has testified in this case has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard and entirely discard any part or the whole testimony of such witness in coming to your verdict."

To the action of the court in each particular defendants excepted.

The instruction the defendants requested was good as far as it went, but it was not as favorable to them as it might have been made. It cannot admit of doubt that if a witness has sworn falsely as to any material fact, such false statement should be rejected by the jury. By section 2061 of the Code of Civil Procedure it is provided "that a witness false in one part of his testimony is to be distrusted in others." As was said by this court in *White v. Disher*, 7 Pac. Rep. 826.

"Here the law provides that a witness willfully false in one part of his testimony *is to be distrusted*; not that the jury *may or may not* distrust his testimony, but they are to be told that, as matter of law, his testimony *is to be distrusted*. This distrust forms the basis or stand-point from which they must view his testimony,—the standard by which to weigh his utterances. It is true that notwithstanding this legal distrust which the law casts upon a witness willfully false in a material part of his testimony, the jury may believe him upon other points,—they are to be the sole judges as to that. There may be abundant reasons why they not only *may*, but why they should, believe him in other particulars. The truth is not to be rejected because it

¹ Affirmed in banc. See 11 Pac. 500, 70 Cal. 14.

passes through a false medium, but as to the existence of the truth the jury is the sole judge."

The action of the court below in relation to the instructions in question was not in accord with these views.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKEE, J.; McKINSTRY, J.

68 Cal. 403

BRECKENRIDGE v. CROCKER. (No. 11,003.)

Filed January 27, 1886.

NEW TRIAL—INSUFFICIENCY OF EVIDENCE TO JUSTIFY VERDICT.

A motion for a new trial, on the ground of insufficiency of the evidence to justify the verdict, is addressed to the sound legal discretion of the court, and, if granted, is never interfered with on appeal, in the absence of an abuse of discretion.

Department 2. Appeal from superior court, county of Merced.

D. M. Delmas, F. H. Farrar, and C. J. Swift, for appellant.

P. D. Wigginton and L. D. McKisick, for respondent.

THORNTON, J. This is an action to recover damages for the breach of an alleged agreement to sell and convey certain real property, known as "Merced Town Property." The case was tried before a jury, and a verdict returned in favor of the plaintiff for \$90,000. The court below granted a new trial, and the appeal is from that order.

One of the grounds upon which the new trial was asked and granted was that the verdict was contrary to law, the evidence, and the charge of the court to the jury. The court granted the new trial upon the ground of insufficiency of the evidence to sustain the verdict. Such a motion on the above ground is addressed, as has been frequently held, to the sound legal discretion of the court, and where in such a case the court grants a new trial, this court, in the absence of an abuse of discretion, never interferes with the order. *Peters v. Foss*, 16 Cal. 357; *Quinn v. Kenyon*, 22 Cal. 82; *Hall v. The Emily Banning*, 33 Cal. 522; *Phelps v. Union C. M. Co.*, 39 Cal. 410; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, Id. 419; *Gerald v. J. M. Brunswick Co.*, 7 Pac. Rep. 306; *Pico v. Cohn*, 7 Pac. Rep. 680.

We see no abuse of discretion here. Order affirmed.

We concur: MYRICK, J.; MORRISON, C. J.

68 Cal. 42.

FANNING v. SCHAMMEL and others. (No. 9,253.)

Filed January 28, 1886.

MUNICIPAL CORPORATION—CONTRACT FOR STREET WORK IN SAN FRANCISCO—
EXTENSION OF TIME—POWER OF BOARD OF SUPERVISORS—LEGISLATURE.

Where a contract for street work required that the work should be completed within 60 days, and the work was not completed within that time, under the law governing the city and county of San Francisco, the contract expired, and the board of supervisors of said city and county had no jurisdiction to extend the time for doing the work, and to thereby revive and validate a dead contract; and acts of the legislature ratifying and confirming orders of the supervisors, so far as they attempt to vitalize such dead contracts, and validate void assessments for street work, are unconstitutional and void.

Department 1. Appeal from superior court, city and county of San Francisco.

J. M. Wood, for appellant.

Fisher & Ames, for respondent.

McKEE, J. Action to foreclose a street assessment lien for street work alleged to have been done under a contract for grading Montgomery avenue, in the city and county of San Francisco. The contract required that the work should be completed within 60 days. The work was not completed within the time; and, under the law, the contract expired. Subsequently, however, the board of supervisors of said city and county extended the time; but it had no jurisdiction to revive and validate a dead contract. The order of extension was therefore unauthorized and void. *Beveridge v. Livingstone*, 54 Cal. 54; *Owens v. Heydenfeldt*, 6 Pac. Rep. 423; *Torrens v. Townsend*, Id. 423.

But nearly a year after the order of extension by the board of supervisors, the legislature, on the nineteenth of March, 1878, by an act entitled "An act to ratify and confirm certain orders and resolutions of the board of supervisors of the city and county of San Francisco, relative to street work on Montgomery avenue," etc., made valid, ratified and confirmed "all orders and resolutions heretofore from time to time passed by said board of supervisors * * * in relation to street work done, in whole or in part, on Montgomery avenue, in said city and county, and all contracts and assessments for such street work, * * * and all other proceedings under and in accordance with the provisions of such orders and resolutions," (St. 1877-78, p. 341;) and it is contended that all the proceedings in connection with the assessment for said street work were thereby validated. But so far as the statute attempts to vitalize a dead contract, and validate a void assessment for street work, it is unconstitutional and void. *People v. Lynch*, 51 Cal. 15; *People v. McCune*, 57 Cal. 153; *Brady v. King*, 53 Cal. 44.

Judgment affirmed.

We concur: ROSS J.; MCKINSTRY, J.

68 Cal. 473

AVILA, Adm'r, etc., v. MEHERIN and others. (No. 9,275.)

Filed January 29, 1886.

CHANGE OF PLACE OF TRIAL—DISCRETION OF COURT.

A motion to change the place of trial on the ground of convenience of witnesses, bias of judge, and inability to secure unbiased jury, is addressed to the sound discretion of the court, and that discretion will not be interfered with on appeal unless it has been abused or injustice done.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Luis Obispo.

Mich. Mullany, for appellant.

Wm. J. Graves, for respondent.

BELCHER, C. C. This action was commenced in the county of San Luis Obispo, and the appeal is from an order refusing to change the place of trial to the city and county of San Francisco. The motion to transfer was made upon the affidavit of one of the defendants, setting forth that deponent believed a fair and impartial jury could not be obtained to try the case in San Luis Obispo county; that the conveniences of witnesses and the ends of justice would be promoted by the change; that great friendship existed between the judge of the court and the plaintiff, and deponent had reason to believe, and did believe, that the judge was disqualified from acting in the case, and that an impartial trial could not be had before him. This affidavit was met by a counter-affidavit of the plaintiff, showing that a fair and impartial jury could be obtained to try the case; that the convenience of a greater number of witnesses and the ends of justice would be promoted by retaining it; that the judge was in no way disqualified, and deponent believed a fair and impartial trial, in every respect, could be had before him.

It is settled law in this state that motions of this kind are addressed to the sound discretion of the court, and this court will not interfere with the exercise of that discretion, unless it appears that this discretion has been abused or injustice has been done. *Sloan v. Smith*, 3 Cal. 410; *People v. Fisher*, 6 Cal. 154; *Watson v. Whitney*, 23 Cal. 375; *Hanchett v. Finch*, 47 Cal. 192. We are unable to see that the court below abused its discretion in this case, and the order should therefore be affirmed.

We concur: SEARLS, C; FOOTE, C.

BY THE COURT. For the reason given in the foregoing opinion the order is affirmed; and it appearing that there is no merit in the appeal, and that it was taken for delay, damages are awarded to respondent in the sum of \$200.

2 Cal. Unrep. 634

CRAIG v. ALLEN and others. (No. 11,196.)

Filed January 30, 1886.

APPEAL—ORDER GRANTING NEW TRIAL—PRESUMPTION IN FAVOR OF.

Where a new trial is ordered by a court, every intendment is in favor of the order, and the legal presumption is that it was made on the ground of insufficiency of the evidence to justify the decision; and, in the absence of all proof of abuse of discretion in the trial judge, such order is not reversible.

Department 1. Appeal from superior court, county of Los Angeles.

J. H. Howard and *J. R. Scott*, for appellant.

Bicknell & White and *Graves & Chapman*, for respondents.

BY THE COURT. Appeal from an order granting a new trial. The judgment rendered in the case was founded upon an elaborate finding of facts. One of the grounds of the motion to vacate the judgment and grant a new trial was "insufficiency of the evidence to justify the findings and decision of the court, and that the judgment and decision were against law." The court ordered a new trial without stating any grounds, but, as every intendment is in favor of the order, the legal presumption is that it was made on the ground of the insufficiency of the evidence to justify the decision. That being so, the order granting a new trial, in the absence of all proof of an abuse of discretion in the trial judge, is not reversible. Order affirmed.

68 Cal. 505

BERNERO v. ALLEN. (No. 9,939.)

Filed January 29, 1886.

LANDLORD AND TENANT—FORFEITURE OF LEASE FOR BREACH OF COVENANT AGAINST SUBLETTING.

Where a tenant covenants not to sublet without the landlord's consent, a subletting of the leased premises, or of a portion of them, terminates the lease, on notice by the landlord; and where the tenant so sublets, the fact that he immediately causes the portion of the premises so sublet to be vacated, on notice to quit, will not prevent such forfeiture.

In bank. Appeal from superior court, county of Los Angeles.

Action of unlawful detainer. Defendant, who was plaintiff's tenant, held under a lease, which plaintiff claimed was forfeited because defendant had sublet contrary to the covenants of the lease. Defendant on the trial asked the court to instruct the jury that if defendant sublet only a portion of his premises, or if, on notice of plaintiff's disapproval of the sublease, he caused the sublet portion of his premises to be vacated, then the lease was not forfeited. The instructions were refused. Defendant excepted.

Will, D. Gould, J. S. Maltman, and *Wells & Lee*, for appellants.

H. T. Gage and *Bicknell & White*, for respondent.

Ross, J. Unlawful detainer, to recover possession of a lot of land in the city of Los Angeles, with damages for the unlawful withholding thereof. The original term of the lease expired April 1, 1884.

Conceding, for the purposes of this decision, that an additional term of three years from April 1, 1884, was created, there was evidence tending to show, and the verdict of the jury includes a finding to the effect, that the lessee sublet the premises in violation of that provision of the lease which declared that the lessee should not "lease or underlet, nor permit any other person or persons to occupy or improve, the same, or make, or suffer to be made, any alterations therein, but with the approbation of the lessor thereto, in writing, having been first obtained.

Upon this state of facts the case is controlled by the fourth subdivision of section 1161 of the Code of Civil Procedure, which declares:

"Any tenant or subtenant, assigning or subletting or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises, under the provisions of this act."

The notice required was given, and by virtue of the provisions of this statute the plaintiff was entitled to restitution. Under this view, the refusal of the court below to give the instruction requested by defendants was clearly correct. The complaint, though inartificially drawn, is sufficient.

Judgment and order affirmed.

We concur: THORNTON, J.; MYRICK, J.; MORRISON, C. J.; McKEE, J.; McKINSTRY, J.

68 Cal. 390

CAMERON *v.* CITY AND COUNTY OF SAN FRANCISCO. (No. 9,147.)

Filed January 27, 1886.

1. STATUTE OF LIMITATIONS—PLEADING.

Where it clearly appears, from the face of the complaint, that the statute of limitations has run, the objection may be urged by demurrer; but, where it does not so appear, the objection must be taken by answer.¹

2. APPEAL—PRESUMPTIONS IN FAVOR OF JUDGMENT.

On appeal, all presumptions are in favor of the judgment of the lower court; and where the defendant sets up the statute of limitations, if the court renders judgment for the plaintiff and against such defense, if nothing appears to the contrary in the record on appeal, the appellate court will presume that there was evidence tending to sustain such judgment.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

J. L. Love, City and Co. Atty., for appellant.

D. H. Whittemore, for respondent.

¹For a full discussion of the question of pleading the statute of limitations as a defense, and therein of when advantage of this defense is to be taken by demurrer, and when it must be set up in an answer; see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and subdivision 5 of the note appended thereto, page 638.

SEARLS, C. This is an action for damages alleged to have accrued to plaintiff's bakery by reason of sewage flowing upon the premises surrounding her house, and into the basement of the bakery. The jury found a verdict for plaintiff, and assessed her damages at \$1,500. The appeal is from the judgment alone, and the case must be determined by the judgment roll.

The principal question that arises is whether plaintiff's cause of action is barred by subdivision 1 of section 339 of the Code of Civil Procedure. It cannot be gathered from the complaint when the injury sustained by plaintiff actually occurred, beyond the fact that it was after the beginning of the year 1877, and before suit was brought. The original complaint is not set out in the record, and there is no certificate or showing from which it can be determined when the action was in fact commenced. There was a demurrer interposed to the complaint, but it was not therein set out that plaintiff's claim was barred by the statute of limitations. The answer set up as a defense is that the claim was barred by the provision of subdivision 1 of section 339 of Code of Civil Procedure. When it clearly appears upon the face of the complaint that the statute has run, the objection may be made by demurrer. *Ord v. De La Guerra*, 18 Cal. 75; *Barringer v. Warden*, 12 Cal. 314; *Miles v. Thorne*, 38 Cal. 335. Where it does not appear by the complaint, the objection must be taken by answer, as was done in the present case. There is no statement or bill of exceptions in the record, and in such case, on appeal all the presumptions are in favor of the judgment, and we must presume there was testimony showing that plaintiff's cause of action accrued within two years next before suit was brought. *Miles v. Thorne*, *supra*. For anything that appears in the record, the original complaint may have been filed in 1877.

The complaint, though inartificially drawn, states facts sufficient to constitute a cause of action; and assuming, as we must, that there was evidence to sustain its allegations, and to show that the damage accrued within two years before suit brought, we can see no good cause for reversal, and the judgment of the court below should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

SUPREME COURT OF CALIFORNIA.

68 Cal. 412

Application of KURTZ for a Writ of Prohibition. (No. 20,146.)

Filed January 27, 1886.

NUISANCE—PROSECUTION FOR MAINTAINING PUBLIC NUISANCE—JURISDICTION.

An indictment for maintaining a public nuisance by allowing filth to stagnate and remain and run into a flume ditch and sewer in a town, whereby the air became poisoned and injurious to health, and offensive to the senses of persons dwelling and passing near, charges an offense within section 370 of the California Penal Code, and within the jurisdiction of the superior court, and is not within section 115 of the Code of Civil Procedure, defining the jurisdiction of the justice's court.

In bank. Application for writ of prohibition.

Paris & Goodcell and Byron Waters, for petitioner.

MYRICK, J. The petitioner was indicted for the crime of maintaining a public nuisance by causing and suffering great quantities of offensive and stinking filth, water, and substance, solid and liquid, to collect, stagnate, ferment, and be mixed together, and remain and run into a certain flume and ditch and sewer in the town of San Bernardino, whereby the air there, and for a great distance around, became and was noxious, injurious to health, indecent, and offensive to the senses, and interfered with the comfortable enjoyment of life and property by a considerable number of persons who dwelt near and passed and repassed daily during the time of such maintaining.

The point presented by the petitioner is that the superior court has no jurisdiction to try the charge; that under article 6 of section 5 of the Constitution, section 19 of the Penal Code, and section 115 of the Code of Civil Procedure a justice's court alone has jurisdiction. The offense charged is within section 370 of the Penal Code, and is, according to section 377 of the Penal Code, punishable by imprisonment not exceeding one year, or by fine not exceeding \$1,000, and therefore is not within section 115 of the Code of Civil Procedure.

The application for the writ is denied, and the order to refrain is discharged.

We concur: McKEE, J.; MORRISON, C. J.; SHARPSTEIN, J.

We dissent: ROSS, J.; THORNTON, J.

v.9p.no.7—29

68 Cal. 395

PAINTER v. Estate of PAINTER. (No. 9,964.)

Filed January 27, 1886.

PARTNERSHIP—DEATH OF PARTNER—RIGHTS AND DUTIES OF SURVIVORS.

A surviving partner after the death of his copartner cannot, by action, collect from the general assets of his partner's estate a debt due by the decedent to the partnership without first complying with section 1585 of the California Code of Civil Procedure, and ascertaining if the partnership's assets will pay the partnership debts.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

Charles H. Parker, for appellant.

Warren Olney, for respondent.

FOOTE, C. The plaintiff at the time of the death of the decedent, Jerome B. Painter, against whose estate and the executors of whose will this action was brought, was his partner, doing business under the firm name of Painter & Co. J. B. Painter died on the sixth day February, 1883, leaving a will, which was admitted to probate on the thirteenth of April of the same year. The will was of date March 11, 1864, a codicil being added thereto 10 years after. The plaintiff, by the will, was named one of its executors. He was also made a legatee thereunder, and appropriated to his own use, it seems, without waiting for the probation of the will, the property claimed by him as a legacy. Afterwards the will was admitted to probate, and he and R. R. Dallam and Caroline A. Painter qualified as executors and executrix under it. An inventory of the estate was made, sworn to, and filed. The decedent's estate, as appraised, was of the value of \$82,713.94, consisting of real estate to the amount of \$75,000, and personal property valued at \$4,615.94. The interest of the estate of the deceased, in the said partnership property and assets of the firm of Painter & Co. are in the inventory valued separately at \$4,152.94. This was made under section 1445 of the Code of Civil Procedure. Under section 1585 of the Code of Civil Procedure the interest of a decedent in a partnership must be included in the inventory of his estate and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him in right of the deceased. But that duty plaintiff, as surviving partner, did not perform. He took possession of all the assets of the decedent in the partnership, claiming them as a special legacy under the will, and propounded a claim for many thousand dollars against the decedent's estate, which claim consisted of moneys that the decedent, as partner, had drawn of the partnership funds in excess of that which the plaintiff had drawn. It appears, however, that the partnership was solvent, and the decedent's share of its assets at his death sufficient to pay this debt to the brothers, executor and

partner, and still leave due the estate the sum of \$4,615.94, as per the inventory.

But the contention of the plaintiff was that he had a right to all the decedent's interest in the partnership assets, absolutely, and that the amount of the decedent's overdrafts on the partnership funds must be paid him by the general estate, even although, as shown, the decedent's interest in those assets exceeded his liabilities thereto. This claim was not allowed by the judge to whom it was presented; thereupon this action was commenced, and a second amended complaint being demurred to, and the demurrer sustained, and plaintiff declining further to plead, judgment passed for the defendants, and the plaintiff appealed. Without closing up the partnership affairs and striking a balance, or settling with decedent's estate upon that basis, plaintiff took all the partnership assets, and now desires the estate of his brother, from its general assets, to pay him near \$58,000, when his decedent's interest in the partnership assets would more than satisfy this debt, which it is claimed he owed the partnership. We think the demurrer was properly sustained. In this action the construction of the terms of decedent's will is not pertinent to the issue. The only question here is this: Can a surviving partner collect from the general assets of his partner's estate a debt due by the decedent to the partnership without first complying with section 1,585, Code Civil Proc., and ascertaining if the partnership's assets will pay the partnership debts? In this case the pleadings admit that no such procedure was had, and that the decedent's share of the partnership assets will more than pay all his debts thereto.

The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 381

STUART v. HOFFMAN. (No. 9,335.)

Filed January 27, 1836.

1. APPEAL—VERDICT—SUBSTANTIAL CONFLICT OF THE EVIDENCE.

On appeal, where the evidence is substantially conflicting, the verdict founded thereon will not be disturbed on the ground of insufficiency of the evidence to sustain the verdict.

2. MALICIOUS PROSECUTION—EXCESSIVE DAMAGES.

In an action to recover damages for malicious prosecution, *held*, that a verdict of \$750 in favor of plaintiff is not excessive.

3. TRIAL—INSTRUCTIONS—REFUSAL WHERE SUBSTANTIALLY GIVEN.

Where instructions have been substantially given, it is not error to refuse those requested by one of the parties.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

Fred. J. Castlehun, for appellant.

J. P. Poole and Thornton & Merzbach, for respondent.

SEARLS, C. This is an action to recover damages for malicious prosecution. The complaint is in the usual form, and its material allegations are negatived by the answer. The cause was tried by a jury, and a verdict of \$750 rendered in favor of plaintiff, upon which judgment was entered. Defendant applied for a new trial, which was denied, and from the judgment and order denying the motion for a new trial this appeal is prosecuted. Appellant contends the evidence is insufficient to sustain the verdict, because the arrest of plaintiff by the procurement of defendant was upon probable cause, and not malicious.

That the verdict will not be disturbed where there is a substantial conflict in the evidence is admitted, but the contention of appellant is that, notwithstanding the rule, the present case, by reason of the great preponderance of the evidence in favor of defendant, stands on an exception. The earnestness and apparent sincerity with which this plea is urged, entitles the claim to careful consideration, and we have more than once perused the record, but always with the result of a settled conviction that the testimony involves a substantial conflict, and that in all human probability some portions of it are untrue. It was the peculiar province of the jury to give credit where due, to reconcile discrepancies, and decide upon the weight of evidence thus conflicting; and having done so, we are not at liberty to disturb the verdict upon the ground that it is contrary to the evidence.

2. The damages are not, all the circumstances considered, so excessive as to warrant the inference that they are the result of passion or prejudice, and are not so excessive as to warrant us in disturbing the verdict.

3. A number of exceptions were reserved at the trial to rulings of the court upon testimony offered. They are, for the most part, predicated upon unimportant matters, and we deem the rulings either correct or of no consequence in their effect upon the final result.

4. The court, upon his own motion so far as appears, gave to the jury 33 instructions, in which, as it seems to us, he very clearly embodied the law applicable to the case. The instructions asked by the defendant and refused by the court, so far as proper to be given, were contained in the charge of the court. So far from being subject to criticism, we think the instructions of the learned judge who presided at the trial are a model of perspicuity for actions of this character.

We should prefer to examine consecutively and pass separately upon each and every exception taken at the trial in all cases submitted to us for decision, lest counsel may feel that a point not mentioned has not been examined; but under the pressure of accumulated business, we feel that the latter cannot be done without greater delay than is warranted by the conditions surrounding us.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 392

In re Application of LA SOLIDARITE MUTUAL BEN. ASS'N, a Corporation, etc. (No. 9,247.)

Filed January 27, 1886.

1. BENEFICIAL ASSOCIATION—CONSTRUCTION OF BY-LAWS.

Where a corporation, organized for the purpose of mutual benefit, provides in its by-laws that upon the death of a member, in order to make up a sum to be paid over to the decedent's nominee, each member shall pay one dollar, and that, at the death of a member who has regularly paid such assessments, his nominee shall be entitled to claim and receive from the association the amount collected on such an assessment levied therefor, the nominee of the decedent is entitled to receive only such sum as was actually collected from the members upon the assessment made for her benefit, and not as many dollars as there were members of the association at the time of the decedent's death.

2. CORPORATIONS—MUST ACT THROUGH OFFICERS.

A resolution of the members of a corporation concerning the disbursement of money, if not adopted or ratified by the directors, (where no money could be appropriated or drawn from the treasury without their order,) is ineffective, as a corporation can only act or speak through the medium prescribed by law, and that is its board of trustees.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

S. H. Henry and *F. J. Castlehun*, for appellant.

A. C. Bradford, for respondent.

BELCHER, C. C. This is an application by a beneficial association for leave to disincorporate. Eliza Little filed objections to the application, in which she alleged, among other things, that her husband died on the twenty-ninth day of January, 1882, a member of the association; that at the time of his death there were 355 members; and that she was the nominee of her husband, and as such entitled to receive \$355, but had only been paid \$150. The case was tried and judgment entered dissolving the corporation, from which and from an order denying a new trial, the appeal is prosecuted. The findings do not meet all the issues raised by the objections; but as a reversal for this reason would not benefit the appellant if the other questions are decided against her, she seems in effect to have waived this point.

The real question presented for decision is, was the appellant entitled to receive as many dollars as there were members of the association at the time of her husband's death, or only such sum as was actually collected from the members upon the assessment made for

her benefit? By the by-laws it was provided that upon the death of a member, and in order to make up the amount to be paid over to his nominee or nominees, each member should pay one dollar in gold or silver coin. It was further provided that, at the death of a member who had regularly paid his assessments, his nominee or nominees should be entitled to claim and receive from the association the amount collected on the assessment to be levied therefor. What is the meaning of these provisions? It is insisted for the appellant that they should be so construed as to give her one dollar for each member, whether collected or not. We do not agree with counsel in this. They seem to us to have a plain and obvious meaning, and not to admit of the construction asked to be put upon them. While it was provided that each member should be assessed and required to pay one dollar for the benefit of every deceased member's nominee, it was evidently contemplated that some members might fail to pay, and in that event the nominee was to receive only the amount collected on the assessment. In our opinion the appellant was entitled to claim from the association only the sum which was actually collected on the assessment, and not one dollar for each and every member. But if this be so, it is said that at a meeting of the members of the association, held on the first day of April, 1882, a resolution was introduced and passed "that after the assessment of W. F. Brisac has been collected, the claims of the nominees of the seven decedents remaining unpaid be paid an equal amount as the nominee of W. F. Brisac shall receive;" that the nominee of Brisac received \$252; and that Little was one of the seven decedents referred to, and under the resolution his nominee was entitled to claim and receive an equal amount.

It does not appear that the nominee of Brisac was paid any greater sum than the amount collected on the assessment. But whether she was or not, we fail to see how the resolution can aid the appellant. It was not adopted or ratified by the directors, and without their order no money could be appropriated or drawn from the treasury. It is settled law in this state that a "corporation can only act—can only speak—through the medium prescribed by law, and that is its board of trustees." *Gashwiler v. Willis*, 33 Cal. 20.

Looking at the whole record, we fail to see any error prejudicial to the appellant, and the judgment and order should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

LAWRENCE v. BOYD. (No. 9,985.)

Filed January 29, 1886.

JUDGMENT AFFIRMED.

Department 2. Appeal from superior court, county of San Bernardino.

Paris & Goodcell and *H. M. Willis*, for appellant.

W. H. Harris, for respondent.

BY THE COURT. There are no points and authorities, and no appearance for appellant herein. The judgment and order are therefore affirmed.

68 Cal. 490

CULBERTSON v. KINEVAN. (No. 11,078.)

Filed January 29, 1886.

LEGALITY OF TOLL—JURISDICTION OF JUSTICE'S COURT.

The justice's court has no jurisdiction to try and determine the question of the legality of a toll. Such matter is within the jurisdiction of the superior court.

Department 2. Appeal from superior court, county of Santa Barbara.

Charles Fernald, for appellant.

W. C. Stratton, for respondent.

MYRICK, J. This action was commenced in a justice's court to recover a penalty for collecting \$1.50 for toll, which was alleged in the complaint to be more toll than the defendant was authorized to collect. The answer averred that the amount collected was a legal toll, and demanded that the case be transferred to the superior court. The justice refused the transfer, tried the case, and rendered judgment for plaintiff. The defendant appealed to the superior court, where the case was again tried, and judgment rendered for plaintiff.

The pleading presented the question of the legality of a toll. The justice's court had no jurisdiction to try and determine that question. Const. art. 6, § 5. It may be remarked that the sole question presented on each of the trials was whether the amount collected was a legal toll. There was no question as to an excessive collection, if the right to collect any toll existed.

The judgment is reversed, and the cause is remanded.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

2 Cal. Unrep. 633

HEILBRON v. LAST CHANCE W. D. Co. (No. 11,140.)

Filed January 29, 1886.

1. NONSUIT—EVIDENCE SUSTAINING ALLEGATIONS OF COMPLAINT

Where the evidence given on a trial tends to sustain the allegations of the complaint concerning the acts complained of it is error to grant a nonsuit.

2. INJUNCTION—WITNESS—EVIDENCE.

In an action to restrain certain acts of a corporation arising from constructing a dam, where an officer of the corporation was asked on the trial: "Unless there is an injunction issued in this case forbidding the corporation, through its agents, from doing this act, you, as long as you are agent of the corporation, will continue to do it when you think it necessary to do it, and to the advantage of the corporation?"—the refusal of the court to allow such question is error.

Department 2. Appeal from superior court, county of Tulare.

Brown & Daggett and D. S. Terry, for appellant.

Atwell & Bradley, for respondent.

MYRICK, J. The evidence given on the trial tended to show that officers and agents of the defendant were engaged in constructing a dam for the defendant, and in such construction committed some of the acts complained of. That being the case, the court erred in granting a nonsuit. The court sustained an objection to the following question propounded to one of the officers:

"*Question.* And unless there is an injunction issued in this case forbidding the corporation, through its agents, from doing this act, you, as long as you are agent of the corporation, will continue to do it when you think it necessary to do it, and to the advantage of the corporation?"

The ruling was error.

Judgment reversed, and cause remanded for a new trial

We concur: MORRISON, C. J.; THORNTON, J.

68 Cal. 413

In re Estate and Guardianship of HAWES and another. (No. 11,304.)

Filed January 27, 1886.

BILL OF EXCEPTIONS—APPLICATION TO SUPREME COURT FOR SETTLEMENT.

The supreme court of California is empowered, by section 652 of the Code of Civil Procedure, to settle bills of exceptions where the judge of a lower court refuses to do so, under such regulations as the supreme court may prescribe. Such court has not yet made any regulations on the subject, and the proper practice in such cases is unsettled; but it is proper practice that the petition should set forth the exceptions taken, and the evidence in support thereof, and notice of the application should be given to the judge of the lower court.

In bank. Application to supreme court to settle bills of exceptions because of refusal of the judge of the superior court of the city and county of San Francisco so to do.

J. C. Bates, for petitioner.

BY THE COURT. This is an application under section 652 of the Code of Civil Procedure, made on the ground that the judge below

refuses to settle a bill of exceptions in the case. The Code provides that such an application as this shall be made in the mode and manner, and under such regulations, as that court (supreme court) shall prescribe. This court has not yet made any regulations on the subject, and the proper practice in such cases is unsettled. In opposition to the application it is contended that the petition should set forth the exceptions taken and the evidence in support thereof. We think this the proper practice, and as the petition in this case does not show any of these facts, it should be denied. We are also of opinion that notice of the application should be given to the judge.

Motion denied, without prejudice.

68 Cal. 434

PEOPLE v. SHELDON. (No. 20,134.)

Filed January 28, 1886.

1. INFORMATION FOR INJURING PUBLIC JAIL—SUFFICIENCY.

An information for injuring a public jail, in substance as follows: That "J. W. Sheldon, at the county of San Bernardino, state of California, on or about the sixth day of June, 1885, and prior to the filing of the information, did wrongfully, willfully, intentionally, and feloniously injure the county jail of San Bernardino county, by digging a hole in the floor thereof, and prying up, pulling down, and breaking a certain door belonging to and being a portion of said jail, which said jail is a public jail for the confinement of prisoners,"—is a good and sufficient information, as it sufficiently states the venue and *situs* of the property injured; charges the offense in the language of the statute, which is sufficient; charges but one offense; and that the injury was done willfully, wrongfully, intentionally, and feloniously.

2. INFORMATION—CHARGING AND PROVING TIME OF OFFENSE.

It is unnecessary to charge in the indictment or information the precise day upon which the offense was committed, or to prove the offense to have been committed on the day charged, except where time is of the essence of the offense.

3. WITNESS—TIME OF COMMISSION OF CRIME.

The evidence of a witness is properly admitted where he testifies (he being a co-prisoner with defendant) that he saw defendant attempt to break jail, the offense charged, though he is unable to give the precise day of the occurrence; and this, though time is of the essence of the offense; for the facts may be established by one witness, and the time of their happening by another.

4. EVIDENCE—LEADING QUESTIONS.

It is not error to allow a leading question as to an unimportant matter.

5. INSTRUCTIONS—ACT WILLFULLY DONE.

It is not error to instruct a jury that an act is willfully done when done with deliberation, and not through surprise, confusion, or *bona fide* mistake.

6. INFORMATION—INJURY TO JAIL—INSTRUCTIONS.

Where the information charges defendant with injuring the door and floor of a jail, and the evidence substantiates the charge, it is not error to instruct the jury that they should find guilty if the offense of injury to the jail is established. The *gravamen* of the offense is the injury to the jail, not to a particular part of the jail.

7. CRIMINAL LAW—INSTRUCTIONS IN CRIMINAL CASE—BELIEF—MORAL CERTAINTY.

An instruction to the jury that they should find guilty "if from the evidence you believe," is sufficient, and need not be qualified by adding that the belief must amount to a moral certainty. But if the defendant is dissatisfied, he may ask that the term "belief," as used in criminal cases, be explained.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Bernardino.

Harris & Parker and Z. G. Peck, for appellant.

Atty. Gen. E. C. Marshall, for respondent.

SEARLS, C. This is an appeal from a final judgment of conviction of the crime of injuring a public jail, and from an order denying a new trial. Defendant interposed a demurrer to the information upon the grounds: (1) That such information does not state facts sufficient to constitute a public offense; (2) that it charges more than one offense, in that it charges defendant with injuring the jail by digging a hole in the floor thereof, and with pulling down, prying up, and breaking a door of said building; (3) that it does not state the acts constituting the offense in ordinary and concise language, that may be readily understood, and comprehended by a person of ordinary understanding, and does not state where said jail is situate, or by whom owned, or what or which public jail is meant.

The substance of the information is that "J. W. Sheldon, at the county of Santa Barnardino, state of California, on or about the sixth day of June, 1885, and prior to the filing of the information, did wrongfully, willfully, intentionally, and feloniously injure the county jail of San Bernardino county, by digging a hole in the floor thereof, and prying up, pulling down, and breaking a certain door belonging to and being a portion of said jail, which said jail is a public jail for the confinement of prisoners," etc.

Section 606 of the Penal Code provides that "every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail, or other place of confinement, is punishable by fine not exceeding \$10,000, and by imprisonment in the state prison not exceeding five years."

The information, it will be perceived, charges the offense as having been committed at the county of San Bernardino, and in and upon the county jail of said county. This was sufficient as to the venue and *situs* of the property injured. The information charges the offense substantially in the language of the statute, which is deemed sufficient. *People v. White*, 34 Cal. 183; *People v. Phipps*, 39 Cal. 326; *People v. Martin*, 32 Cal. 91; *People v. Potter*, 35 Cal. 110. There is but one offense charged in the information. But one breaking or injuring is charged. The defendant is charged with *injuring* the county jail by certain acts, viz., by digging a hole in the floor, prying up, pulling down, and breaking a door. The several acts go to make up and constitute a single injury. The removal of a single brick from a building may constitute an injury thereto. An injury to a building charged to have been consummated by the removal of one hundred bricks would constitute *one* and not *one hundred* injuries. The information charged the injury to have been done willfully, wrongfully, intentionally, and feloniously. The demurrer was properly overruled.

The second error assigned relates to the ruling of the court permitting the witness Capt. Gill to testify to injuries to the jail as discovered on Sunday, June 7, 1885, on the ground that the offense is charged in the information to have been committed on or about June 6, 1885. It is a sufficient answer to the objection to say that the testimony of the witness related to the date at which the injury to the jail was discovered, and not to the date of its commission. *Non constat* but that it may have been done on the sixth of June, and not discovered until the following day. Waiving, however, the technical aspect of the question, a crime charged to have been committed on or about June 6, 1885, may be shown to have been committed on the seventh of June of the same year, if before indictment or information, as in this case. It is unnecessary to charge in the indictment the precise day upon which an offense was committed, or to prove the offense to have been committed on the day charged, except where time is of the essence of the offense. *People v. Lafuente*, 6 Cal. 202; Pen. Code, § 955; Amer. Crim. Law, § 599.

The alleged errors founded upon the rulings of the court in relation to the testimony of the witness Garcia are not well assigned. This witness was an inmate of the county jail, professed to have witnessed the efforts of the defendant and another prisoner to break the iron door, but professed to be unable to give the precise day of the transaction. It was not essential in any point of view that he should do so. Even where time is of the very essence of a crime the facts may be established by one witness, and the date or time at which they transpired by another or by others. Nor was it error to permit a leading question upon the unimportant question as to the iron bar being the one with which the prisoners worked.

The only other portion of the testimony of this witness to which any question can attach is that in which he says the sheriff did not agree to release him from confinement on condition of his testifying in the case, and we do not, under the circumstances, detect error therein.

There was no error in instructing the jury "that an act is willfully done when done with deliberation, and not through surprise or confusion, or a *bona fide* mistake." To do a thing willfully is to do it by design, with set purpose. To do a thing with deliberation is to do it after examining the reasons for and against a choice,—after consideration and reflection. After indulging in this mental process, if an act is done as the result of it, it is a willful act. "A purpose or willingness to commit the act" renders it willful under section 7 of the Penal Code.

The second instruction was to the effect that if the defendant willfully and intentionally broke down, or by any means injured any portion of the county jail, etc., and that it was a public jail etc., the jury should find him guilty. The objection is that the information extended only to charging the defendant with injury to the floor and

door of the building. We must suppose, and indeed the record shows, that the evidence was confined to the door and its supports adjoining; and if the testimony as offered was not warranted by the information, objection should have been made to its introduction, and if the objection was not sustained the ruling could have been assigned as error. The *gravamen* of the charge, however, is the injury to the jail, and the manner of the injury as shown by the evidence substantiates the charge in the information. The instruction was proper, and did not in any wise tend to prejudice the defendant.

To the third instruction it is objected that the court instructed the jury that "if from the evidence you believe," etc., whereas it is contended the instructions should have been qualified by the addition of the words "to a moral certainty," or of some equivalent words. The language used by the court was proper. If counsel for the defendant desired greater particularity, it was within his province to ask the court to explain what is meant by the term "belief," or rather that what we term "belief," in a criminal case, when applied to the guilt of a defendant, is a conviction of the mind to a moral certainty and beyond a reasonable doubt.

The first instruction asked by defendant was properly refused. The case in no wise depended upon circumstantial evidence, but upon direct testimony to the overt act. *People v. Turner*, 65 Cal. 540; S. C. 4 Pac. Rep. 553.

The modifications to the second and third instructions asked by defendant were proper. As given, they were correct expositions of the law; as asked, the second, in which the words "vicious act," etc., was changed so as to read "unlawful act," was objectionable, and that portion of the third instruction which announced the doctrine that defendant was not guilty, if he incidentally injured the jail in an attempt to escape, was not law, and was very properly stricken out.

We see no error prejudicial to the defendant, and are of opinion the judgment and order appealed from should be affirmed.

WE CONCUR: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 500

PEOPLE v. MORE. (No. 20,076.)

Filed January 29, 1886.

1. CRIMINAL LAW—COMMITMENT—INFORMATION—MOTION TO SET ASIDE.

A superior court, on a motion to set aside an information for manslaughter, has no right to determine the question whether the crime was committed within the county in which the information is filed, if the defendant has been regularly examined and committed by a magistrate authorized by law to make such an examination.

2. APPEAL—ORDER SETTING ASIDE INFORMATION.

An order of the superior court setting aside an information, and discharging the defendant, if improper, is the subject of an appeal.

In bank. Appeal from superior court, Santa Barbara.

Attorney General, for appellant.

R. B. Carfield, R. H. Chittenden, and McNulta & Oglesby, for respondent.

MORRISON, C. J. On the ninth day of August, 1884, the district attorney filed in the superior court of Santa Barbara county the following information against the defendant:

[Title of Court.]

"The People of the State of California v. Alexander P. More.

"INFORMATION FOR MANSLAUGHTER.

"Alexander P. More is accused by the district attorney of the said county of Santa Barbara, state of California, by this information, of the crime of manslaughter, committed as follows: The said Alexander P. More, on the twenty-ninth day of June, 1884, at and in the said county of Santa Barbara and state of California, and prior to the filing of this information, upon a sudden quarrel and in the heat of passion, did willfully, unlawfully, and feloniously kill one Ah You, a Chinaman, then and there being a living human being, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California.

JOHN J. BOYCE,

"District Attorney of the said County of Santa Barbara, State of California."

On this information were indorsed the names of the witnesses examined before the filing of the same. The sufficiency of the information in form was not challenged in the court below, but a motion was made on behalf of the defendant to set the same aside on the following grounds and for the following reasons:

"That the defendant before the filing of the information had not been legally committed by a magistrate for the offense for which he is informed against, or for any offense. That the commitment of the defendant by the police judge of the city of Santa Barbara (if any commitment was in fact made) was and is illegal in the following particulars: (1) It does not appear from the evidence and depositions upon which the defendant was committed that the offense for which the defendant was committed, and with which he is charged, took place within the county of Santa Barbara, or that it was committed partly in said county and partly in any other county; or upon or within five hundred yards of the boundary line between any two counties; or that the said offense having been consummated within the county of Santa Barbara, if in fact it was consummated therein or elsewhere in this state, was commenced without the state of California; nor does it appear that such consummation was through the intervention of any agent of defendant, or

any other means proceeding directly from the defendant. (2) That the defendant was committed on said charge without reasonable or probable cause; that the evidence and depositions upon which said defendant was held to answer show that no public offense was committed by him. (3) That the police judge of the city of Santa Barbara, Cal., had no jurisdiction of the offense for which defendant was held to answer and committed."

And on the twenty-fourth day of December, 1884, the court made the following orders in the case:

"The motion of the defendant to set aside the information having heretofore been argued and submitted to the court for consideration and decision, and the court having duly considered the same, and being fully advised in the premises, now files its written decision thereon, granting the same. It is therefore ordered that the said information be, and the same is hereby, set aside, on the ground that neither the police court nor this court has jurisdiction of the said cause. The district attorney then moved the court for leave to file another information against the defendant. The said motion is hereby denied on the ground that the court has no jurisdiction of the offense for the reasons assigned in the written decision. And it further appearing to the court that the defendant has been admitted to bail, it is further ordered that his bail be exonerated and the defendant discharged."

From these orders the people have appealed and likewise sued out a writ of error. We think the case is properly before us for review on appeal.

The main question in the case is, did the court properly set aside the information, which it did on the ground that the crime was not committed in the county of Santa Barbara? It appears that an examination of the case was had before the police judge of the city of Santa Barbara, and we think he was a magistrate authorized by law to make such examination. The examination was conducted according to the forms of law by questions and answers, all of which were taken down, and afterwards written out in full hand and certified to by the stenographer reporter appointed by the court for that purpose. Pen. Code, §§ 807, 808; Id. Sub. 5, § 869. This was sufficient to authorize the district attorney to file an information under section 809 of said Code.

If it be conceded that the alleged crime was not committed in the county of Santa Barbara, was that a sufficient ground for the intervention of the power of the court on a motion to set the information aside? This question must be determined by a correct construction of section 995 of the Penal Code, which provides that the information must be set aside in the following cases:

"(1) That before the filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county."

The court held that the defendant had not been legally committed by the magistrate, because the crime was not committed within the county of Santa Barbara. The forms of law respecting the preliminary examination of the case had been complied with, and the committing magistrate had determined that the *locus delicti* was in the

county of Santa Barbara; and had the superior court a right to review, and, so to speak, reverse the action of the committing magistrate? If it had appeared on the face of the information (which it did not) that the offense charged was committed out of the jurisdiction of the court, the proper mode to take advantage of such objection would have been by demurrer. Pen. Code, § 1004. But in a case like the one we are now considering, where the information is good on its face, defendant should have availed himself of the objection to the jurisdiction under the plea of not guilty; and in that event it would have been a question for the jury to determine. Pen. Code, § 1012. We do not think the superior court, on a motion to set aside the information, had any right to determine the question.

We think the order of the court setting aside the information and discharging the defendant a final judgment, and the subject of an appeal. The other orders appealed from are likewise appealable orders. In respect to the order denying the motion of the district attorney for leave to file another information, it is sufficient to say that the information set aside is a good and sufficient one, and therefore it is not necessary to file another. *People v. Jordan*, 4 Pac. Rep. 773; *People v. Geisea*, 63 Cal. 345.

The orders of the court are reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

We concur: THORNTON, J.; ROSS, J.; SHARPSTEIN, J.; MYRICK, J.; MCKINSTRY, J.; MCKEE, J.

PEOPLE v. MORE. (No. 20,083.)

Filed January 29, 1886.

APPLICATION FOR WRIT OF ERROR DISMISSED.

In bank. Appeal from superior court, county of Santa Barbara. Attorney General, for appellant.

J. J. Boyce, for respondent.

BY THE COURT. Application for a writ of error. The merits of the case have been considered and decided on appeal, (No. 20,076,) ante, 461, this day filed; therefore it becomes unnecessary to pass upon the application for the writ of error in this case. Proceedings dismissed.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 627

BROWN v. MANN. (No. 9,043.)

Filed January 27, 1886.

1. APPEAL—DEFENDANT ADMINISTRATOR, CONVICTION OF FOR FELONY.

The fact that one of the defendants in whose favor a judgment was rendered in an action in which he was sued as administrator, was convicted of embezzlement, is not cause for dismissing an appeal, as in such case the administrator does not become *civiliter mortuus*, as that no notice of appeal could be served on him or his attorney.

2. PLEADING—SUPPLEMENTAL COMPLAINT—CAUSES OF ACTION—STATUTE OF LIMITATIONS.

Where a supplemental complaint filed in 1879 sets forth a cause of action founded upon a verbal loan for one year, made in 1869, and secured by a deed, such action is barred by the statute of limitations.¹

3. TRIAL—FINDINGS, SUFFICIENCY OF.

Findings reviewed, and held to cover all the issues made by the pleadings, and to be sufficient.

Commissioners' decision.

Department 1. Appeal from superior court, county of Santa Cruz.

W. D. Story, for appellant.

C. B. Younger, J. A. Barham, F. Adams, and A. Craig, for respondents.

FOOTE, C. The motion to dismiss the appeal herein is not well taken, and should be denied. It is made for the reason, as alleged, that one of the defendants, in whose favor a judgment was rendered in the trial court, was convicted of embezzlement, and, while acting as administrator, became *civiliter mortuus*, and that, being sued as such, no service of notice of appeal could be made on him or his attorney. No question of this kind was raised in any of the proceedings in this cause until judgment was had in favor of the defendant Otts, administrator, and his co-defendants, and it is now raised for the first time to prevent this appeal from being heard.

We are of opinion that the reasoning of this court in the case of *Estate of Nerac*, 35 Cal. 396, applies here, and said administrator, not being sentenced for life as a convict, his responsibilities to those having claims against him did not cease, although certain of his rights were for a time suspended. His letters as administrator were never revoked by the action of the court, to which he was subject as such officer. He litigated with the plaintiff at every stage of the cause up to and including the rendition of the judgment in his favor, and only raises the point of his disability when an appeal is prayed for aimed at the reversal of that judgment. To allow his contention now to prevail would be manifestly unjust.

¹ For full discussion of the question of the statute of limitations, and when an action is barred by, see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-641; also *Glenn v. Saxton*, (Cal.) 9 Pac. Rep. 420, and note, 423.

Leaving out of view for the present all other questions in the case, it becomes pertinent to determine if the plaintiff is entitled upon the findings to recover against any of the defendants, in view of the interposition of the plea of the statute of limitations. In his supplemental complaint he counts upon a cause of action which is upon a verbal loan for one year, made in 1869, and secured by a deed. This was not the same cause of action which was counted upon in the first complaint; that was upon a note secured by a mortgage of date the fourth of May, 1870. The supplemental complaint was not filed until the twelfth of September, 1879, more than eight years after the note became due, and nine years after the debt of 1869 became due. As against all of the defendants, therefore, the action was barred by the statute of limitations when the supplemental complaint containing the new cause of action, the debt of 1869, was filed. *Anderson v. Mayers*, 50 Cal. 525.

It is claimed, however, that the court did not find upon all the material issues made by the pleadings. The finding upon the question as to whether the note was paid or not is, we think, though not very full, sufficient. There was no necessity to find whether or not the deed from T. W. and M. J. Mann to Abel Mann was without consideration, etc., for the reason that there was a finding showing such deed to have been null and void, and that the mortgage on which the action was based was made prior to that deed, and plaintiff could not have been injured thereby under section 3441 of the Civil Code.

It appears from the findings, taken as a whole, that the court determined the claims of defendants to the property therein described were not subject to the lien of plaintiff's mortgage, and the issue thus made was sufficiently passed upon. The findings are sufficient also as to the bar of the statute of limitations. Nor is the objection made as to finding 9, viz., that it was surplusage, tenable.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

WE CONCUR: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 404

MANASSE and others v. DINKELSPIEL and others. (No. 11,179.)

Filed January 27, 1886.

MORTGAGE—DEED ABSOLUTE ON ITS FACE.

Where parties at the time of executing a deed enter into an oral agreement that the execution of such deed is intended to be and is full payment and satisfaction of an existing debt of \$1,800, but that to make it certain that the grantee will realize the amount of the debt and interest, there being at the time some uncertainty as to the value of the land, the grantor executes a note for \$500 to be paid if such sum of \$1,800 and interest is not realized on selling such land, but not otherwise, and if, on the other hand, the sale of such land realizes more than that amount, or any land remains over after such sale, such surplus of land or money is to be repaid to the mortgagor, then such deed does not amount to a mere security, and is therefore not a mortgage.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Diego.

M. A. Luce, N. H. Conklin, and Works & Titus, for appellants.

Levi Chase, W. J. Hunsaker, and Jarboe & Harrison, for respondents.

FOOTE, C. This action was instituted by the plaintiffs to have a deed (which upon its face appears absolute as such, and was executed by them to the defendants) declared to be in reality a mortgage to secure a certain indebtedness amounting to the sum of \$1,800. It was also alleged by them that it was agreed by all the parties in interest at the time of the execution of that instrument that it should be deemed and held as a mortgage only, and that the grantees thereunder should sell so much of the property conveyed as might be necessary to satisfy the indebtedness it secured, and then must reconvey to plaintiffs such property as had not been sold. That since the date of the execution of said deed the defendants had disposed of more than enough of said property to fully satisfy all of said indebtedness, and still retain possession of a large portion thereof, and refuse to reconvey it to plaintiffs. In addition to the prayer that the instrument in question be declared a mortgage, it is sought to compel defendants to pay the plaintiffs the surplus of money above the \$1,800 and interest received by them from the sales of land, and a reconveyance of the part remaining unsold.

The defendants deny all the material allegations of the complaint, and allege that at the time the deed was executed the plaintiffs were indebted to them in the sum of \$1,800, which they were then attempting to collect by a civil action; that thereafter an arrangement by way of compromise was entered into between the parties thereto, whereby the deed was made in satisfaction and payment of the said debt, which instrument was to be held by defendants as a conveyance of the said lands in fee simple, and not as a mortgage, or for security of any kind or for any purpose.

The court made its findings of fact and conclusions of law based thereon, and gave judgment for the defendants. The findings are assailed by the appellants as not being sufficient to support the judg-

ment. We have carefully examined them and are fully satisfied that they do support the judgment. The trial court found substantially that the agreement of the parties was oral; that it went to this extent only, viz., that the \$1,800 debt was fully paid and satisfied by the execution of the deed, and was so intended to be; that, to make it certain that the defendants would realize that amount and interest, there being at that time some uncertainty as to whether the lands conveyed would when sold realize so much, the defendants demanded and received from the plaintiffs a note for \$500, which was to be paid if the land did not realize sufficient to fully make up the sum of \$1,800 and interest, but not otherwise; that if the proceeds of the sales of the lands did more than realize that amount, or after that any land remained, said surplus of land or money should belong to plaintiffs. The following has been said by this court in reference to the distinctive features which characterize a mortgage, in the case of *Henley v. Hotaling*, 41 Cal. 28:

"There is one fact which is indispensable for this purpose. A mortgage is a security for the performance of an agreement which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either expressed or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. If there is no debt, there is no mortgage."

The court found that by the agreement that led up to the deed, and by the execution thereof, the \$1,800 debt and interest was to be satisfied and paid; that it no longer existed; that the \$500 note, as a separate contract, was made merely to make certain the full realization of the \$1,800 and interest, if the land conveyed should not, when sold, realize that sum. The oral agreement did not constitute the deed a mortgage, as the indebtedness of \$1,800 it was intended to pay was thereby paid and satisfied, and not merely secured to be paid.

The judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 335

BARLEY v. BUELL. (No. 11,173.)

Filed January 30, 1886.

JUDGMENT AFFIRMED.

Department 2. Appeal from superior court, county of Santa Barbara.

W. C. Stratton, for appellant.

Wm. H. H. Hart and *A. R. Colton*, for respondent.

THORNTON, J. We are of opinion that under the allegations of the complaint the plaintiff could have and recover the amount of \$3,000, for which a verdict was rendered in his favor. There is no difficulty as to the consideration of the promise to pay. The consideration was services to be rendered in procuring a loan, and there was a promise to pay, sufficiently definite, averred in the complaint as regards \$3,000, the amount of the verdict. As to the \$7,000, the complaint was too indefinite to recover any part of it, but the verdict for \$3,000 can be sustained under the allegations of the complaint. Judgment affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

BROWN v. MANN. (No. 9,043.)

Filed February 3, 1886.

JUDGMENT SET ASIDE AND CAUSE SUBMITTED.

Department 1. Appeal from superior court, county of Santa Cruz.

W. D. Story, for appellant.

C. B. Younger, *J. A. Barham*, *F. Adams*, and *A. Craig*, for respondent.

BY THE COURT. Ordered the judgment entered in this case January 27, 1886, be set aside, the same having been inadvertently entered before the submission of the cause upon its merits. Further ordered the motion to dismiss the appeal be submitted for decision.

68 Cal. 517

BROWN v. MANN and others. (No. 9,043.)

Filed February 8, 1886.

APPEAL—DEFENDANT ADMINISTRATOR, EFFECT OF CONVICTION OF, FOR FELONY.

An appeal will not be dismissed for the reason that one of the defendants, in whose favor a judgment was rendered in an action in which he was sued as an administrator, was convicted of embezzlement. In such case the administrator does not become *civiliter mortuus*, so that no notice of appeal could be served upon him or his attorney.

Commissioners' decision.

Department 1. Appeal from superior court, county of Santa Cruz.

W. D. Story, for appellant.

C. B. Younger, J. A. Barham, F. Adams, and A. Craig, for respondents.

FOOTE, C. The motion to dismiss the appeal herein is not well taken and should be denied. It is made for the reason, as alleged, that one of the defendants, in whose favor a judgment was rendered in the trial court, was convicted of embezzlement, and while acting as administrator became *civiliter mortuus*, and that, being sued as such, no service of notice of appeal could be made on him or his attorney. No question of this kind was raised in any of the proceedings in this cause until judgment was had in favor of the defendant Otts, administrator, and his co-defendants, and it is now raised for the first time to prevent this appeal from being heard.

We are of opinion that the reasoning of this court in the case of *Estate of Nerac*, 35 Cal. 396, applies here, and said administrator, not being sentenced for life as a convict, his responsibilities to those having claims against him did not cease, although certain of his rights were for a time suspended. His letters as administrator were never revoked by the action of the court, to which he was subject as such officer. He litigated with the plaintiff at every stage of the cause, up to and including the rendition of the judgment in his favor, and only raises the point of his disability when an appeal is prayed for aimed at the reversal of that judgment. To allow his contention now to prevail would be manifestly unjust.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied.

68 Cal. 363

CRAIG v. FRY and others. (No. 7,455.)

Filed January 26, 1886.

1. CONTRACT—JOINT AND SEVERAL LIABILITY.

Where parties entered into a contract, by the terms of one covenant of which defendants agreed to pay to plaintiff, and to him only, a certain sum of money on the performance by him of certain work, which certain other parties agreed should be done by plaintiff, the obligation to pay was joint, and the obligation to do the thing contracted was several on the part of plaintiff, and upon performance plaintiff was entitled to maintain an action to recover the amount contracted to be paid without joining such other contracting parties as plaintiffs.

2. CONTRACT—EVIDENCE—PERSONAL LIABILITY OF PARTNER.

Where parties to a contract entered into their respective agreements in their own names, although the contract recited that they were acting on behalf of certain corporations, the defendants in an action on such contract could not object to the admission of the contract in evidence on the ground that they were not personally bound, as no question could properly arise in regard to their liability until the contract was in evidence.

3. APPEAL—STATEMENT OF CASE PART OF RECORD.

The statement of the case on motion for a new trial is part of the record, upon which an appeal from a judgment may be heard.

Department 1. Appeal from superior court, city and county of San Francisco.

G. E. Harpham, for appellant.

R. Y. Hayne, for respondents.

McKEE, J. This was an action brought by Joseph Craig against J. D. Fry, Eugene L. Sullivan, and Edward J. Pringle. The complaint contains statements of two separate causes of action: The first counts upon a contract in writing, which it is alleged "defendants and plaintiff made on the twelfth of December, 1874, whereby the plaintiff agreed to erect and complete, at or near the Santa Inez quicksilver mine, situate in the Santa Cruz mining district, county of Santa Barbara, state of California, a first-class furnace * * * of the style known as the "Neat Furnace," capable of working twelve tons per day of Santa Inez quicksilver-bearing ore without the use of a blower;" and deliver the same erected and completed to the Los Prietos Mining Company immediately, or as soon as the weather will permit after the date hereof; "for which defendants agreed to pay, or cause to be paid, to the plaintiff \$11,000 in United States gold coin, \$6,000 of which in cash at the time of making said contract, and the balance of \$5,000 thereof whenever and as soon as said furnace should be completed." These averments were followed by allegations of performance by the plaintiff, acceptance and payment by defendants upon the contract of the sum of \$8,500, leaving due and unpaid a balance of \$2,500, which they refused to pay upon demand before the commencement of the action.

The second cause of action was for services rendered by plaintiff, between the twelfth of December, 1874, and the nineteenth of February, 1875, for the defendants, "by occupying and maintaining possession of, cutting trails, building roads, erecting houses, prospecting mines, etc., upon the lands and mining claims of the Los Prietos Mining Company, situate in the county of Santa Barbara, and state of California, for which the defendants promised to pay so much as the same should be reasonably worth, in United States gold coin."

The allegations of the complaint were specifically denied; and as separate and distinct defenses it was averred (1) that there was a misjoinder of parties plaintiff and defendant, in that Heydenfeldt, Brown, and the Santa Inez Mining Company were not joined as plaintiffs, and the Los Prietos Mining Company was not joined as defendant; and (2) that the services rendered by Craig in the construction, completion, and delivery of the furnace, and in the work done upon the lands and mining claim of the Los Prietos Mining Company, were rendered by the plaintiff under and in performance of a contract in writing which was made and entered into at San Francisco, in the state of California, on the twelfth day of December, A. D. 1874,

by and between J. D. Fry, Eugene L. Sullivan, and Edward J. Pringle, acting on behalf of Los Prietos Mining Company, parties of the first part, and Solomon Heydenfeldt, Harvey S. Brown, and Joseph Craig, acting on behalf of the Santa Inez and Scott Quicksilver Mining Companies, parties of the second part, * * * by which, in consequence of mutual covenants between the contracting parties, the parties of the second part, Heydenfeldt, Brown, and Craig, agreed as follows:

"And the parties of the second part further agree that the said Craig shall, for and in consideration of the said sum of eleven thousand dollars, (\$11,000,) provide materials and labor and erect and complete at or near the said Santa Inez quicksilver mine, and deliver to the Los Prietos Mining Company immediately, or as soon as the weather will permit after the date hereof, a first-class furnace, of the same style as that now being used on the Saint Johns Company works, in Solano county, and known as the 'Neat Furnace;' said furnace to be capable of working twelve (12) tons per day of Santa Inez quicksilver-bearing ore, without the use of a blower; * * * for which the said Fry, Sullivan, and Pringle, as parties of the first part, agreed that they would cause to be paid by Los Prietos Mining Company as a charge upon its capital stock—which the parties of the first part had agreed to increase to \$11,000,000, divided into 110,000 shares of the par value of \$100 each—the sum of eleven thousand dollars, (\$11,000,) gold coin to the said Craig; six thousand dollars (\$6,000) thereof cash, and the balance whenever and as soon as the said Craig shall have completed the furnace by him hereinafter contracted to be erected." * * * And it was further agreed "that the cost of erecting the furnace and apparatus now in process of erection upon the mines of Los Prietos Mining Company * * * shall be a charge upon the whole capital stock, so increased, of Los Prietos Mining Company.

"In witness whereof, the parties aforesaid have hereunto set their hands at San Francisco on the day and year aforesaid in duplicate.

"In the presence of.

J. D. FRY.

"E. L. SULLIVAN.

"EDWARD J. PRINGLE.

"S. HEYDENFELDT.

"H. S. BROWN.

"JOSEPH CRAIG."

This contract the plaintiff offered in evidence as proof of the allegations of the first count of his complaint. But the court, against his objection and exception, excluded the evidence; and that is assigned as error. It will be observed that the excluded contract corresponds with the alleged contract of the plaintiff's cause of action, in date; in the object of the contract, so far as it relates to the subject-matter of the action; in the compensation payable upon performance of the work; in the terms of payment; in the name of the party to whom, and the names of the parties by whom, payment was to be made. It is true that the excluded contract contains other covenants than the one upon which the plaintiff's action is founded; and the covenantors and covenantees named in it are joint contracting parties, except as to the provisions for erecting a furnace upon the mining claim of the contracting parties. As to that particular of the contract, while the covenants are joint, the interest of Craig in

the covenants is several. Fry, Sullivan and Pringle promise to pay *him*, and him only, the sum of money covenanted to be paid, according to the terms of the contract, upon completion and delivery of the furnace. The obligation to pay was therefore joint, and the obligation to do the thing contracted for, although in one sense joint, was several; for Heydenfeldt, Brown, and Craig covenanted that Craig would erect, complete, and deliver the furnace, according to the terms of the contract, for a compensation payable to him. The covenant was therefore made for his benefit and in his interest so far as related to the thing which he was to do; and, although the contract was made by several jointly, "it is to be measured and moulded according to the interests of the covenantees;" and each shall be entitled to sue and recover for a breach so far as his own interests extend. *Anderson v. Martindale*, 1 East, 497; Platt, Covenants, 123. In 1 Pars. Cont. 13, the rule upon the subject is thus stated: "If the contract contains distinct grants, or promises of distinct sums, to distinct payees, they would then have several interests, and *certainly may*, perhaps must, bring separate actions." And the Code rule is that every action must be prosecuted in the name of the real party in interest. Code Civil Proc. § 367.

As payee of the compensation to which he was entitled under the covenant for building the furnace, Craig was the only party interested in the recovery. Although Heydenfeldt and Brown guaranteed performance of the work by Craig, they had no interest in the thing to be recovered; therefore they were not necessary parties plaintiff to the action, nor was the Santa Inez Quicksilver Mining Company a necessary party plaintiff; and as Fry, Sullivan, and Pringle were the only promisors, the Los Prietos Mining Company was not a necessary party defendant. The contract was admissible as evidence of the allegations of the complaint as to the performance of the work by Craig, to whom the promise of payment for it was made, and of the compensation to which he was entitled for performance. But it is insisted that as each of the contracting parties acted on behalf of the respective mining corporations named in the contract, the defendants were not personally bound to pay. That question, however, was not involved in the objection to the admissibility of the contract. It could not properly arise until the contract was in evidence. It was therefore a question which went to the effect and not to the admissibility of the contract as evidence. But the terms of the covenant in the contract, out of which arises the obligation to pay for the furnace, clearly manifest that the obligation of the defendants was personal and not representative.

The court erred in excluding the evidence and in granting a nonsuit. The statement of the case used on the hearing of a motion for a new trial is part of the record upon which an appeal from the judgment may be heard. Code Civil Proc. § 950; *People v. Crane*, 60 Cal. 279.

The appeal from the order denying the motion for a new trial was taken too late, and the appeal must be dismissed. Appeal from order dismissed. Judgment reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; ROSS, J.

68 Cal. 519

In re Estate of McCABE, Deceased. (No. 9,041.)

Filed February 12, 1886.

WILL—PROBATE OF WILL—WITNESSES—STATUTES OF WILLS.

The California statute concerning wills, other than nuncupative and olographic wills, requires two attesting witnesses, and therefore a will with only one attesting witness cannot be admitted to probate. Statutes of wills take away no natural right to dispose of property by will, but regulate and conserve it by reasonable formalities.

Department 2. Appeal from superior court, county of Santa Clara.
Burt & Pfister, for petitioners.

Louis Arques, for contestant.

MYRICK, J. The paper offered for probate as a will was written by a scribe under the direction of the deceased. The paper was signed by the deceased, and, at her request and in her presence, the scribe signed it as a witness. No other person was present at the time of this signing, and the name of no other person as a witness was at any time written. The paper, so far as the signatures of the deceased and the one witness were concerned, was properly executed.

Section 1276, Civil Code, declares that "every will, other than a nuncupative will, must be in writing, and every will, other than an olographic will and a nuncupative will, must be executed and attested as follows: * * * (4) There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request and in his presence."

The point presented by the appellants on this appeal is in substance, this: As it is manifest the deceased intended to dispose of her property by will, and as she had the natural right of ownership and of disposition, (as well by deed as by testament,) the legislature could not interfere with or direct the mode of the exercise of the right of disposition; that if it be manifest the paper was intended by her to be a will, and expresses her wishes as to the disposition of her property, it must be recognized as her will, even though it fails to have been executed in the mode prescribed by the statute. We quote the language of counsel for appellants so that the point may be presented clearly in his own words:

"Is the right to dispose of one's own property, either by conveyance *inter vivos* or by devise, a natural and fundamental right, existing independently of statute and cherished as a part of the liberties of the citizen, or is it a mere evanescent vapor springing from the breath of a captious legislature."

We had supposed the point presented had been disposed of by a long line of decisions and the unbroken usage of the profession. In order to be sure whether or not this supposition was well-founded, we have carefully examined and considered the brief presented on behalf of the appellants. We are of opinion that at this day it is not an open question that the legislature may prescribe the formalities to be observed in the execution of a testament; and by so doing it does not interfere with the right, from whatever source it may come, of disposing of property by will.

It is very doubtful, from the evidence, if the deceased intended the paper to be a will or anything other than a basis of a paper to be thereafter properly executed; for the witness testified: "Mrs. McCabe said to me at the time I drew this paper that she wanted to take it to the attorney to have it embodied in a regular legal form of a will; to have it drawn legally." The court found, however, that the deceased published the same as her will; and that finding is not now for review.

The court was correct in refusing to admit the paper to probate as the will of the deceased. There is no error in the rulings of the court as to the admissibility of evidence. The orders appealed from are affirmed.

I concur: SHARPSTEIN, J.

THORNTON, J., (*concurring.*) I concur. The statute of wills takes away no natural right to dispose of property by will, but regulates it and conserves it by reasonable formalities. The right to convey property *inter vivos* is also regulated. It must be done by an instrument in writing executed by the grantor. Does this latter take away any natural right? I cannot see that it does. The contention of appellant's counsel is untenable.

68 Cal. 374

GRAHAM, Ex'r, etc., v. STEWART. (No. 9,919.)

Filed January 26, 1886.

1. NEW TRIAL—STATEMENT ON MOTION—SPECIFICATION OF ERRORS.

Where, on motion for a new trial, the statement fails to specify any errors of fact or of law on which the moving party will rely, such statement is wanting in its essential elements, and is not sufficient as the basis of such a motion, and in such case the decision of the trial court must be regarded as conclusive of the facts in the case.

2. TRIAL—EQUITY CASES—JURY TRIAL—AMENDING PLEADINGS.

It is within the sound discretion of the court in an equity case whether to allow amendments to pleadings at any stage in the cause, or to allow a jury trial; and unless, in the exercise of the power, the court has clearly abused its discretion, the supreme court will not interfere.

3. SAME—SUBMISSION OF ISSUES TO JURY—ERROR.

A reversal is not warranted by error in overruling objection to a proposed issue submitted to the jury in an equity case, if, notwithstanding the answers of the jury, the court find all the facts connected with such issue.

Cal. Rep. 9-11 P.—12

4. APPEAL FROM JUDGMENT—CONCLUSION FROM FINDINGS.

It is a proper question to be considered on appeal from the judgment whether the facts found warrant the conclusion drawn by the court.

5. HOMESTEAD UNDER CALIFORNIA LAW OF 1860—REMARRIAGE OF WIFE.

A declaration of homestead, made under the California homestead law of 1860 as amended in 1862, which law declared that the husband and wife shall be deemed to hold the homestead as joint tenants, and that on the death of either spouse the homestead property shall vest absolutely in the survivor, will, upon the death of the husband, vest the property immediately in the wife as her separate property; and it will remain vested in her, on her remarriage, as her separate property, and disposable without her husband's consent.

6. MORTGAGE—FORECLOSURE—JURISDICTION—DESCRIPTION OF PROPERTY.

Where, in an action to foreclose a mortgage, the complaint alleges that the mortgage was "duly recorded in the office of the recorder of San Diego," and the copy of the mortgage attached to the complaint as an exhibit describes the premises as "lot G, in block numbered 93, in Horton's addition to San Diego, as per maps on file in the county recorder's office, made by James Pascoe," the mortgage is not void for want of a sufficient description of the property; and in such case the complaint shows that the real estate was in San Diego county, and judicial notice is taken of the fact that there is but one San Diego county in the state of California; and the superior court of that county consequently has jurisdiction of the action.

7. MORTGAGE—FORECLOSURE—INDEFINITE DESCRIPTION.

In a foreclosure suit a mortgagor cannot be heard to complain of the indefiniteness of the description of the mortgaged property, whatever the effect of a sale under such description might be.

In bank. Appeal from superior court, county of San Diego.

A. B. Hotchkiss, for appellants.

Leach & Parker, for respondent.

McKEE, J. The appeal taken by defendant in this case is from a decree of foreclosure and an order denying a motion for a new trial.

1. The order denying the motion was made upon a statement of the case, indorsed by the court "allowed," and by the clerk of the court "engrossed statement on motion for new trial." The document merely specifies the object of the action, the pleadings in the case, the contents of a deed which, it is claimed, was the basis of a counter-claim filed by the defendant, and errors of law occurring at the trial. It contains no statements of any evidence given at the trial, except the deed referred to as the basis of the counter-claim; no specifications of particulars in which any evidence was claimed to have been insufficient to sustain any finding; no notice of motion designating the grounds upon which the motion would be made; and no motion based upon any statutory grounds. The only reference to a motion is found in the order appealed from, which shows that the parties appeared by their respective attorneys and "the defendant moves the court for a new trial herein, and in support of said motion offers in evidence the statement on motion for new trial and the judgment roll herein. Whereupon the motion for new trial is denied by the court, and defendant excepts to the ruling of the court." The office of a statement on motion for a new trial is to bring into the record those matters which have arisen in the progress of the trial, and matters which constitute the basis of the motion, or grounds for a new trial, out of which arises whatever questions the appellant desires to have

reviewed, on appeal from the order granting or refusing a new trial. Code Civil Proc. §§ 656, 657, 659; *Harper v. Minor*, 27 Cal. 107. A statement which does not specify any errors of fact or of law on which the moving party will rely for a new trial is wanting in its essential elements, and is insufficient as the basis of a motion. Section 659, sub. 3, *supra*; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Crowther v. Rowlandson*, 27 Cal. 385; *Burnett v. Pacheco*, Id. 408; *Partridge v. San Francisco*, Id. 416; *Beans v. Emanuelli*, 36 Cal. 117. As, therefore, the statement in the record does not specify any error of fact on which the motion for a new trial was made, the decision of the court must be regarded as conclusive of the facts of the case.

2. But the statement contains the following:

"Particular errors of law occurring at the trial of said cause on which defendant will rely on hearing of motion for new trial: (1) The court erred in allowing a trial of the cause by jury and in refusing to strike out and vacate the order for jury trial. (2) The court erred in submitting certain issues to the jury. (3) The court erred in allowing plaintiff to amend his complaint at the close of his evidence."

The allowance of a trial by jury in an equity case, or of amendments to pleadings, at any stage in the proceedings, is a matter addressed to the sound legal discretion of the trial court; and this court never interferes with the exercise of that discretion, except where there is a showing that the discretion has been abused. No such showing is made in this case. The court, however, did err in overruling the objections to the proposed issues submitted to the jury as to the deed referred to as the basis of defendant's counter-claim; but the error was not prejudicial, because, upon the evidence, the court itself, notwithstanding the answers of the jury, found all the facts in connection with the deed and counter-claim, and decided the question of the validity of the claim. No attack has been made upon the finding. It must therefore be accepted as conclusive of the facts; and the only question is whether the facts warrant the conclusion drawn by the court. That question arises on the appeal from the judgment.

3. On that appeal the errors insisted upon are:

"(1) The findings of fact do not respond to the issues made by the pleadings. (2) The conclusions of law are not sustained by the findings of fact, and are not based on the facts or the pleadings."

The pleadings consist of the complaint, demurrers, and answer. The complaint contains a statement of facts sufficient to constitute a cause of action for the recovery of a judgment upon the note, and foreclosure of the mortgage in suit. The answer specifically denies all the allegations of the complaint, and sets up as separate and distinct defenses against the note and mortgage (1) a set-off or counter-claim for \$1,712, money alleged to have been received for the defendant, in October, 1880, by the original mortgagee from a sale of real property which he had and held for the benefit of himself and defendant; and

(2) that the premises described in the mortgage were, at the date of the mortgage, the homestead of the defendant, and that the mortgage executed thereon was void.

The court finds that all the allegations of the complaint are true; that the original mortgagee was not indebted to defendant for moneys had and received; that there was no offset or counter-claim against the note; and that the facts in connection with the claim of homestead upon the mortgaged premises are as follows:

"On the ninth day of February, 1870, the defendant Annie Stewart and one John Sherman were, and for a long time prior thereto had been, husband and wife, and as such husband and wife they were the owners in fee of the land and premises known as lot G, in block 93, of Horton's addition to the city of San Diego, in the county of San Diego, state of California, as community property, and were then actually residing and living in their dwelling-house thereon with their children; that while they were so the owners as aforesaid, and so residing with their family on said premises, the said Annie Stewart, then the wife of the said John Sherman, on the ninth day of February, 1870, selected said land, together with the dwelling-house thereon, and its appurtenances, as a homestead for herself, her children, and her said husband, and to that end she, in due form of law, and in writing, made, signed, executed, and acknowledged on said date a declaration of intention to claim said premises as a homestead, which said declaration was thereafter recorded in the proper books of records in the recorder's office of San Diego county, as required by law, in Homestead Book 1, page 41, etc., * * * that afterwards during the year 1870, said John Sherman died, leaving surviving him the defendant Annie Stewart and two minor children; that thereafter, during said year 1870, the defendant Annie Stewart intermarried with one R. W. McQuilkin, and ever since has been his lawful wife, of all of which said plaintiff and said Matthew Carruthers had notice, although, for a portion of the time, they supposed that said McQuilkin was dead; that since the execution and recording of said declaration of homestead said Annie Stewart has occupied said premises and claimed the same as a homestead under and by virtue of said declaration and dedication, which homestead premises are the same premises described in the mortgage in plaintiff's complaint described; that said premises are now and always have been of less value than \$5,000; that said mortgage is not signed by said R. W. McQuilkin, and the same is not void as a lien against said homestead premises."

The findings are responsive to the pleadings, and cover the issues made by them, and, as they are conclusive of the facts stated in them, the only question arising upon the assignment of errors is, whether they warrant the conclusion drawn from them that the plaintiff was entitled to a foreclosure and sale of the mortgaged premises. Dedication of the premises as a homestead was made in 1870, under the homestead law of 1860, as amended in 1862, which was then in force. By that law it was declared that the husband and wife shall be deemed to hold the homestead as joint tenants, (St. 1860, p. 311;) and that upon the death of either spouse the homestead property shall vest absolutely in the survivor, and be held by the survivor as fully and amply as the same was held by them, or either of them, immediately preceding the death of the deceased, etc. St. 1862, p. 519. Under the law, therefore, when the husband, John Sherman,

died in 1879, the homestead property vested absolutely in the defendant as his surviving wife, and she became the sole owner of it, as of her separate estate. As her separate property it was not affected by her subsequent marriage with McQuilkin. The marriage changed her social *status*, but it did not change her right to the property. In its title and use it remained vested in her as the true owner, usable by her for her exclusive benefit, and disposable by her, without the consent of her husband, in the manner provided by law, *i. e.*, by a conveyance of the property executed and acknowledged by her as a married woman, before an officer authorized to take her acknowledgment. The defendant did make such a disposition of the property on the third of September, 1881, when she, by the name of Mrs. Annie Stewart, late Annie Sherman, signed and delivered the promissory note, and executed and acknowledged as a married woman, and delivered, the mortgage in suit. The conclusion that the mortgage was valid, and that the plaintiff was entitled to judgment, and foreclosure and sale of the mortgaged premises, was, therefore, properly drawn from the findings.

4. Lastly, appellant insists that "the court got no jurisdiction of the *res*, because there is no allegation in the complaint that the real estate upon which the lien is claimed is in San Diego county or the state of California." And that the description of the mortgaged premises is insufficient to confer jurisdiction.

The allegations of the complaint are "that on a certain day, to-wit, the third day of September, 1881, at the said county of San Diego, in the state of California, the said defendant, Annie Stewart, made her certain promissory note in writing, * * * and as security for payment of the same, executed, acknowledged, and delivered a certain mortgage, which was duly recorded in the office of the recorder of said county of San Diego," a copy of which, being marked as Exhibit A, was annexed to the complaint and made part thereof. The premises are described as "all that certain piece or parcel of land bounded and described as follows, to-wit: "Lot lettered G, in block numbered ninety-three (93) in Horton's addition to San Diego, as per maps on file in the county recorder's office made by James Pascoe, together with the improvements on said lot."

Affirmatively it sufficiently appears that the real estate is in San Diego county, and the court takes judicial notice that there is but one San Diego county in the state of California; therefore the court had jurisdiction of the subject of the action.

The mortgage was not void for want of a sufficient description of the property; and the property was sufficiently described for the exercise of the jurisdiction of the court. But even if the description were indefinite, it would be no objection to the enforcement of the mortgage against the mortgagor. In an action for foreclosure of a mortgage as it is written, a mortgagor cannot be heard to complain of an indefinite description of the property mortgaged, whatever might

be the effect of a sale under the description. *Whitney v. Buckman*, 13 Cal. 536; *Tryon v. Sutton*, Id. 490.

There is no prejudicial error in the record. Judgment and order affirmed.

We concur: ROSS, J.; MYRICK, J.; MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.

68 Cal. 512

TOWN OF REDWOOD CITY *v.* GRIMMENSTEIN. (No. 8,642.)

Filed January 30, 1886.

REDWOOD CITY—LIABILITY AND DUTY OF MARSHAL IN COLLECTING TAXES.

The amendment of March 30, 1874, to the California act of March 27, 1868, incorporating the town of Redwood City, and providing that the "marshal shall be *ex officio* tax collector, and as such shall be vested with the same power and authority conferred on tax collectors of state and county taxes," etc., operates to add new duties to the office of marshal, but not to create a new office, and the sureties on the marshal's official bond are therefore bound for his defalcation in collecting taxes.

Department 2. Appeal from superior court, county of San Mateo. *Fox & Ross*, for appellant.

Kincaid & Fitzpatrick, for respondent.

THORNTON, J. Action against principal and sureties on the official bond of defendant Grimmerstein. The court erred in rendering judgment for defendants, sureties of Grimmerstein. The judgment was rendered on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants, sureties of Grimmerstein, on his bond. In that the complaint was ample in its allegations to show a liability on the part of the defendants. It appears that the town of Redwood City (plaintiff here) was first incorporated by an act of the legislature approved March 27, 1868. See St. 1867-68, p. 411. This act was amended by the act of March 30, 1874, (St. 1873-74, p. 946.) This latter act, so far as concerns this case, remained in force and unaltered up to the time that this action was commenced. By section 13 of this latter act it was provided that "the marshal shall be *ex officio* tax collector, and as such shall be vested with the same power and authority conferred on tax collectors of state and county taxes, and shall be governed by the laws of this state now or hereafter in force, except in so far as his duties shall be regulated or modified by ordinance. He shall keep a true and accurate account of all moneys collected by him, and from what source and what account received, and report the same to the treasurer on the first Monday of each month, which report shall be duly verified under oath. He shall give a receipt for all taxes and assessments, showing a description of the property, to the party paying the same."

By this act the marshal had added to his duties those of tax collector. The language of the act (section 13) has plainly this meaning. He became such by virtue of his office of marshal. New duties were added to the office of marshal, but no new office was created.

That no new office was intended to be created is further shown by section 3 of this act, in which it is provided that the government of the town of Redwood City shall be vested in a board of trustees, consisting of five members, a marshal, assessor, treasurer, and police justice, and such other officers as are hereafter authorized to be appointed by said board of trustees. The failure to mention tax collector, while the marshal and other officers are mentioned, and the duties of tax collector imposed on him by section 13 above referred to, shows clearly that the legislature did not intend by section 13 to create any such new office as that of tax collector. It is said that it is provided in section 4 that the assessor, treasurer, marshal, police justice, and the officers hereinafter named shall each file a bond, and the tax collector is hereinafter named, that he is one of the officers to give bond. This is a mode of argument styled *petitio principii*, or begging the question. It assumed the very point in dispute, that the tax collector is one of the officers hereinafter named. The foregoing has already answered this point. But in fact the officers "hereinafter named" plainly appear in the act. They are inspector, poundmaster, and superintendent of streets, named in section 7, subdivisions 10, 16, 17, and may be license tax collector named in subdivision 18 of the same section. Superintendent of streets is also named in section 16. As those officers are hereinafter named (though to be appointed subsequently by the board of trustees, makes no difference) it is useless to be searching for other officers, especially when the act does not name them as separate and distinct officers. In our judgment the bond of the marshal related to all duties imposed on him by law, as well that of collecting taxes as any others, and that the bond herein bound the sureties for his defaults in collecting the taxes.

Section 4108 of the Political Code has no application to this case. It relates only to county officers. Nor does the case of *People v. Ross*, 38 Cal. 76, apply. That case related to a county officer. Ross was sheriff of Kern county and was made by statute tax collector by virtue of his office of sheriff. But the court held that these offices were made separate and distinct offices by the constitution, and, therefore, a bond had to be given for each office. On this provision of the constitution the case turned, as is plainly apparent, from what is said in the opinion in relation to *People v. Edwards*, 9 Cal. 286, that since the decision in that case "the offices of sheriff and tax collector, under the constitution, are separate and distinct offices." *Lathrop v. Brittain*, 30 Cal. 680, goes on the same grounds as *People v. Edwards*. There is nothing in *People v. Love*, 25 Cal. 521, in conflict with what is said herein.

It follows from the foregoing that the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

v.9p.no.8—36

68 Cal. 515

TOWN OF REDWOOD CITY v. GRIMMENSTEIN. (No. 8,643.)

Filed January 30, 1886.

REDWOOD CITY—TOWN MARSHAL'S SALARY.

The salary of the town marshal of Redwood City, allowed by the California act of March 30, 1874, § 19, is in full for the discharge of all the official duties devolving upon him, including that of collecting taxes.

Department 2. Appeal from superior court, county of San Mateo.
Fox & Ross, for appellant.

Kincaid & Fitzpatrick, for respondent.

THORNTON, J. The questions to be decided in this case have all been determined adversely to respondent in appeal of same title, No. 8,642, except one, which is whether the defendant Grimmerstein is entitled to commissions on the amount of taxes collected by him as marshal of Redwood City, and, by virtue of the office of marshal, tax collector of said city during the fiscal year 1881-82. We are of opinion that he is not. He held but one office, that of marshal, and by virtue of holding that office he became tax collector. By section 19 of the act of March 30, 1874, (see St. 1873-74, p. 957,) the marshal is allowed a salary of \$200 per year, payable out of the general fund. By section 13 of the same act (see page 954) it is provided that "the marshal shall be *ex officio* tax collector."

We are of opinion that it was the intention of the legislature that the marshal should receive in compensation for the discharge of all duties devolved upon him by law, including that of collecting the taxes, the sum of \$200, and nothing more. Nor do we perceive that this is changed by the fact that he is made *ex officio* tax collector, and invested by the act (section 13, p. 954) "with the same power and authority conferred on tax collectors of state and county taxes, and shall be governed by the laws of this state now or hereafter in force, except in so far as his duties shall be regulated or modified by ordinance." We understand these last provisions as referring only to his power and authority and the exercise thereof in the discharge of his duties, and to have no reference to the compensation he is to receive. This is controlled by section 19 of the act, which, in our judgment, fixes his compensation for all services he may render. See *New Orleans v. Finnerty*, 27 La. Ann. 681; S. C. 21 Amer. Rep. 569.

It follows from the foregoing that the judgment and order must be reversed, and the cause remanded, with directions to enter judgment for the plaintiff for the sum of \$547.88 and costs of suit. Ordered accordingly.

We concur: MYRICK, J.; SHARPSTEIN, J.

TOWN OF REDWOOD CITY v. GRIMMENSTEIN. (No. 8,642.)

Filed February 1, 1886.

OPINION MODIFIED.

Department 2. Appeal from superior court, San Mateo county.

The opinion modified hereby is the one rendered January 30th, and reported *ante* 560.

Fox & Ross, for appellant.

Kincaid & Fitzpatrick, for respondent.

BY THE COURT. It is ordered that the opinion heretofore filed in this cause be modified by striking out the words "for a new trial" in the last sentence of said opinion, and inserting in lieu thereof the following, viz.: "And the court below directed to enter judgment in favor of plaintiff and against defendants for the sum of \$547.88 and costs of suit." And said opinion as thus modified stand as the judgment of this court.

SUPREME COURT OF CALIFORNIA.

38 Cal. 398

WIGGIN v. SUPERIOR COURT. (No. 11,230.)

Filed January 27, 1886.

EXECUTORS AND ADMINISTRATORS—SETTING ASIDE FINAL DISCHARGE.

The superior court, sitting as a probate court, has, independently of statute, full power to set aside and annul a decree of final discharge of the administrator of a decedent's estate, where made and entered inadvertently; and, having jurisdiction so to do, error, if committed, cannot be corrected on a writ of prohibition.

Commissioners' decision.

Department 1. Application for writ of prohibition.

William Reade, for petitioner.

Charles F. Hanlon, for respondent.

SEARLS, C. This is an application for a writ of prohibition against the judge of the superior court (department 9) in and for the city and county of San Francisco, commanding him to desist from further proceedings in the matter of the estate of Hannah Murphy, deceased, upon the ground that the threatened action of said court is in excess of its jurisdiction. Samuel B. Wiggin, the petitioner, was the administrator of the estate of Hannah Murphy, deceased. On the nineteenth day of January, 1885, the superior court settled the final account of the administrator, and entered a decree of distribution of the property of the estate remaining in his hands. On the twenty-sixth day of January, 1885, a decree of final discharge of petitioner as administrator was entered in the usual form in such cases. On the twenty-seventh day of January, 1885, on the application of counsel for certain of the heirs of deceased, the court made an order setting aside and vacating the decree of final discharge, reciting therein that the decree of final discharge was entered and "made inadvertently, and *ex parte*," and further ordering that the application of petitioner for a final discharge be heard January 28, 1885. Thereafter, and on the nineteenth day of May, 1885, the court issued an order for petitioner to show cause why he should not pay certain moneys ordered to be distributed to the heirs, or be dealt with by the court for disobedience to the decree of distribution. Petitioner appeared and objected to the jurisdiction of the court, contending that by the decree of final discharge of January 26th the court lost all jurisdiction over the matter, and the court, disregarding the objection, and being about to proceed in the premises, this application is made.

The question turns upon the authority of the court to set aside and annul the decree of final discharge of the petitioner as administrator. If the court had jurisdiction to annul that decree, its authority to proceed in the cause as if no discharge had been granted, to enforce its

decree of distribution, and to punish petitioner for contempt if he shall contumaciously refuse to obey the orders of the court for the payment to heirs of the moneys in his hands, and decreed to be paid to them, cannot be successfully contradicted. In *Ex parte Smith*, 53 Cal. 204, this court held that disobedience of an order of final distribution of an estate is contempt of court within the meaning of section 1209 of the Code. If, on the other hand, the court lost all power by the decree of final discharge of January 26th, and had no jurisdiction for any cause to set aside and annul that decree, then its subsequent acts were *coram non judice*, and void. In a direct appeal from a judgment or order the recitals therein are not conclusive, and may be contradicted by other portions of the record. *McKinlay v. Tuttle*, 42 Cal. 571. But in a collateral attack on a judgment of a court of superior jurisdiction the recitals are presumed to be correct, and every intendment will be indulged in its support. *Drake v. Duvenick*, 45 Cal. 455; *Hahn v. Kelly*, 34 Cal. 391.

As this is not an appeal from the order setting aside the decree of final discharge, but a collateral attack thereon, we must assume as true the statements contained in the order, which are that the decree of final discharge of the petitioner was made "inadvertently and *ex parte*." Has the superior court jurisdiction to set aside a decree thus made? We think the question must be answered in the affirmative.

We understand the rule of the common law, and of this state alike, to have been that a court of record having general jurisdiction was master of its entire proceedings, and, except as limited by some statute, could change, modify, amend, annul, and strike out therefrom such portions as it deemed necessary and proper to secure the ends of justice, so long as they remained *in fieri*; second, that when a case had proceeded to final judgment the court still retained power over, and could vacate, modify, or amend, it until the expiration of the term at which it was rendered; third, that upon the expiration of the term all power of the court over its judgments ceased, unless reserved by statute, or by some appropriate action on the part of the court itself. To these general rules there was the exception that clerical errors and misprisions with reference to the entry of judicial proceedings could be corrected by the court after the expiration of the term at which judgment was entered, provided the record showed the mistake. *Hastings v. Cunningham*, 35 Cal. 550; *Bell v. Thompson*, 19 Cal. 706; *Baldwin v. Kramer*, 2 Cal. 582; *Robb v. Robb*, 6 Cal. 21; *De Castro v. Richardson*, 25 Cal. 52; *Carpentier v. Hart*, 5 Cal. 406; *Blackamore's Case*, 4 Coke, 156.

The theory upon which this doctrine proceeded in the English courts was that during the term the record was in the breast or knowledge of the judges, and not in the roll, and it was not until the term closed that the record was made up and completed, after which it could not be disturbed. Our constitution and Code have abolished terms of court, and the rules which formerly prevailed for the correction

of errors and irregularities cannot, as to time, be literally applied. By section 473 of the Code of Civil Procedure it is provided that most of the relief which formerly could only be granted before or at the term during which final judgment was rendered must be sought within a reasonable time, and in all cases within six months, after the judgment order or proceeding complained of is entered. So, too, by section 937 of the Code of Civil Procedure "an order made out of court without notice to the adverse party may be vacated or modified without notice by the judge who made it; or may be vacated or modified on notice in the manner in which other motions are made."

But independent of statutory provisions, we are of opinion the court has power to correct mistakes in its proceedings, and to annul, within a reasonable time, orders and judgments inadvertently made. To illustrate: suppose a judgment is taken upon a default prematurely entered, or a judgment is inadvertently entered in favor of defendant where it was intended to be in favor of plaintiff, or that for any one of a hundred reasons which might be supposed the court has accidentally or inadvertently entered orders or decrees not in consonance with its judgment or with law, and from which rank injustice must follow, can it be contended the court has no power, when within a day it discovers the mistake, to correct the error, and that the injured party must be remitted to an appeal for remedy? We think not. Where the judgment of a court has been deliberately exercised in a cause, and a final result reached as a conclusion thereof, there are good reasons why it should not be disturbed, except by the formal methods prescribed by statute; but rulings, orders, and even judgments inadvertently made are not the result of judgment, but of oversight, neglect, or accident, and are subject to correction by the judge or court making them. *Hall v. Polack*, 42 Cal. 218.

We are of the opinion that the court had jurisdiction to set aside its order or decree discharging petitioner from his office of administrator, upon the ground that such decree had been inadvertently made and entered; and that having power so to do, if error was committed it cannot be corrected by means of a writ of prohibition, which only issues to arrest "the proceedings of any tribunal, corporation, board, or person, * * * when such proceedings are without or in excess of the jurisdiction," etc. Code Civil Proc. § 1102; *People v. Whitney*, 47 Cal. 584; *Bandy v. Ransom*, 54 Cal. 87; *Central Pac. R. Co. v. Placer Co.*, 43 Cal. 368; *People v. Supervisors Kern Co.*, 47 Cal. 81.

The application of petitioner should be denied.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the writ is denied.

2 Cal. Unrep. 629

COHEN v. MITCHELL and others. (No. 9,357.)

Filed January 27, 1886.

1. CONFLICTING EVIDENCE—FINDINGS.

Where there is a conflict in the evidence, the judgment will not be reversed on the ground that the findings are not supported by the evidence.

2. FINDINGS—EVIDENCE.

Findings reviewed, and *held* not supported by the evidence.

Commissioners' decision.

Department 1. Appeal from superior court, county of Calaveras. *Lloyd & Wood*, for appellant.

E. A. Rogers, John A. Wright and McAllister & Bergin, for respondents.

BELCHER, C. C. On the eleventh day of November, 1873, Cohen owned one-third and Mitchell two-thirds of the Bonny placer mine. Cohen had become indebted to Mitchell in the sum of \$5,000, and on that day, for the expressed consideration of that sum of money, conveyed to him his one-third interest by a deed absolute in form. The deed was intended to be only a mortgage, as is clearly shown by the paper executed by Mitchell on the twenty-fourth of January, 1874, wherein he declares that he holds the title to the undivided third of the mine in trust for Cohen, and agrees to reconvey it to him upon payment of his indebtedness of \$5,000, with interest thereon from the eleventh day of November, 1873, until paid, at the rate of 1 per cent. per month, the payment to be made upon demand; and, if not so made, that judgment should be obtained for the amount found due, and 3 per cent. counsel fees, with costs of suit for foreclosure, should be included in the judgment. Upon this paper Mitchell made an endorsement, some time in the summer of 1875, as follows: "I hereby agree to extend the within document for one year, or till the claim is sold." Mitchell died on the eighth day of February, 1882, no reconveyance having been made to Cohen, and this action was commenced on the eighteenth day of April, 1882. In the complaint it is alleged that after the conveyance of November 11, 1873, Mitchell held the legal title to the one-third interest in the mine, in trust for the plaintiff, and was to reconvey it to the plaintiff upon payment by him to Mitchell of the sum of \$5,000, with interest thereon at the rate of 1 per cent. per month; that he (plaintiff) had before Mitchell's death paid to him the full amount of the \$5,000, and interest, and was entitled to a reconveyance, but by his consent Mitchell continued to hold the legal title in trust for him, and so held it at the time of his death. The prayer is for a judgment that plaintiff is the owner of a one-third interest in the mine, and that the defendants be required to execute to him a good and sufficient deed therefor. The defendants, by their answer, deny that any part of the \$5,000, or the interest thereon, was ever paid by Cohen to Mitchell, and they allege that his cause of action is barred by the provisions of section

346 of the Code of Civil Procedure. The court below found that no part of the debt had ever been paid, and that since the eleventh of July, 1876, and until the eighth day of February, 1882, Mitchell had been in the sole and exclusive possession and ownership of the Bonny mine, holding and claiming the same during all that time adversely to Cohen.

1. There was testimony tending to show that the debt had not been paid, and we cannot reverse the judgment upon the ground that the finding upon this question was not justified by the evidence.

2. Section 346 of the Code of Civil Procedure reads as follows:

"An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage."

After carefully reading all the testimony presented in the transcript, we are unable to find anything to justify the finding that Mitchell continuously maintained an adverse possession of the mortgaged premises for five years before his death. Mitchell was at the mine in Calaveras county, managing and working it, and Cohen was in San Francisco. From 1875 to 1880 frequent correspondence was kept up between them in reference to the working of the mine, cleaning up the gold, procuring and paying for supplies, trying to find a purchaser, etc. In none of the letters do we see any evidence of an adverse holding by Mitchell, but, on the contrary, the most intimate and friendly relations seem to have been maintained between them. In July, 1876, Mitchell wrote to Cohen, and, speaking of getting pipe needed in the mine, said: "Now I leave it to you whether we get Smith or Wing to make it. The sooner we get it the better." In July, 1877, Mitchell wrote, and, speaking of the sale of the mine, said:

"I have received yours of the 10th, and one letter from Mr. Eells. He says he has made sale, and getting his business fixed as fast as he can; and I think we should give him a little time, as it would ruin him for us to make other arrangements. I would take pleasure in showing any one our claim, but could not go into arrangements with any one else for a little while."

In December, 1877, Mitchell wrote, and after saying that he had not heard a word from Eells for a long time, and he supposed he had failed in his undertaking, he said:

"We will have to raise some money on the claim, or some other way, for I must have some to work with, for I cannot afford to wait any longer to make sale of the claim. So please think about it, so as we get at the best plan to get it."

In March, 1878, he wrote:

"I heard from Mr. Eells about a week ago, and he said he had his company formed, and I expect to see him soon, or hear from him again."

In February, 1880, he wrote:

"Mr. Kline has been here, and I showed to him the claim, and he has returned, and I expect you have seen him and found out what he thinks of it, and what he expects to do."

On the twenty-second day of August, 1877, Mitchell and Cohen signed a paper, in which they recited that on the eighth day of February, 1877, they had agreed in writing to sell and convey unto John S. Eells, upon certain terms and conditions, the Bowling Green and Bonny mining claims, and had extended the time for the performance of the terms of the agreement until the first day of November, 1877, and then agreed if the sale should be effected to pay back to Eells a large percentage of the purchase money.

Mrs. Mitchell was called as a witness for the defendants, and testified that in December, 1876, she heard her husband say to Cohen, at Vallecito: "I want you to pay me the \$5,000 and interest you owe me, when we get cleared up." And again, in January, 1877, she heard them talking in San Francisco, and Mitchell said to Cohen: "I want you to pay me the \$5,000 and interest you owe me." Kline, a witness called for defendants, testified that "on the second day of November, 1881, or the next day afterwards, and when Mitchell had secured the conveyance of the claim from the Bonny Mining Company, he said to Cohen, in my presence: 'I have got it back, and I now demand pay for the last time.'" It is clear that this evidence—and we see nothing in conflict with it—is wholly inconsistent with any theory that Mitchell was holding the possession of Cohen's one-third of the mine adversely to him. It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

2 Cal. Unrep. 633

HARTER v. DONAHOE. (No. 11,138.)

Filed January 29, 1886.

SALES—IMMEDIATE DELIVERY AND CHANGE OF POSSESSION.

Where a sale is not accompanied by an immediate delivery and continued change of possession, it is void as against the vendor's creditors.

Department 1. Appeal from superior court, county of Fresno.

Grady & Merriam, for appellant.

Sayle & Harris, for respondent.

By THE COURT. The evidence showed that there was no such immediate delivery and continued change of possession of the property in question as required by statute to make valid the transfer to plaintiff. Civil Code, § 3440.

Judgment and order reversed, and cause remanded for a new trial.

68 Cal. 495

BALDWIN v. ELLIS, Tax Collector, etc. (No. 11,221.)

Filed January 29, 1886.

1. TAXES—BOARD OF EQUALIZATION—POWER OVER TAXES FOR COUNTY PURPOSES.

The California state board of equalization has power to increase or lower the assessment rolls of the several counties so as to affect taxes levied for county purposes.

2. PLEADING—ALLEGATION OF OFFICIAL CHARACTER OF DEFENDANT.

Where a tax collector in his official capacity is defendant, the complaint should allege the fact of his being such officer, and an omission of such allegation in the statement of one cause of action is not cured by an allegation thereof containing such other causes of action as may be joined in the same complaint.

Commissioners' decision.

In bank. Appeal from superior court, county of Los Angeles.

Wells, Van Dyke & Lee, for appellant.

Stephen M. White, for respondent.

FOOTE, C. The plaintiff instituted this action with the object in view of recovering a sum of money alleged to have been illegally exacted from him as taxes by the defendant, as tax collector of Los Angeles county. A general demurrer was interposed to each of the alleged causes of action set out in the complaint, and being sustained, and the plaintiff declining to amend his pleading, judgment passed for the defendant, and from that this appeal is prosecuted.

The demurrer was properly sustained to the second cause of action set out at folio 75 of the transcript, for the reason that the action was brought against the defendant as tax collector, and not as an individual; and, therefore, in order that a judgment could properly be obtained against him as such, the allegations in that statement of the cause of action should have averred the fact of his being such officer. There is an allegation of the necessary kind in the first cause of action, but none in the second. These two must stand or fall by reason of their several recitals; and, in the absence in one of any special reference to anything contained in the other, cannot be aided by anything save what is in itself averred. *Haskell v. Haskell*, 54 Cal. 262.

The main question involved in the case is this: Has or not the state board of equalization the lawful right to increase or lower the assessment roll of the county of Los Angeles, so as to affect taxes for county purposes? The appellant's contention is that it has no such power granted by law; that its rightful action affects the said roll only so far as state taxes are concerned. By section 3650 of the Political Code the county assessor must prepare an assessment book under the direction of the state board of equalization. Under section 3655, same Code, it is made his duty to transmit a summary of his assessment to that board on the first Monday in July of each year. The board of supervisors of each county, acting as a board of equalization, must meet on the first Monday in July in each year,

and must perform its duties as such, as prescribed in section 9, art. 13, of the state constitution, which were accurately defined in *Wells v. Board of Equalization*, 56 Cal. 198, speaking of the powers thereby granted to the county and state boards, as follows: “* * * And conferring on the local boards, the county boards, the power only to increase or lower the individual assessments upon the roll of their respective counties, and thus to make them equal with each other, and equivalent to the value in money of the property assessed.”

After the county board acts within its own particular sphere, and completes its work by the third Monday in August of each and every year, then the state board must meet, under section 3692 of the Political Code, subds. 8, 9, to “remain in session from that date until the third Monday in September, Sundays excepted;” and “at such meeting to equalize the valuation of the taxable property of the several counties in this state for the purpose of taxation; * * * to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value in money of the property assessed,” etc. And there is no language used in that section which can be construed into meaning that the power of said board is limited to the raising or lowering of the assessment roll for state purposes alone.

Under section 3695 of the Political Code it then becomes the duty of the clerk of the state board to notify the various clerks of the boards of supervisors of the several counties of the action of the former body. By section 3696, Id., it is made incumbent upon the state board, between the first and third Mondays in September, to fix the rate of state taxation, and give due notice thereof to the board of supervisors and auditor of each county; and such auditor, upon receiving a statement of the alterations thus made in the assessment roll of his county, must make corresponding changes by entering the same in a column provided with a proper heading, etc. Section 3730, Id. By section 3731, Id., the same county official must make certain entries, footings, and computations in the assessment book. In neither of the sections last mentioned is there any language employed which implies that there are to be *two* valuations upon property,—one for state and the other for county purposes. By section 3714, Id., it is made the duty of the county board of supervisors, on the first Monday in October of each year, to “fix the rate of county taxes;” and the date of this action by them is after the time when the state board of equalization has ordered placed upon the assessment roll the *true value* of *all property* subject to taxation, if it acts at all, either in raising or lowering the said roll.

If it was not the scheme of the law that there should be but one true valuation, and that the one fixed by the state board, why the enactment that the county board should fix the rate of taxation after the former board has acted? It would seem as if this was the true

rule of law in the matter, as then only can it be definitely known upon what total amount the rate of taxation is to be based; and a tax-payer cannot be damaged under this construction of the statutory enactments, for if the valuation were less, the percentage of taxation would be of necessity larger, and if by the action of the state board the valuation be higher, the percentage necessary to meet county and state expenses would be less. Section 3627 of the Political Code enacts that all taxable property must be assessed at its full cash value. If the appellant's theory of the law be the proper one, then there must be *two* cash valuations of the same piece of property,—one for state and another for county purposes. There can be no real need of a state board of equalization, unless its main function be to ascertain and declare, as near as possible, the true valuation of taxable property.

This court in *People v. Dunn*, 59 Cal. 330, quoting its language in the case of *Wells v. State Board of Equalization*, 56 Cal. 194, said “* * * that the power of the state board is to equalize the assessment rolls of the various counties by comparing the assessment roll of each county with the roll of each and all of the others, and thus to make the assessment conform to the *true value in money* of the property contained in the respective rolls.” Also in the same case and page this language was used: “The object which the constitution seeks to attain is that the assessments shall be made to accord with the true value in money.” We cannot understand how it can be held in the light of such words that “the true value in money” means “*two* true values in money,” which seems to be appellant's contention here.

By section 1837, Deering's Pol. Code, it is provided that “the rate of taxation shall be ascertained by deducting 15 per cent. for anticipated delinquencies, from the aggregate assessed value of the property in the district, as it appears on the assessment roll of the county, and then dividing the sum voted by the remainder of such assessed value;” and this same section provides that this rate must be so fixed at the time the levy of taxes is made. Here one assessment only is spoken of, and this must mean the one about which everything has been done, as contemplated by the statute, to make it complete. Upon the whole case it appears that the manifest intention of the law is that when the state board raised the total value of the assessment roll of Los Angeles county it was done for all taxable purposes, as well county as state, and that the plaintiff has only paid to the tax collector of that county, sued in this action, the amount of money which it was incumbent upon him to do.

The judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

68 Cal. 439

PEOPLE v. HOLLADAY and others. (No. 8,501.)

Filed January 28, 1886.

SAN FRANCISCO — TITLE TO LAFAYETTE PARK — EFFECT OF JUDGMENT AS ESTOPPEL.

In an action on behalf of the people to cause the removal of certain buildings and fences maintained by defendants upon a tract of land in San Francisco, alleged in the complaint to be a public square, and to have been dedicated as such, and designated upon the official map of San Francisco as a public square, under the name of "Lafayette Park," the defendants in their answer set up as a bar to the action a judgment given in another action commenced on behalf of the people, for the same purpose, in November, 1863, issue in such action having been joined on the twenty-first of April, 1864, and the judgment in which was rendered on the eleventh of July, 1864, wherein it was held that no dedication of such land had ever been made, but that at the time of such action such land was the private property of the defendant Holladay. *Held*, that such judgment was not a bar to the present action, because at the time the former action was commenced, and at the time issue therein was joined, the legal title to the land was in the government of the United States, and did not pass from it until the passage of the act of congress of July 1, 1864, and then only in trust for the uses and purposes specified in the ordinances of the city and county of San Francisco, which were ratified by the act of the legislature of date March 11, 1858, and that the title which passed to the city and county of San Francisco by the act of congress of July 1, 1864, was unaffected by the judgment pleaded in bar herein, (1) because it was acquired long after issue in the action in which that judgment was rendered was joined and the cause submitted for decision, and was not put in issue therein; and (2) because the attorney general of the state had no power to submit to the determination of any tribunal the title of the government of the United States.

In bank. Appeal from superior court, city and county of San Francisco.

John L. Love and William Matthews, for appellant.

S. W. Holladay and Mastick, Belcher & Mastick, for respondents.

Ross, J. This action was instituted at the relation of A. J. Bryant, by the attorney general of the state in the name of the people, to cause the removal from a tract of land, designated upon the map of the city and county of San Francisco as "Lafayette Park," certain buildings and fences maintained thereon by the defendants. The complaint alleges that the land in question was "heretofore, to-wit, on the eleventh day of March, A. D. 1858, by the lawful owner and holder thereof, lawfully dedicated to public use as a public square by the name of 'Lafayette Park,' and such dedication accepted by the public, and then was and still is laid down upon the official map of said city and county as a public square, as aforesaid." It is also averred that the defendants maintain buildings and fences on the land which constitute a public nuisance. In their answer the defendants admit the maintenance of the buildings and fences, deny that the land ever was dedicated to public use, or that it ever was a public park; and, in addition, set up in bar of the action the judgment given in a certain action commenced by the attorney general, on the sixteenth of November, 1863, in the name of the people, at the relation of George T. Bohen, against the defendants and their

predecessors in interest. The complaint in that case averred that the said tract of land called "Lafayette Park" had been theretofore dedicated and accepted by the public as a public square; that the defendants were erecting and maintaining fences and other improvements thereon, and asked that those erected be removed, and defendants be enjoined from erecting or maintaining others. On the twenty-seventh of November, 1863, the defendants filed their answer in the action, in which they denied the alleged dedication, and averred title in themselves to the premises. The issue thus joined was on the twenty-first of April, 1864, submitted to the late Fourth district court for its decision; and on the eleventh of July, 1864, that court rendered its judgment, by which it was adjudged that no such dedication as was alleged in the complaint was ever made, but that, on the contrary, the property in question was at the time of the commencement of that action, and at the time of the trial thereof and judgment therein, the private property of the defendant Holladay.

The question now before us is whether or not the judgment just referred to is a bar to the present action. It is urged on behalf of the people that this cannot be so, because at the time the former action was commenced, and at the time issue therein was joined, the legal title to the land was in the government of the United States, and did not pass from it until the passage of the act of congress of July 1, 1864, and then only in trust for the uses and purposes specified in the ordinances of the city and county of San Francisco, which were ratified by the act of the legislature of date March 11, 1858. There can be no doubt that to the extent just stated, at least, the counsel for the plaintiff are correct. "The nature of the title of San Francisco to her pueblo lands," said the supreme court of the United States in *Palmer v. Low*, 98 U. S. 16, "has often been the subject of consideration in this court, and was carefully stated by Mr. Justice FIELD in *Townsend v. Greeley*, 5 Wall. 326, and *Grisar v. McDowell*, 6 Wall. 363. At the time of the conquest the pueblo, of which the city of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portions of those lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. 'It was a right which the government might refuse to recognize at all, or might recognize in a qualified form.' 6 Wall. 373. Upon the conquest the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadalupe Hidalgo. As before that time the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the treaty which followed. Before, therefore, the estate of the pueblo could become absolute and indefeasible, some action was required on the part of the United States. It is conceded that this action was not taken until the act of July 1, 1864. Down to that time the city held under its original imperfect Mexican title only; afterwards it

was possessed of the fee 'for the uses and purposes specified' in the Van Ness ordinance."

There are numerous decisions of this court to the same effect. The title which passed to the city and county of San Francisco by the act of congress of July 1, 1864, was unaffected by the judgment pleaded in bar herein—*First*, because it was acquired long after issue in the action in which that judgment was rendered was joined and the cause submitted for decision, and was not put in issue therein, (*People's Sav. Bank v. Hodgdon*, 64 Cal. 95; *Valentine v. Mahoney*, 37 Cal. 396;) and, *secondly*, because the attorney general of the state had no power to submit to the determination of any tribunal the title of the government of the United States.

The title which the government of the United States conveyed to the city of San Francisco by the act of congress of July 1, 1864, was, as the act itself recites, conveyed for the uses and purposes specified in the ordinances of the city that were ratified by the act of the legislature of the state approved March 11, 1858. To hold the public squares of the city in trust for the use of the people was among those purposes. If the particular piece of land in controversy had been, prior to the passage of the act of congress of July 1, 1864, dedicated by the city as a public square, congress, "by granting and relinquishing the title of the United States to the city, for the uses and purposes mentioned in the act of March 11, 1858, ratified and confirmed the dedication, and made it operative upon the legal title as well as such title as the city held prior to the act of July 1, 1864, and this virtually perfected the dedication." *Hoadley v. San Francisco*, 50 Cal. 274. To hold that the plaintiffs are concluded by the judgment pleaded in bar from showing that there was a dedication to which the title conveyed by the act of 1864 related, and which it perfected, would be in effect to hold the title conveyed by the act of 1864 concluded by the former judgment, which, for the reasons already given, is not the case.

Our conclusion is that the judgment of the court below holding the plaintiffs estopped by the judgment given in the action commenced in 1863 is erroneous.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKEE, J.; MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

68 Cal. 419

CERF and others v. ASHLEY and others. (No. 8,795.)

Filed January 28, 1886.

1. FORECLOSURE OF MORTGAGE—PARTIES TO ACTION.

In an action to foreclose a mortgage the original mortgagees, and a party to whom the mortgage has been assigned to secure a debt of the mortgagees, may be joined as plaintiffs; and if at the commencement of the action the latter is not a party, he may be brought in by amendment.

2. SUIT IN EQUITY—JOINDER OF PARTIES.

In an equitable suit the assignee of the legal title may ordinarily be joined with the party who retains the equitable right, as both have an interest in the relief demanded.

3. FORECLOSURE OF MORTGAGE—PROOF OF INDEBTEDNESS—EVIDENCE.

In an action to foreclose a mortgage, where the note to secure which the mortgage is given is recited in the complaint, and the averment as to its contents and due execution is not denied in the answer, proof of such debt is dispensed with.

4. EQUITABLE ACTION—APPORTIONMENT OF COSTS.

In a suit in equity costs may be apportioned by the court.

Department 1. Appeal from superior court, county of Santa Cruz.

F. Adams and Z. N. Goldsby, for appellants.

A. E. Bolton, for respondents.

McKINSTRY, J. The action is to foreclose a mortgage executed May 23, 1878, by Otis and Sarah A. Ashley, to secure their promissory note of even date therewith. It is claimed by appellants that the mortgagees had no interest in the note and mortgage when the action was commenced. On the nineteenth December, 1878, the mortgagees assigned to "E. L. Williams, trustee for E. H. Watson," the said note and mortgage of defendants Otis and Sarah Ashley to secure the payment of a note of the mortgagees, (Cerf, Blockman, and Blum.) The original complaint was filed November 6, 1879, by Cerf, Blockman, and Blum, and contained no reference to their transaction with Williams. January 29, 1880, an amended complaint was filed, with leave of the court, and with the consent of Williams, (who verified the same,) in which E. L. Williams, trustee, is made co-plaintiff with the original plaintiffs. The amended complaint sets forth the assignment to Williams, and that the same was as security for the payment to him of the note of Cerf, Blockman, and Blum.

Williams might properly have been joined as plaintiff in the original complaint, the suit being in equity. "All persons having an interest in the subject-matter, and in the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title." Code Civil Proc. 378. The Code allows, in case of a transfer of a *part* of the subject-matter, the transferee to be joined as plaintiff with the original plaintiff. "In case of a transfer * * * of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." Code Civil Proc. 385. It would be too narrow a construction of this section to hold that it applies only where the transfer is of the entire interest.

By Section 369 of the Code of Civil Procedure it is provided: "A trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted." Williams was not a trustee of an express trust, but if he were, the Code only *permits* the non-joinder. In a suit in equity the assignee of the legal title may ordinarily be joined with the party retaining an equitable right. Both have an interest in the relief demanded. The court below did not err in allowing the amended complaint.

Appellants contend that the fifth and sixth findings are not sustained by the evidence, and that the seventeenth and eighteenth findings are without any issues that can be made in this action. The findings are not numbered, and this of itself would be sufficient reason why these points could not be maintained; but assuming that the references in the brief of counsel are to findings mentioned in the enumeration of particulars wherein the evidence is claimed to be insufficient, at the end of the statement on motion for a new trial, the objections of appellants are not such as should be sustained.

It is said that the debt to secure which the mortgage was given was not proved at the trial, and therefore neither should the mortgage have been admitted in evidence, nor should plaintiffs have had decree in their favor. But the note of the mortgagors was recited in the complaint, and the averment as to its contents and due execution was not denied in the answers. The ascertainment of the amount due was a mere matter of arithmetic. The inquiry with respect to the consideration of the note given by the mortgagees to Williams, or as to the consideration for the assignment, could not have injured the defendants. These were things which did not concern the defendants, except, *perhaps*, as to the matter of costs, and in an equity suit the costs may be apportioned by the court. It was necessary for the court to ascertain the amount due from the mortgagees to Williams in order to provide in the decree for the proper distribution of the proceeds of the sale of the mortgaged premises.

Judgment and order affirmed.

We concur: McKee, J.; Ross, J.

1. UNIVERSITY LANDS—RIGHT TO PURCHASE—PLEADINGS.

In a contest to determine the right to purchase lands from the University of California, under the act of March 13, 1874, the plaintiff is not entitled to a judgment on the pleadings if the answer denies material allegations of the complaint.

2. SAME—RIGHT TO PURCHASE MUST BE PROVED.

In a contest to determine the right to purchase university lands, under the

California act of March 13, 1874, each party is an actor, and must allege and prove all facts on which he relies as showing his right to purchase, and as evidence of the steps which he has taken to avail himself of his right to make the purchase.

Department 1. Appeal from superior court, county of Monterey. *S. F. Geil, H. V. Morehouse, and R. H. Willey*, for appellant. *William Shipsey*, for respondent.

McKEE, J. A contest having arisen in the land-office of the university of the state between two opposing applicants to locate and purchase a tract of land in Monterey county, described as the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 6, in township 18 S., range 1 E., Mount Diablo base and meridian, the land agent of the university, under the provisions of an act entitled "An act concerning the selection and sale of university lands," approved March 13, 1874, and amended April 9, 1880, (Deer. Pol. Code, 354,) made an order referring the contest to the superior court of Monterey county for hearing and determination. Pursuant to the order, Volney Cushing, the first applicant, commenced an action in said court against the adverse applicants, Jackson and Charles Keslar. Each of them appeared in the action and filed an answer. The answer of Jackson contained a disclaimer of any right to purchase the land, and the answer of Charles contained certain denials of the allegations of the complaint. Upon these pleadings the plaintiff in the action submitted the case for decision; and the court, without hearing any evidence, decided that the plaintiff was entitled to purchase the land, and that the defendant Charles was not, and gave judgment accordingly in favor of the plaintiff against the defendant Charles for costs.

We think the judgment was irregular and erroneous; for although the answer of Charles was, in form and matter, in many respects objectionable, it contained such denials of material facts as imposed upon the plaintiff the burden of proof before judgment could be rendered. The objectionable parts of the answer were denials of allegations assumed to have been made between lines in the complaint which the pleader designated by numerals; but the lines in the complaint, as it appears in the record, are not numbered, and the particular matter which the denials were intended to controvert is not apparent,—*quod non apparent non est*. The denials were therefore bad in form and insufficient in substance. An answer should either directly deny the facts as alleged, or confess and avoid them; otherwise it is, as a pleading, ambiguous and evasive. But the answer did deny the allegation of the complaint that the land involved in the contest had been selected by the land agent of the university as part of the 150,000 acres of land granted to the state for an agricultural college; also the allegation that there were no improvements on the land when the plaintiff filed his application to purchase it; and it affirmatively averred "that said plaintiff well knew that when he made his application for said land that there were improvements on

the same consisting of a small house and fences, the property of the defendant Charles Keslar." These denials were sufficient to put the plaintiff to proof of his allegations of the selection of the land, and of his right to purchase it. *Tyler v. Houghton*, 25 Cal. 26.

Even if the court could assume from the pleadings that the land agent of the university, under the provisions of sections 3533, 3534, Pol. Code, had selected the land as a portion of the agricultural college lands, subject to sale by the regents of the university, yet the plaintiff was bound to prove that he was qualified to purchase. For that purpose the law required that he must state in his affidavit "that there are no improvements of any kind on the land other than those of the applicant." That statement was made in the affidavit filed by the plaintiff on the seventeenth of June, 1881; but subsequently, on the fifth of July, 1881, he filed another affidavit, in which it was stated "that there were no improvements on said land except an abandoned cabin, some pickets driven in the ground, which improvements are the property of Charles Keslar, and have been upon the land for three months or over, and that the township has been sectionized, and the plats of survey filed in the land-office of the district in which the land is located, for three months or over;" and in his complaint he alleged "that the improvements are not and never were on said land." The allegations were specifically denied, and it was necessary for the plaintiff to prove them.

But it is contended that as the defendant by his answer did not claim to be an applicant to purchase the land, he abandoned his right by failing to assert it, and that, in consequence, the plaintiff was entitled to judgment upon the pleadings. The complaint, however, contains the allegations "that on, to-wit, the sixth day of December, A. D. 1881, the defendants, Charles and Jackson Keslar, made a joint application to purchase the aforesaid land from said state under the laws herein referred to, and that they now pretend and claim that they have a right to purchase the same, and that this plaintiff has no right to make a purchase thereof. Plaintiff alleges that defendants' said claims and pretenses are wholly unfounded and untrue, and that plaintiff has a right to purchase said land from said state under said laws, but that defendants have no such right;" and these allegations are not denied. Now, while it is true, in ordinary cases, that when an answer admits or leaves undenied the material facts which constitute a cause of action stated in a complaint, judgment may be rendered on the pleadings, (*Farish v. Coon*, 40 Cal. 34; *Hicks v. Lovell*, 64 Cal. 14; *Felch v. Beaudry*, 47 Cal. 183; *Amador Co. v. Butterfield*, 51 Cal. 526,) yet, in a proceeding arising out of a contract referred to a proper court for determination as to conflicting rights to purchase lands from the state, each party is an actor, and must allege and prove all the facts upon which he relies as showing his right to become a purchaser from the state, and the steps he has taken to avail himself of and secure his right to make the purchase.

Caderque v. Duran, 49 Cal. 356; *Ramsey v. Flournoy*, 58 Cal. 260; *Dillon v. Saloude*, 9 Pac. Rep. 162.

It follows that the court erred in rendering judgment on the pleadings.

Judgment reversed, and cause remanded for further proceedings.

We concur: Ross, J.; McKINSTRY, J.

70 Cal. 461

PEOPLE v. CITY OF RIVERSIDE. (No. 11,233.)

Filed January 30, 1886.

1. MUNICIPAL CORPORATION—ESTABLISHMENT OF.

The propriety of establishing a municipality, and including within its boundaries particular territory, is a matter for the legislative department of the government. Courts do not interfere if the course pursued in establishing the municipality be substantially such as is pointed out by the law-making department.

2. SAME—NOTICE OF ELECTION.

Proceedings for establishment of a municipal corporation reviewed, and held that the election notice properly stated the number of inhabitants ascertained to reside within the boundaries of that municipality.

Department 2. Appeal from superior court, county of San Diego. *E. C. Marshall*, Atty. Gen., and *Byron Waters*, for appellant. *Curtis & Otis* and *H. C. Rolfe*, for respondent.

MYRICK, J. This action was brought to have it determined that the defendant unlawfully holds and exercises the franchise and powers of a municipal corporation. Two points are made on the appeal:

1. The findings of fact are silent on the issue presented in the complaint, that it was in excess of the jurisdiction of the board of supervisors to include within the boundaries of the proposed city any of the territory not settled upon and occupied as the village proper of Riverside, and that all action of said board including within the boundaries of the proposed municipality any territory, except such village, was unreasonable and oppressive, and therefore void, in that no territory other than the village would derive any benefit from being included therein. The propriety of establishing a municipality, and of including within its boundaries a particular territory, is in general a political question for the legislative department of the government. If the course pursued in establishing that municipality be substantially such as is pointed out by the law-making department, courts do not interfere. All the facts necessary to give the board of supervisors jurisdiction were found by the court below. From the facts thus found it appears to us that the requirements of the statute were substantially complied with. Therefore whether or not the board of supervisors had jurisdiction to proceed became a question of law, and no finding was necessary. It was not necessary for the court to find whether or not territory not settled upon and occupied as a village proper was embraced within boundaries of the proposed munic-

ipality, or whether the territory would or would not derive benefit from being included.

2. That the notice of election did not state the number of inhabitants ascertained to reside within the boundaries. The statute (St. 1883, p. 94) required the notice to state "the number of inhabitants so ascertained to reside therein." The object of this provision is that it may be known to which class the proposed municipality is to belong. It appears from the findings that at the final hearing before the board of supervisors the board ascertained and determined the number of inhabitants residing within the boundaries to be not less than 500 and not exceeding 3,000, and granted the petition with certain modifications as to territory; and the board caused notice of an election to be held under the statute, which notice, among other things, gave the number of inhabitants within the limits of the proposed corporation to be about 3,000. We think it sufficiently appears from the notice given that the proposed municipality would belong to the sixth class, which class, under the statute, embraces exceeding 500 and not exceeding 3,000 inhabitants.

Judgment affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; THORNTON, J.

68 Cal. 485

BURTON v. TODD. (No. 11,222.)

Filed January 29, 1886.

1. NOTICE OF APPEAL—EXTENSION OF TIME TO SERVE AND FILE.

Section 1054 of the California Code of Civil Procedure, providing that the superior courts and the judges thereof may extend the time for service of notices other than notices of appeal, is applicable to and includes the power to grant an extension of time for filing notices of appeal.

2. SAME—OF MOTION FOR NEW TRIAL—EXTENSION OF TIME.

The right to move for a new trial is statutory, and must be strictly pursued; and so, if the time fixed by statute therefor has expired, courts have no jurisdiction to extend or revive it; but if the time provided has not expired, the court may, for good cause, extend the time in which to serve and file the notice of motion for a period not exceeding 30 days.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Barbara.

A. Packard and *R. B. Canfield*, for appellant.

Charles Fernald, for respondent.

SEARLS, C. This is an appeal from an order of the superior court, made after final judgment, dismissing and refusing to settle a statement on motion for a new trial. The facts essential to an understanding of the question involved are as follows: Judgment was rendered in favor of defendant February 5, 1885. Notice in writing of the filing of the findings and rendition of judgment was duly served upon plaintiff's attorney February 9, 1885. On the thirteenth day

of February, 1885, the judge of the superior court, by an order made *ex parte*, without notice to or consent of attorney for defendant, extended the time for 20 days to file and serve notice of motion for a new trial, or to prepare and serve a bill of exceptions, as plaintiff might elect. On the fourth day of March, 1885, plaintiff's attorney served and filed a notice of motion for a new trial. This notice, as will be seen, was not served and filed within 10 days after service of notice of filing of findings and entry of judgment, but was served and filed before the expiration of the time as extended by the judge. Upon the service of a statement upon him on motion for new trial, counsel for defendant served formal objections to the motion as not being in time, and, subject to such objections, served amendments to plaintiff's statement, and thereafter, the matter coming on before the court, the application to settle statement was dismissed because the notice of motion was not made in time.

The question presented relates to the power of the judge of the court below to extend the time for service and filing of a notice of motion for new trial. Section 659 of the Code of Civil Procedure provides that "the party intending to move for a new trial must, within 10 days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court, * * * if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention," etc. Section 1054 of the same Code, as amended in 1880, provides that "when an act to be done, as provided in this Code, relates to the pleadings in the action; * * * or to the service of notice other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed 30 days without the consent of the adverse party."

The order of the judge extending the time to file and serve notice of motion recites that it was granted upon "good cause shown," and the motion to strike out the statement is based, not upon any defect in this order, but upon the fact that the notice of motion was not filed and served within 10 days after notice of the decision. We are therefore called upon to decide whether section 1054 of the Code of Civil Procedure authorizes the superior court, or a judge thereof, to extend the time for *filing and service* of a notice of motion for a new trial. In *Hook v. Hall*, 6 Pac. Rep. 422, it was said:

"But the right to move for a new trial is statutory, and there is no provision of the Code of Civil Procedure which gives to the superior court, or to the judges, power, by order, to extend the time for *filing* a notice of intention to move for a new trial. Section 1054 does not authorize such an order," etc.

Girdner v. Beswick, 8 Pac. Rep. 11, and *Brinchman v. Ross*, Id. 316, followed *Hook v. Hall*, and enunciated the same doctrine. In *Brinchman v. Ross*, however, it appearing that no objection had been made in the court below, it was held to have been waived. A hear-

ing in bank was granted in *Hook v. Hall*, and the cause was finally decided without passing upon the very point under consideration here. A hearing in bank has also been ordered in *Girdner v. Beswick*. Under these circumstances we feel at liberty, notwithstanding the case of *Brinchman v. Ross*, to treat the question in the light of former decisions, or as an original proposition, for the reason that *Brinchman v. Ross*, having been decided upon the authority of *Hook v. Hall*, should not be sustained after the latter is set aside, except upon principle.

Viewed in this light, did the legislature, by section 1054 of the Code of Civil Procedure, intend that the extension of time to *serve* a notice of motion for a new trial therein provided for should also extend to the *filing* of such notice? In *Cottle v. Leitch*, 43 Cal. 320, it was said that an order extending the time "for preparing and filing motion for a new trial" extended the time of the defendant to give notice of the intention to move for such new trial. We suppose the court proceeded upon the theory that an extension of time to *move* carried with it an extension of time to do those things *essential to the motion*. We know that as a matter of convenience it has been the usual practice in this state to first serve and then file papers required to be served and filed, in order that the evidence of service may accompany the paper when filed, and, except as otherwise expressly provided, the practice is to be commended. In view of the exposition in *Cottle v. Leitch*, *supra*, and of the practice of the profession, with both of which we may presume the legislature was familiar, we think it but reasonable to suppose that when power was given to the superior courts and the judges thereof to extend the time for service of notices other than of appeal, it was intended also to include an extension of the time for filing such notices.

Section 1054 is quite general in its scope, extends to a great variety of proceedings, and covers notices for varied and diverse objects, which are required to be filed, and in some of which, at least, there can be no propriety whatever in filing before service; yet if the court or judges cannot extend the time for filing, this must, in all instances of extension, be done before the service. To illustrate: The court is by this section given the power to extend the time to plead, to amend pleadings, to prepare bills of exceptions, etc. Now, if the time for filing an answer cannot be extended, it would in most cases be futile to extend the time for its preparation and service. In the construction of a statute the *intention* of the legislature is to be pursued, if possible. Code Civil Proc. 1859. We think when the legislature gave to the courts and judges the authority to extend, within certain limits, the time within which notices were to be served and other acts were to be performed, the object was to give parties additional time within which to *prepare* such notices, and to do every act naturally following and dependent thereon and essentially connected therewith. Time may be essential for deliberation and consultation,

before determining upon the propriety of a motion for a new trial, and we think this was the paramount reason for lodging in the courts and judges power to extend the time. These reasons are of constant recurrence, while the necessity for an extension to enable a party to procure service of the notice will but rarely present itself. We conclude, therefore, (1) that as the right to move for a new trial is statutory, it must be pursued in the manner pointed out by the statute; (2) that after the time fixed by statute has expired, the courts have no jurisdiction to extend or revive such right; (3) that before the expiration of the 10 days given by statute within which to move for a new trial, a superior court or judge thereof may, for good cause, extend the time, not exceeding 30 days, within which to *serve and file* a notice of motion for new trial. It follows from this view that *Brinchman v. Koss*, *supra*, so far as in conflict with this opinion, is not a correct exposition of the law, and should be overruled. The order from which this appeal is taken was doubtless made upon the authority of *Hook v. Hall*, and was eminently proper under that case. It should, however, for the reasons herein given, be reversed, and the court below directed to settle the statement or motion for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is reversed, with directions to the court below to settle the statement on motion for a new trial.

68 Cal. 481

EADS v. CLARKE and others. (No. 11,183.)

Filed January 29, 1886.

SUPERIOR COURT—JURISDICTION OVER CONTEST FOR RIGHT TO PURCHASE STATE LANDS.

It is not necessary, in order to give the superior court jurisdiction of a proceeding referred to it for trial to determine a contest between conflicting claimants of a right to purchase state lands, that the certified copy of the order for trial should affirmatively show that such order was entered in a record-book in the surveyor general's office; but it is sufficient if the certificate of the surveyor general shows that the instrument is "a copy of a document on file" in his office; and it will be presumed in such case that the surveyor general regularly performed his official duty and entered such order in the record-book.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Bernardino.

Byron Waters, for appellant.

Will. D. Gould, for respondent.

FOOTE, C. Eads, the plaintiff, instituted this action to determine whether he or defendant Clarke was entitled to purchase certain lands of the state of California. The Pomona Land & Water Company in-

tervened, claiming to have acquired all the defendant's rights in the premises. The plaintiff recovered judgment, and from that the intervenor appeals. The only point made by the appellant for the reversal of that judgment is that the profert or order made by the surveyor general as required by law was, as appears by the bill of exceptions, insufficient to give the superior court jurisdiction to try the action. Section 3414, Pol. Code, which relates to matters such as the one in hand, is as follows:

"* * * But when in the judgment of the officer a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record-book in his office."

By law the superior court of such county is now the tribunal substituted for the former district court.

Section 3415 of the Political Code is as follows:

"After such order is made either party may bring an action in the superior court of the county in which the land in question is situated, to determine the conflict, and the production of a certified copy of the entry made by either the surveyor general or the register gives the court full and complete jurisdiction to hear and determine the action."

Hence by law it is required that an order of reference be made by the proper officer, and that the production of a certified copy of the same as entered in the record-book in that officer's office, as proof to the superior court that the order had been duly made, shall be sufficient to give that court jurisdiction to try the issue. The copy of that order, and the certificate attached called a "profert," are as follows:

"STATE OF CALIFORNIA, OFFICE OF THE SURVEYOR GENERAL—SS.

"In the matter of the conflicting claims of R. W. Clarke and John G. Eads to purchase a certain tract of state school lands, lying and being situated in the county of San Bernardino, state of California, and more particularly described as the east $\frac{3}{4}$, section 14, township 1 south, range 8 west, San Bernardino meridian. On the thirtieth day of December, 1882, an application (1999) for the above-described land was filed in the office of the state surveyor general by R. W. Clarke. This was approved May 3, 1883, certificate of purchase No. 8,611 being issued thereon to said Clarke on the twenty-first day of May of the year last above written. On the thirtieth day of August, 1883, an application (No. 2,066) for the above-described land was filed in the office of the state surveyor general by John G. Eads. On the thirtieth day of April, 1883, Charles R. Johnson, register of the United States land-office for Los Angeles district, certified that there was no valid claim adverse to the claim of the state of California for all the land embraced in this controversy. A question of law being involved, and on demand of John G. Eads, one of the claimants aforesaid, filed August 30, 1883, in which the validity of the title obtained by the said R. W. Clarke was brought into question, it is therefore ordered and directed that the contest as set forth as between the above-named parties be, and the same is hereby, referred to the superior court in and for the county of San Bernardino, state of California, for adjudication.

"In witness whereof I have hereunto subscribed my name, and caused the

seal of this office to be affixed, at the city of Sacramento, state of California, on this fourteenth day of November, A. D. 1883.

"H. I. WILLEY,

"State Surveyor General and *ex officio* Register State Land-office.

[Seal.]

"Per E. TWITCHELL, Deputy.

"SURVEYOR GENERAL'S OFFICE, STATE OF CALIFORNIA.

"I hereby certify that the annexed and foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original, and is a correct transcript therefrom, and of the whole of such original.

"In witness whereof I have hereunto set my hand, and affixed my official seal, this fifteenth day of November, A. D. 1883.

"H. I. WILLEY,

"Surveyor General and *ex officio* Register State Land-office.

[Seal.]

"Per E. TWITCHELL, Deputy."

This was filed in the county clerk's office of San Bernardino county, November 17, 1883. In the case now under discussion it was filed June 4, 1885. From this it appears certain that the surveyor general did make the order for trial in the superior court, and that the certified copy introduced in evidence shows that fact. But the appellant contends that to give that court jurisdiction to try the action it must affirmatively appear from the profert and certificate that such order was entered *in a record-book* in the *surveyor general's* office. The certificate of the surveyor general says of the instrument introduced in evidence that it "is a copy of a document on file in my office."

Section 1963, Code Civil Proc. subd. 15, provides that it is a disputable presumption, that is satisfactory if uncontradicted, "that official duty has been regularly performed." Therefore it is to be presumed that this order which the surveyor general made was entered *in a record-book*. Whether that record-book was simply one with blank leaves on which the original orders were pasted, or otherwise attached, in their original form, and was thus a book of original documents, or was in some other form, the record does not disclose. The fact that the original is designated "a document on file" in the surveyor general's office does not negative the presumption that it was entered in some kind of a record-book. What the law requires is that a proper order be made by the proper officer; that this be entered, the manner of entering not being prescribed, in a record-book, the special kind of record-book not being prescribed; and that the production of copy of such order thus made and entered, duly certified by the surveyor general, shall give the court jurisdiction. In *Lane v. Pferdner*, 56 Cal. 122, this court, speaking of a point such as that made here, said: "The jurisdiction * * * was special, and depended upon the fact that the surveyor general had made an order 'referring the contest.' The district court passed upon the fact which gave it jurisdiction, which fact could be proved by the certified copy." We are of opinion that the certified copy of the order in evidence in the case in hand was sufficient to justify the action of the superior court,

which thereby passed upon the fact that the order referring the contest had been made by the surveyor general, and entered in some kind of a record-book, whether in book of documents, papers, or entries is not disclosed by the record.

The judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

68 Cal. 521

LAMET v. MILLER. (No. 11,177.)

Filed February 17, 1886.

MOTION TO DISMISS APPEAL—TIME FOR HEARING.

A motion to dismiss an appeal should be made on the day noticed for the hearing, or at the first opportunity during the session of the court. If not so made, the motion lapses, and it cannot be revived at a subsequent session.

Department 1. Appeal from superior court, county of Sacramento.

Ed. M. Martin, for appellant.

Grove L. Johnson, for respondent.

MCKEE, J. On the fourth of August, 1885, respondent's attorney served on the attorney of appellant notice that he would, on the fifteenth of August, move to dismiss the appeal taken in this case, on the ground that no transcript had been filed within the time prescribed by the rules of the court. After service appellant's attorney filed the transcript, before the day noticed for the hearing of the motion. Respondent's attorney knew of the filing of the transcript on the day it was filed, and he did not bring on his motion for hearing on the day for which it was noticed, or at any other time during the session of the court. There was no stipulation by the attorneys to postpone the hearing of the motion, and no order of the court continuing it to a future time; but in the month of October respondent's attorney served appellant with notice that he would, on the third November, 1885, bring to a hearing the motion to dismiss the appeal which had been noticed for the fifteenth August. A motion to dismiss an appeal should be made on the day noticed for the hearing, or at the first opportunity during the session of the court. If not so made, the motion lapses, and it cannot be revived at a subsequent session. Motion denied.

We concur: ROSS, J.; MCKINSTRY, J

Cal.Rep. 9-11 P.—14

11 Cal. 169

BREEZE and others v. BROOKS and another. (No. 8,671.)

Filed January 27, 1886.

FRAUDULENT CONVEYANCE—CONSIDERATION—ESTOPPEL.

If one purchases land, taking the legal title in his own name, the consideration therefor being paid by another, the former is merely a trustee holding the naked legal title for the other, and if such trustee executes a deed to the other party without the payment of a new consideration therefor, such deed is not void, and the *cestui que trust* does not, by allowing the trustee to claim the land as his own, estop himself from claiming title to the premises.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Mateo. *William M. Pierson, E. B. & J. W. Mastick, and W. C. Belcher*, for appellants.

Fox & Ross and *S. F. Leib*, for respondents.

FOOTE, C. The decree in this action adjudged that a certain deed made by John Brooks to his brother and co-defendant, Patrick Brooks, was fraudulent and void, and that Patrick took the legal title thereunder in trust for John and his successors in interest, and that he holds the same in trust for the plaintiffs, who were creditors of John, and purchasers at a sheriff's sale of the land conveyed, under a judgment where they were plaintiffs against John, and it commands the defendant Patrick to execute and deliver to plaintiffs a deed of conveyance to the land. The lands involved are 94.91 acres, parcel of the Buri Buri, or Sanchez, *rancho*, in San Mateo county, and are described in the complaint by metes and bounds.

The complaint alleges: *First*, that on the seventeenth of October, 1865, the defendant John Brooks became the owner by purchase of one-half of an undivided one-sixtieth of the Buri Buri, or Sanchez, *rancho*, in San Mateo county; *second*, that under his purchase he took and thereafter held actual possession of the 94.91 acres particularly described in the complaint, and which was parcel of the *rancho*; *third*, that on the twenty-ninth of May, 1868, the *rancho* was partitioned among the owners by decree of the district court of the Twelfth judicial district for the county of San Mateo, and that the 94.91 acres occupied by the defendant John Brooks was by the decree set off to him in severalty, and that after the partition he continued to occupy it; *fourth*, that on the second day of January, 1875, John Brooks was indebted to the plaintiffs, on settlement and adjustment of accounts, in the sum of \$707.35, and gave them his note for that amount, payable one day after date, with interest at $1\frac{1}{2}$ per cent. per month; *fifth*, that on the fifth day of January, 1875, the defendant John Brooks executed and delivered to the defendant Patrick Brooks a deed conveying the 94.91 acres, which deed was recorded on the next day in the office of the county recorder; *sixth*, that this deed was executed and delivered by John, and received and recorded by Patrick, without consideration and for the "single object and purpose of hin-

dering, delaying, and defrauding the plaintiffs" in the collection of their debt; *seventh*, that on the thirteenth of June, 1877, the plaintiffs recovered a judgment against the defendant John Brooks in the district court of the Fourth judicial district for the city of San Francisco, for \$948.85, for principal and interest on their note, and \$19 costs, making in all \$967.85; *eighth*, that on the twenty-second of June, 1877, the sheriff of the county, under an execution issued upon that judgment, levied upon, and, on the sixth of August sold to the plaintiffs, all the right, title, and interest of John Brooks in this 94.91 acres of land, and no redemption being made, executed to them his deed on the sixteenth of May, 1878; *ninth*, that the deed from John Brooks to Patrick Brooks was fraudulent and void, and that Patrick acquired no title under it; *tenth*, that the plaintiffs are, under their sheriff's deed, the successors in interest of John Brooks, and are owners of all his title and interest in the land. And they pray that the court may, by its decree, determine—*First*, that the deed from John to Patrick was made for the purpose of hindering, delaying, and defrauding the creditors of John, and that Patrick did not acquire thereby any title or interest in the land except in trust for John and his successors in interest; *second*, that plaintiffs, under their sheriff's deed, acquired John's interest and the true title, and that Patrick be required to convey to them.

The defendants separately demurred to the complaint, on the ground of misjoinder of defendants and that the complaint did not state facts sufficient to entitle the plaintiffs to the relief asked, or any relief, against them. The demurrer was overruled, and the defendants having answered separately, the case was tried.

The court finds: (1) That the Buri Buri *rancho* was a Mexican grant, containing about 11,000 acres, and that prior to 1865 it was owned by a considerable number of persons as tenants in common. (2) That prior to that year the defendant Patrick Brooks had acquired the possession of a small parcel of said *rancho*, upon which he was living at the time of the trial, and an undivided interest in the *rancho* sufficient to represent it. (3) That prior to 1865 the defendant Patrick and one Fay were in possession of another parcel of the ranch, (the premises in controversy here,) which was about two miles distant from the other parcel; and that on the twenty-sixth of August of that year Fay, for the consideration of \$500, conveyed his interest to Patrick, who thereupon secured the exclusive possession. (4) That afterwards, but in the same year, Patrick leased the premises in controversy to his brother, John Brooks, who continued to occupy the same as his tenant until the spring of 1878, holding from year to year under a parol lease. (5) That on October 17, 1865, Patrick, for the consideration of \$3,660, bought another undivided interest in the *rancho*—an undivided one hundred and twentieth—to represent this parcel, and had the deed made in the name of his brother, John, to enable him to secure both parcels—that is, the one where he resided and the

premises in controversy—on a partition of the *rancho*. (6) On May 26, 1868, under a decree of the district court, the *rancho* was partitioned, and the premises in controversy were, by the decree, set off to John in severalty, on account of the one hundred and twentieth interest standing in his name, and the place on which he was living was set off to Patrick. (7) From 1872 to 1875, John bought goods from the plaintiffs, and was, on January 2, 1875, indebted for goods sold in the sum of \$707, for which he gave them his promissory note. (8) During the time of his dealing with the plaintiffs John was residing on the land in controversy, and represented to them that he was the owner of the land. (9) That John was, in fact, during all the time of his dealing with the plaintiffs, insolvent, and Patrick was aware of his financial condition. (10) On the fifth of January, 1875, John executed and delivered to Patrick, for the purpose of reinvesting him with the legal as well as the equitable title to the premises, a deed of conveyance, which was immediately put on record in the office of the county recorder. (11) The deed expressed a consideration of \$2,000, but no consideration was, in fact, paid. (12) On the thirteenth day of June, 1877, in a suit brought in the Fourth district court, in and for the city and county of San Francisco, against John upon his note, the plaintiffs recovered a judgment for \$948 damages and \$19 costs. (13) Execution was issued upon that judgment, and on the twenty-second of June, 1877, was levied by the sheriff of San Mateo county upon John's interest in the land in controversy. On the sixth of August, 1877, the sheriff sold to the plaintiffs all John's right, title, and interest in the property, and no redemption being made, on the sixteenth of May, 1878, made to them his deed, conveying to them all that right, title, and interest.

From these facts the court found, as conclusion of law, that plaintiffs were entitled to a decree in accordance with the prayer of their complaint, and by its decree adjudged that the deed from John to Patrick "was made without consideration, and was, and is hereby, decreed to be fraudulent, void, and of no effect; that the said Patrick Brooks thereby neither took, acquired, had, nor has any right or title in or to the said described lands, or any part thereof, but thereunder took and held, and now holds, the legal title of said lands as trustee of and for the said John Brooks and his legal successors in interest; that the plaintiffs Charles K. Breeze and Thomas Loughram have, by due and legal proceedings, process, sale and conveyance, duly succeeded to, become, and now are, the legal successors of and holders of the interest, right, and title of the said John Brooks in and to all the said lands and premises, together with the appurtenances, and are now entitled to have the legal title thereof conveyed to them." And the decree thereupon commands the defendant Patrick to execute to the plaintiffs a deed, and directs that the clerk execute one for him in case he neglects for five days to make one.

Defendants moved for a new trial upon a statement of the case.

The court denied their motion, and they appealed from the judgment and the order.

It is thus seen that the principal ground relied on to support the plaintiffs' contention was that the deed of January 5, 1875, was void because made in fraud of the plaintiffs, as creditors of John. The decree ordered to be entered was in accordance with the prayer of the complaint, which was, as we have seen, that the deed be deemed to have been made "without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of the said John Brooks, and that the said deed and pretended conveyance was and is fraudulent and void, and of no effect;" and the conclusions of law were that the plaintiffs were entitled to a decree in accordance with such prayer.

From the findings it plainly appears that John had nothing except a naked legal title. Patrick had paid all the money for the land, and John, therefore, held it in trust for him. John was his tenant, acknowledged himself to Patrick as such, and never, so far as Patrick knew, asserted any title adverse to Patrick's, and Patrick's right to assert his claim thereto was not barred, and John only conveyed to Patrick that which belonged to him.

The findings negative the idea that the plaintiffs, in giving credit to John, relied on any statement of Patrick that John owned the land. Nor is it there intimated that they examined the records of deeds, or that of the partition suit, to find out what they disclosed in reference to John's title, or relied on them in any way to induce the credit which they extended to John. They seem to have relied on the facts that John lived on the land, claimed it in his conversations with them as his, and that he was insolvent, and Patrick knew it; and that is all which it is there claimed even tends to show Patrick as having been privy in any way to John's obtaining credit from the plaintiffs. Therefore it does not appear that the deed from John to Patrick was made to hinder, delay, or defraud creditors; it was simply made to re-invest Patrick with the legal title to his own land. So that after this conveyance was made in good faith, John had no interest in the land; and if it was sold at sheriff's sale, under execution, the purchaser got no title, as a purchaser at such sale can get no title save that of the judgment debtor. *Freem. Ex'ns*, § 301; *Boggs v. Hargrave*, 16 Cal. 564; *McAlpine v. Tourtelotte*, 24 Fed. Rep. 69. The findings, therefore, do not justify the decree that the deed was fraudulent and void, unless it appears that Patrick, by his acts *in pais*, was estopped to set up what otherwise would have been the clear legal as well as equitable title, which he held under John's deed to him of the disputed premises. So far as the findings disclose, Patrick did no act to induce creditors of John to believe the land was John's save that he allowed the title upon the record to stand in John's name, which record these creditors never examined.

Now, it does not appear that Patrick had any knowledge that John was getting credit from any one upon the faith of his apparent owner—
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ship of the land. There was therefore, on the part of the former, no such carelessness or negligence as amounted to even the smallest degree of turpitude; and in such a case we understand the authorities all to agree that one cannot be estopped to set up that which, but for such act, would be a good legal title to land. It would be dangerous, in view of the statute of frauds, to further extend this rule of law in transferring by estoppel title to land. *Bigelow*, Estop. 503; *Fitzj. Steph. Dig. Ev.* 124; *Boggs v. Merced Min. Co.*, 14 Cal. 279; 2 Pom. Eq. Jur. § 807; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221.

The material allegations of the complaint are not sustained by the findings, and the latter, so far from justifying the decree, warrant, we think, a reversal of the order denying a new trial, and a rendition here of a judgment in favor of the defendants that the plaintiffs take nothing by their action and pay the costs of this suit.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded, with directions to render judgment for defendants on the findings.

68 Cal. 414

FOWLER v. SUTHERLAND and others. (No. 9,448.)

Filed January 27, 1886.

1. SPECIFIC PERFORMANCE—DILIGENCE NECESSARY IN SEEKING RELIEF.

Equity will not grant specific performance of contracts if there has been a long and unexplained delay in asking for the assistance of the courts, and in this case held that the unexplained delay of two years and three months from the time of the contract to the commencement of the action is a bar to such relief.

2. SAME—VERBAL CONTRACT FOR SALE OF LAND.

In an action to specifically enforce the performance of a verbal contract for the sale of distinct and widely separated tracts of land, on the ground of part performance, the complaint should distinctly and clearly allege the acts which it is claimed constitute the part performance. An allegation of entry by the vendee and erection of valuable improvements, without stating on which parcel of land the entry was made or the improvements placed, or the character of the improvements, is insufficient.

Commissioners' decision.

In bank. Appeal from superior court, county of Fresno.

Campbell & Hinds, for appellant.

Bennett, Wigginton & Creed, and *E. D. Edwards*, for respondents.

BELCHER, C. C. This is an action to enforce the specific performance of an alleged verbal contract for the sale of certain lands in the county of Fresno, on the ground of part performance. The contract is alleged to have been made between one John Sutherland, deceased, and one Jesse Morrow, and the lands referred to consist of several separate and disconnected lots in the town of Fresno, and several other tracts situated in different parts of the county, some of them being miles apart.

The allegations of the complaint are—

"That on the nineteenth day of July, 1880, one Jesse Morrow and the said John Sutherland entered into a verbal agreement whereby the said John Sutherland agreed to sell and convey to the said Jesse Morrow all of the above-described property, on the payment to him, his heirs, executors, administrators, or assigns, within a reasonable time thereafter, by the said Jesse Morrow, his heirs, executors, administrators, or assigns, the sum of \$10,000, lawful money of the United States of America, the said Jesse Morrow agreeing at the same time with the said John Sutherland to pay to him, his heirs, executors, administrators, or assigns, the said sum of \$10,000 within a reasonable time thereafter; that afterwards, and in pursuance of the said verbal agreement aforesaid, the said Jesse Morrow entered upon said premises with the consent and acquiescence of the said John Sutherland, and in part performance of said agreement, and with the full knowledge of said Sutherland, made valuable improvements upon said property, to-wit, of the value of \$1,500."

The complaint also alleges the death of John Sutherland on the twentieth day of August, 1881; the appointment of the defendant William Sutherland, as administrator of his estate; the assignment by Morrow to the plaintiff, for a good and valuable consideration, of "all his [Morrow's] right, title, and interest in said agreement aforesaid, and in and to the said land;" and a tender by the plaintiff, on the twenty-fifth day of October, 1882, to the administrator of the estate of Sutherland of "the sum of \$10,000 as the purchase price of said land, together with a sum additional thereto in payment of lawful interest on the said \$10,000 from the nineteenth day of July, A. D. 1880, to the commencement of this suit; at the same time demanding from the said administrator a deed of conveyance of said lands;" which tender and conveyance were refused.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and upon the further ground that it was ambiguous, unintelligible, and uncertain in that it did not specify the terms of the agreement for the sale of the land, nor what improvements were made by the plaintiff or his grantor, nor the particular tract or tracts of land on which such improvements were claimed to have been made. The court sustained the demurrer, and, the plaintiff declining to amend, judgment was entered in favor of the defendants.

We think the demurrer was properly sustained. The contract sought to be specifically enforced was made July 19, 1880. As alleged, Morrow was to pay Sutherland for the property within a reasonable time. More than a year elapsed without any offer on his part to comply with his agreement in that particular, and then Sutherland died. An administrator of his estate was appointed and qualified, and more than another year elapsed without any offer by Morrow or his assignee to pay for the property. According to the allegations of the complaint, it was more than two years and three months after Morrow agreed to pay for the land "within a reasonable time" before there was any offer to comply with the agreement on his part.

There is no attempt in the complaint to explain or account for this delay, or to show that it arose from any just cause, or was acquiesced in by Sutherland and the defendants. As pleadings are construed most strongly against the pleader, we cannot say, therefore, that there was any just cause for the delay, or that it was acquiesced in. Nor can we say that two years and three months is a reasonable time within which to offer to comply with such an agreement, knowing as we must that in that time great changes often occur in the value of lands in this state.

But courts of equity do not grant the specific performance of contracts when there has been long and unexplained delay in asking for their assistance. In *Benedict v. Lynch*, 1 Johns. Ch. 379, Chancellor KENT, after reviewing learnedly the authorities, stated the general principle to be "that time is a circumstance of decisive importance in these contracts, but it may be waived by the conduct of the party; that it is incumbent to the plaintiff, calling for a specific performance, to show that he has used due diligence, or, if not, that his negligence arose from some just cause, or has been acquiesced in; that it is not necessary for the party resisting the performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the plaintiff."

Judge STORY, speaking upon the subject, says:

"In general, it may be stated that to entitle a party to a specific performance he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part. If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed." STORY, Eq. Jur. § 791. See, also, *Weber v. Marshall*, 19 Cal. 459.

The complaint is also obnoxious to the objection that it is ambiguous and uncertain. Where specific performance is asked on the ground of part performance, the acts which constitute the part performance should be distinctly and clearly stated. Here the averment is that "Morrow entered upon said premises" and "made valuable improvements upon said property." How did he enter, and was his entry upon each of the separate and distinct parcels of land, or only upon one of them? Of what did the valuable improvements consist, and where were they placed? Were they permanent or temporary in their character? For aught that appears they may have been all placed upon one of the separate parcels, and may have been, as suggested by counsel, mere portable fences.

We think the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

SUPREME COURT OF CALIFORNIA.

68 Cal. 430

COMMERCIAL ASSUR. CO. *v.* AMERICAN CENT. INS. CO. (No. 9,075.)

Filed January 28, 1886.

1. FIRE INSURANCE—REINSURANCE—SUIT BY ORIGINAL INSURER—COMPROMISE OF LOSS.

Where one insurance company was an original insurer, and another company acted as reinsurer, against a risk by fire, and, upon the insured premises being destroyed, the two companies agreed that no liability attached to pay the loss suffered, and that the action to recover the loss should be defended, and the original insurer was for that purpose authorized to act as agent of the reinsurer in making its defense, such original company in the exercise of its authority is bound to defend the action until the question of liability is determined, and it cannot compromise or settle the claim so as to bind the reinsurer, unless with the latter's knowledge and consent.

2. JUDGMENT, WHEN BINDS INDEMNITOR.

One bound to protect another from liability is bound by the result of a litigation to which such other was a party; provided, however, that he had notice of the litigation, and an opportunity to manage and control the same; that the same was conducted in a reasonable manner, and without fraud or collusion.

Department 1. Appeal from superior court, city and county of San Francisco.

Chickering & Thomas and McAllister & Bergin, for appellant.

T. C. Van Ness, for respondent.

McKEE, J. Appeal from a judgment of nonsuit in an action upon a policy of insurance. From the record on appeal it appears that the Commercial Assurance Company issued a policy of fire insurance to W. B. Bartlett, for the benefit of Alexander Forbes, doing business under the name of Forbes Bros., upon a building known as the "Eureka Odd Fellows' Association Building," in Eureka, state of Nevada, and afterwards, on the same day, insured itself in the American Central Insurance Company against the risk which it had taken. After some months the insured building was destroyed by fire. The person entitled to the benefit of the insurance gave notice of the loss to his insurer, who notified the reinsurer, and the two companies, upon consultation, came to the conclusion that the claim presented for loss was illegal and unjust, and refused to pay. Forbes Bros. thereupon brought an action against the original insurer to recover the loss, of which the reinsurer was notified; and the two companies again agreed that the action should be resisted and contested, and that the original insurer, as defendant in the action, should have the conduct, management, and control of the contest for itself and as agent of the reinsuring company. Pursuant to that agreement the defendant in the action filed an answer, and made some preparations for trial, but never brought the case to trial. On the contrary, pending the action,

it abandoned the defense of it, compromised and settled the claim with the plaintiff, had the action dismissed, and then brought the action in hand to recover from the reinsurer its *pro rata* proportion of the moneys paid and the costs and expenses incurred in the original action.

The policy of reinsurance was a contract of indemnity to the original insurer against liability for the risk it had taken, (section 2646, Civil Code;) and when the loss occurred by the destruction of the insured property it became a question whether the insurers were liable to pay the claim which was presented for the loss. Both the original and reinsurer determined that no liability to pay attached, and agreed that the action brought to recover the loss should be defended. For that purpose the original insurer was authorized to act as agent of the reinsurer in making its defense; and it was bound, in the exercise of its authority, to defend the action until the question of liability was adjudicated. Sub. 4, § 2778, Civil Code. Any judgment rendered against it in the action would have conclusively established its liability, and also the liability of the reinsurer upon its policy; for it is a well-settled rule that where one is bound to protect another from liability he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner. *Mors-Le Blanch v. Wilson*, 8 C. P. 227; *Com. Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. St. 479; *Robbins v. City of Chicago*, 4 Wall. 657.

But the original insurer did not defend the action, and there was no adjudication of the question of liability. In its control and management of the action it acknowledged its liability by abandoning all defenses to it, and compromised and settled with the party it had insured. This it had a right to do, so far as the question of its own liability was concerned; and as there was no privity of contract between the original insured and the reinsured, the latter could not legally object to or prevent such a compromise. Section 2649, Civil Code. But the original insurer had no power, under the authority conferred upon it to defend the action for the reinsurer and itself, to compromise and settle the claim so as to bind the reinsurer, unless the latter had knowledge of the compromise, and consented to it or approved of it. *Preston v. Hill*, 50 Cal. 43. In that particular the plaintiff failed to make out a case. The fact is admitted by the pleadings that the compromise, settlement, and payment of the original claim were made on the twelfth of September, 1881, and the evidence offered by the plaintiff showed that the reinsurer had no knowledge of the compromise, settlement, and payment until several days after they were made, when it heard of them by a verbal notice given to its chief clerk by one of the clerks of the plaintiff; and upon that informal notice it objected and protested against the compromise.

The plaintiff failed to make out a case, and the court properly granted a nonsuit.

Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

68 Cal. 445

McDONALD, Adm'r, etc., v. BURTON and others. (No. 8,730.)

Filed January 28, 1886.

1. PUBLIC LANDS—MEXICAN GRANT—DEATH OF CLAIMANT—CONFIRMATION TO HEIRS.

Where a claimant and owner of lands died pending proceedings in the United States district court to procure a confirmation of the title to a Mexican grant, and the proceedings were afterwards continued by the widow and children as his "heirs and legal representatives," and subsequently a patent issued to the latter as such "heirs and legal representatives," the legal title so acquired was held by them in trust for the estate of the deceased claimant; and the administrator of said estate could maintain an action to subject such land to administration, and to the payment of claims, irrespective of any question as to the staleness of such claims; and the records in the confirmation proceedings and the patent showed the representative character of the patentees, and were notice thereof to subsequent purchasers and incumbrancers claiming under them.

2. TRIAL—FINDINGS—EVIDENCE.

Findings reviewed and criticised, and the habit of embodying in the findings matters which are evidence only condemned.

In bank. Appeal from superior court, county of San Diego.

Conklin & Hunsaker and Works & Titus, for appellant.

Leach & Parker and Graves & Chapman, for respondents.

MORRISON, C. J. This is a suit by G. W. B. McDonald, administrator of the estate of Henry S. Burton, deceased, brought to subject certain real estate situate in the county of San Diego, and known as the "Rancho Jamul" to administration, the legal title thereto being, as is alleged, out of the estate. The amended complaint alleges that Henry S. Burton died intestate on the fourth day of April, 1869, and that the plaintiff was duly appointed his administrator on the sixth day of February, 1870; that Henry S. Burton purchased the Rancho Jamul from Bonifacio Lopez and others in the year 1853, built a house, and resided thereon with his family from the year 1853 down to the time of his death; that he instituted the proper proceedings to procure a confirmation of the title to said *rancho*, and was the real party prosecuting such proceedings to obtain a confirmation of the grant thereof; that on the twenty-seventh day of September, 1870, the United States district court made the following order in the case:

"It appearing to the court that the said Henry S. Burton died seized and possessed of the said Rancho Jamul, having purchased the same in his lifetime, it is ordered that the motion to substitute the names of Maria A. Burton, widow, and Nellie Burton and Henry H. Burton, children, of said Henry S. Burton, deceased, be granted, and thereupon the cause proceed in the names of said heirs."

—That Maria Burton, the widow, and Nellie and Henry H., children, became parties to such proceeding for the confirmation of the *rancho*

as the heirs of Henry S. Burton, deceased, and not as the personal claimants of said *rancho*, and the same was confirmed to them as such heirs and legal representatives by the United States district court of California; that in pursuance of such confirmation a patent to said *rancho* was issued to them as the heirs of said Henry S. Burton on the twenty-sixth day of October, 1876. The complaint proceeds to allege that claims against the estate have been duly allowed in the process of administration against said estate which remain unpaid, and that the expenses of administration will amount to a large sum of money, to-wit, about \$3,000. It further appears from the complaint that on the thirty-first of December, 1872, the defendants Maria A. Burton, Nellie Burton, and Henry H. Burton executed a mortgage to one Maurice Dore, whereby they mortgaged all their right, title, and interest in and to said *rancho* as security for the payment of \$10,000; that on the twenty-fourth day of December, 1877, said Dore commenced his suit to foreclose said mortgage; that on the twenty-second day of December, 1880, said *rancho* was sold under a decree of foreclosure in said suit, and on the twenty-fourth day of June, 1881, a deed thereto was executed by the sheriff of San Diego county to one Henry Ingraham, to whose rights the defendants Wallace Leach and John G. Capron succeeded in the month of April, 1883. The complaint alleges that the defendants Leach and Capron have wrongfully taken possession of the *rancho*, and now claim the same under the mortgage and foreclosure sale aforesaid, and prays that it may be decreed and adjudged that the Rancho Jamul is the property of the estate of Henry S. Burton, deceased, subject to administration as such; that a trust be duly declared in and to said property; and that restitution thereof be duly awarded to the plaintiff, as administrator of the estate of Henry S. Burton, deceased.

To the complaint the defendants Leach and Capron interposed a demurrer, which, being overruled, they filed an answer denying all right and interest in the estate in and to the *rancho*, denying that Henry S. Burton ever purchased the same and entered into the possession thereof, or improved the same, or lived thereon with his family or otherwise, and asserting title thereto under the mortgage aforesaid, and the subsequent foreclosure proceedings in the district court. By the answer all the facts material to the maintenance of plaintiff's case are denied generally and specifically, and title in the defendants claimed and asserted. Several other defenses are set up by the defendants,—such as the statute of limitations, former judgments of the courts, etc. The defendant Maria A. Burton sets up a homestead to a portion of the property in dispute set apart to her by the superior court of San Diego county, sitting in probate, on the twenty-seventh day of June, 1883.

Bonifacio Lopez and others, under whom Henry S. Burton, deceased, claimed title under a contract of sale entered into by them with Juan Foster, pretending to act as the agent of one Pio Pico, who

was the grantee of the *rancho* from the Mexican government, which contract was made on the twenty-fifth of January, 1851, without authority from said Pio Pico, but the contract of sale was ratified, approved, and confirmed by said Pico on the first day of August, 1870. On the second day of June, 1870, Pio Pico, without any consideration therefor, executed a deed conveying the *rancho* to Maria A. Burton, which conveyance was lost, and on the twenty-fourth day of June, 1870, he executed another deed to the same party for the same land in lieu of the lost deed. In this deed it was expressed that "Maria A. Burton, her heirs and assigns, are to have and hold said *rancho* to and for her and their benefit, and for none others." This second deed was duly recorded on the second day of July, 1870. During this time there were proceedings pending in the United States district court in the name of Pio Pico, the grantee of the Rancho Jamul from the Mexican government, to procure a confirmation of the title by the authorities of the United States, and on the twenty-first day of September, 1870, the following order was made and entered in said case:

"The United States v. Pio Pico.

"This day came Maria A. Burton, widow, and Nellie Burton and Henry H. Burton, children and heirs, of Henry S. Burton, deceased, by their attorney, John J. Williams, Esq., and moved the court that their names be substituted on the record as claimants herein in the place of the name of Pio Pico; and it appearing to the court that the said Henry S. Burton died seized and possessed of the said Rancho Jamul, having purchased the same in his life-time, it is ordered that said motion be granted, and that this cause hereafter be conducted and proceed in the names of the said Maria A. Burton, Nellie Burton, and Henry H. Burton, as the claimants of the said Rancho Jamul.

OGDEN HOFFMAN, District Judge."

On the twenty-first day of September, 1870, it was ordered by the court "that a decree be entered in the cause in favor of the claimants in accordance with the opinion this day filed herein."

The opinion of the court does not appear in the transcript.

On the twenty-sixth day of August, 1870, an order was entered by the court in the said case of *United States v. Pio Pico*, in which Maria A. Burton moved for the vacation of an appeal previously taken in the case to the supreme court of the United States, in which it is recited:

"And it further appearing that the real claimant herein is General Henry S. Burton, formerly of the United States army, now deceased, who, while prosecuting his claim in the name of the original grantee, was ordered east and in the late civil war lost his life in the cause of his country, and that, therefore, no negligence or laches can justly be imputed to him in the failure to prosecute his claim with diligence and in presenting the evidence necessary to establish its validity; and it further appearing that the said Henry S. Burton died leaving him surviving the said Maria A., his widow, and two children, Nellie Burton and Henry H. Burton, his sole heirs at law, * * *—now, therefore, it is hereby ordered that the said order granting an appeal as aforesaid be vacated, and that the said decree rejecting the said claim

be set aside, and that a rehearing herein be granted, with leave to introduce further testimony in support of said claim and title.

"OGDEN HOFFMAN, District Judge."

It appears from this order that proceedings to obtain a confirmation of the grant to Pio Pico were instituted by Henry S. Burton; that there was an adverse decision of the district court in the case; that an appeal therein was allowed and taken to the supreme court of the United States; that the order allowing the appeal was vacated, a rehearing granted, and a subsequent confirmation of the title to the claimant. The cause in which such confirmation was had is entitled *The United States v. Maria A. Burton, Nellie Burton, and Henry H. Burton, Widow and Heirs of Henry S. Burton, deceased*, (Transcript, 143,) and the confirmation is to them as the "legal representatives of the said Henry S. Burton, deceased."

Under and by virtue of said confirmation a patent was duly issued on the twenty-sixth day of October, 1876, to Maria A. Burton, Nellie Burton, and Henry H. Burton, widow and heirs of Henry S. Burton, deceased. On the nineteenth day of September, 1879, Maria Burton petitioned the probate court of San Diego county, in which the proceedings for the administration of the estate of Henry S. Burton, deceased, were pending, to set apart to her a homestead out of said rancho, which petition was granted, as hereinabove stated. On the ninth day of July, 1884, the court below rendered its judgment as follows:

"Now, therefore, it is ordered, adjudged, and decreed by the court that the plaintiff, G. W. B. McDonald, administrator of the estate of H. S. Burton, deceased, take nothing by this action, and that the defendant Maria A. Burton take nothing by her cross-complaint herein, and is not entitled to any homestead in the real property described in the complaint or cross-complaint."

From this judgment an appeal is prosecuted to this court by the plaintiff, G. W. B. McDonald, and the defendant Maria A. Burton.

It will be seen that the principal cause of contention is the ownership of the Rancho Jamul. The court below held, in effect, that it was the property of Maria A. Burton and her two children; that the mortgage from them to Dore was good and valid; and that the legal title passed by the foreclosure proceedings, and became vested in the defendants Leach and Capron. On the other hand, it is claimed that there was no title in Maria A. at the time, but that the proceedings for the confirmation of the grant were for the benefit of the estate of Henry S. Burton, deceased. It is as the representative of that estate that the plaintiff claims the property and seeks by this proceeding to subject it to administration. We think it sufficiently appears from the proceedings in the United States district court that they were for the benefit of the estate. Maria A. Burton is referred to therein as the widow, and Nellie Burton and Henry H. Burton as the

heirs, of Henry S. Burton, and in the order of the court dismissing the appeal to the supreme court Henry S. Burton is declared to be the "real claimant," and his position as an officer in the United States army, ordered east on duty, is referred to as explanatory of any apparent laches in the prosecution of the claim. The patent is in harmony with the proceedings for confirmation, and the proceedings for confirmation were initiated by Henry S. Burton in the name of Pio Pico, as the grantee from the Mexican government. The deed from Pico to Maria A. Burton was without consideration, and was soon afterwards followed by the execution of an instrument ratifying the act of his assumed agent, Foster. If Maria A. Burton and the children claimed the title in their own right, there was no necessity for their proceeding as the widow and children of Henry S. Burton. Everywhere in the proceedings for confirmation they are described in representative capacity, and we think the title acquired by them is held in trust for the estate.

In the case of *Soye v. McCallister*, 18 Tex. 97, the court says:

"The plaintiffs, to maintain their action, rely on the conveyance from the original grantee of the government, Delgado, to themselves, on the sixth of October, 1838. They insist that the deed vested in them title exclusive of the rights of creditors of their grantor; that the land conveyed constituted no part of his estate, and consequently was not subject to sale by his administrator; and to support this view they rely upon the evidence afforded by the face of the deed itself,—the fact that it conveys the land to the plaintiffs by name for a consideration therein expressed. But it is seen that in stating the parties to the deed the plaintiffs, though named as the grantees, are described as the 'heirs and legal representatives of John Soye, deceased.' The conveyance, being made to them as such, must be deemed *prima facie* evidence that the consideration moved from their ancestor; else why convey to them as his heirs and legal representatives? The manifest intention was, not to convey to them in their own right, irrespective of their ancestor, whom they represented, but in their right in their representative character, as the heirs and representatives of their deceased father. The consequence is that they took the estate, as they did whatever other estate they inherited from their ancestor, subject to the payment of his debts. It became assets in the hands of his administrator."

It positively appears in this case that whatever consideration moved between the parties by which the Pico title was affected was paid by Henry S. Burton, and that Maria A. Burton paid nothing for the deed from him to her. We think that the principle of the above case applies with full force and effect to this. Here the confirmation was to Maria A. Burton and Nellie Burton and Henry H. Burton, widow and heirs of Henry S. Burton, deceased, clearly indicating their representative character.

The foregoing disposes of the main question in the case, but there are several other questions yet to be considered. Defendants Leach and Capron offered certain proceedings in the probate court in evidence as a bar to plaintiff's right of recovery. There were certain appli-

cations made in that court for an order to sell the land in question for the payment of the debts, and likewise the judgment in certain actions. We cannot understand how the plaintiff's right of recovery in this suit was affected by any of the proceedings referred to. This is the only case, so far as the record shows, in which the questions involved in this suit have ever arisen; and by the adjudication in none of those other cases was plaintiff's right to have the property declared a portion of the estate of Henry S. Burton, deceased, and to subject it to the payment of the debts of said estate, involved or adjudicated. The legal title to the *rancho* has not been, and is not now, in the estate, so that an order of sale thereof by the probate court would be defective, (*Hartley v. Brown*, 51 Cal. 465;) and the object of this proceeding is to put it in that condition. Neither was the homestead right of Maria A. Burton affected by the judgment in ejectment against her. Her homestead claim did not accrue until June, 1883, and was a subsequently acquired interest. *Estate of Burton*, 64 Cal. 428; S. C. 1 Pac. Rep. 702; *Estate of Moore*, 57 Cal. 437.

The matter set up as a defense, that the claims allowed by the administrator of the estate of Henry S. Burton, deceased, were stale claims, constituted no reason why this proceeding should not be sustained and the property declared a portion of the estate. The administrator has a right to administer it as a portion of the estate without reference to the staleness of the claims. On the question of notice, actual or constructive, to the purchasers under the mortgage from Maria A. Burton we have no doubt. The records in the case show the representative character of her claim, and of these records all parties were bound to take notice. *Sherman v. McCarthy*, 57 Cal. 514.

The findings in this case cover more than 100 pages. They embrace many matters which are evidence only, which should not appear in the findings. Facts, not evidence of facts, are the staple of findings. The statute directs facts to be found, and conclusions of law evolved by the application of the rules of law to the facts so found. Code Civil Proc. § 633. We have endeavored to separate from the facts found the portion which should not be in the findings, regarding such portion as surplusage, and, having done so, have decided the case on the facts as stated in the opinion, which we deem to be found. On such facts this opinion is rested. But in so doing we feel bound to express our disapproval of the course pursued in this case as to the findings, and invite the special attention of the judges of the superior courts to the statute requiring them to find the facts, not evidence of facts. This court is not competent to deduce conclusions of facts from evidence. To do that would be the assumption of original jurisdiction, committed by the constitution to the superior court, and denied by the same instrument to this court.

The judgment and order are reversed, and the cause remanded for
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a new trial. On such new trial there will be proper adjudication as to the homestead.

We concur: MYRICK, J.; MCKINSTY, J.; SHARPSTEIN, J.

I concur in the judgment: MCKEE, J.

63 Cal. 407

MONTGOMERY v. SUPERIOR COURT. (No. 11,141.)

Filed January 27, 1886.

1. PLEADINGS IN JUSTICES' COURTS—NEED NOT BE SUBSCRIBED.

The requirement of the California Code of Civil Procedure, (section 446,) that pleadings in the superior court shall be subscribed by the party or his attorney, is not applicable to justices' courts.

2. COMPLAINT IN JUSTICE'S COURT—SUFFICIENCY OF.

In an action in the justice's court a complaint stating as a cause of action an indebtedness of "one hundred dollars, for money borrowed the thirty-first day of January, 1884," is sufficient, in absence of a demurrer.

3. JUSTICE'S COURT—ENTRY OF JUDGMENT—APPEAL.

If on appeal from the justice's court the record transmitted to the superior court showed that a judgment had been entered in conformity with the verdict, and appeared to be in all respects regular and sufficient, and on the trial of the cause on appeal the respondent appeared by his attorney, and, without objecting to any of the proceedings, defended the case on its merits, an objection that when the appeal was taken no judgment had been, in fact, entered by the justice in his docket was thereby waived.

4. APPEAL—ENTRY BY JUSTICE OF JUDGMENT IN DOCKET.

If a justice of the peace fails to enter judgment in his docket in conformity with the verdict before an appeal is taken to the superior court, such failure is not fatal to the jurisdiction of the latter court.

Commissioners' decision.

In bank. Application for writ of *certiorari*.

R. Clark and E. R. Rush, for petitioner.

F. E. Baker and J. Lambert, for respondent.

BELCHER, C. C. This is an application for a writ of *certiorari* to review a judgment of the superior court of the county of Yolo. It is claimed for the petitioner that no action was commenced in the justice's court, because no sufficient complaint was filed, and that no judgment was entered by the justice, and therefore no appeal could be taken therefrom to the superior court. It appears from the record that one Chantry, in order to commence an action against Montgomery, filed with a justice of the peace, as his complaint, what purported to be a copy of an account for "\$100, for money borrowed the thirty-first of January, 1884." Upon this complaint a summons was issued and served upon Montgomery, and in due time he appeared and answered, without demurrer or other objection that the complaint was insufficient. The case was afterwards tried before a jury, both parties being present with their witnesses and attorneys, and a verdict was returned in favor of the defendant. Within 30 days after the verdict was returned the plaintiff served and filed a notice of appeal to the superior court upon questions both of law and fact, and at

the same time filed an undertaking sufficient to make his appeal effectual. In due time thereafter the justice transmitted to the clerk of the superior court the notice of appeal, undertaking, and other papers filed in the case, and also a paper entitled "Transcript from Docket." In this transcript was entered the title of the action, and all the proceedings, as required by statute, down to and including the verdict of the jury. After the verdict appeared the following entries, which were subscribed by the justice:

"Jury fees paid by defendant, and judgment entered for the defendant for costs of suit,—defendant's costs being \$25 for witness and jury fees, also the sum of \$1.75 for constable fees; total, \$26.75; plaintiff's costs being \$17.

"I hereby certify the foregoing to be a true and correct transcript from my docket of the proceedings made in the above-entitled case."

Nearly a year after the papers were filed in the superior court, without any objection on the part of the defendant, the case was brought to trial before a jury. Both parties appeared with their witnesses and attorneys, and at the end of trial a verdict was rendered in favor of the plaintiff, upon which judgment was entered. Thereupon the defendant moved the court to set aside and vacate the verdict and judgment upon the ground that the court had no jurisdiction to render the judgment, or to hear and determine the matters involved in the case. At the hearing of the motion the justice was called as a witness, and produced his docket. He testified: "All I did was to take the verdict of the jury and enter it in the docket. I never rendered or entered any judgment, except as appears in the docket." The docket did not show any formal entry of judgment. The court denied the motion to set aside the judgment, and this proceeding was then commenced.

1. The point is now made for the petitioner that no case was ever commenced in the justice's court, and that court acquired no jurisdiction to try the supposed case, because—*First*, the paper filed as a complaint was not a concise statement in writing of the facts constituting the plaintiff's cause of action, nor a copy of an account, note, bill, bond, or instrument upon which the action was based; and, *second*, the paper was not subscribed by the party or his attorney. The point is not well taken. "Pleadings in justice's court must be construed with great liberality, and if the facts stated are sufficient to show the nature of the claim or defense relied upon, nothing further is required." *Stuart v. Lander*, 16 Cal. 374. That this complaint was sufficient to show the nature of the plaintiff's claim abundantly appears from the answer to it filed by the defendant. Besides, if it was deemed insufficient, the defendant should have demurred instead of answering and going to trial. It was not necessary that the complaint be subscribed by the party or his attorney. Pleadings in superior courts must be so subscribed, (section 446, Code Civil Proc.;) but we have no statute requiring it in justices' courts.

2. It is insisted that the superior court acquired no jurisdiction to try the case, because when the appeal was taken, no judgment had been entered by the justice in his docket. The record transmitted to the superior court showed that a judgment had been entered in conformity with the verdict, and appeared to be in all respects regular and sufficient. When the case was tried the petitioner appeared by his attorney, and, without objecting to the regularity of any of the proceedings, defended the case on its merits. Having thus taken the chances of obtaining a verdict in his favor, we think his objection now comes too late. But, whether this be so or not, in our opinion the superior court had jurisdiction of the case. The Code provides that "when a trial by jury has been had, judgment must be entered by the justice at once in conformity with the verdict." Section 891, Code Civil Proc.

In *Lynch v. Kelly*, 41 Cal. 232, a sale of real property had been made under an execution issued by a justice of the peace, which recited that a judgment had been rendered by him, but, in fact, only the verdict of the jury had been entered in his docket. It was claimed that the sale was void because no judgment was ever entered in form upon the verdict, but the court held otherwise. Speaking for the court, WALLACE, J., said:

"The justice, upon receiving the verdict, was required by statute to 'immediately render judgment accordingly.' The formal entry of the judgment was therefore a mere clerical duty imposed upon him by the statute, and the performance of which he had no discretion to decline. He might have been compelled to make the proper entry in his docket by judicial proceedings instituted against him for that purpose by the plaintiff, and it may be conceded that to issue an execution before judgment entered in form upon the verdict would be bad practice, and that a timely motion by the defendant to set it aside for that reason should be supported. That would be so, however, not because such an execution would be void, but because it would be irregular merely; and a failure to make the objection would, of course, amount to a waiver of the irregularity."

Felter v. Mulliner, 2 Johns. 181, was referred to approvingly, where a plea of former judgment in favor of the defendant was held to be supported by proof of a verdict in his favor, upon which the justice of the peace ought to have rendered judgment, but had omitted to do so.

The following language by the supreme court of Michigan was also cited from *Gaines v. Betts*, 2 Doug. 99:

"The verdict is itself the judgment of the law in the case, and the justice is simply required so to make the entry on his docket. If he neglect to do so, still the verdict must be considered the final determination of the case."

If an execution issued after verdict, but before judgment has been formally entered, be not void, we fail to see why an appeal taken as it was here should not be upheld.

The writ should be denied.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the writ is denied.

68 Cal. 383

WICKERSHAM v. DENMAN. (No. 9,040.)

Filed January 27, 1886.

1. PARTITION—COSTS—CONVEYANCE PENDENTE LITE.

In an action of partition, defendant, to whom plaintiff, *pendente lite*, conveys his interest in common property, is liable for the just proportion of the costs of the proceedings charged upon the interest conveyed to him, although the interest was nominally allotted and set apart in severalty to his grantor.

2. SAME—CONTRACT CONCERNING COSTS.

If in an action of partition the plaintiff conveyed his interest in the common property to certain defendants, under a contract whereby the latter assumed payment of all costs which would be chargeable upon such interest, and they prosecuted the action in the name of their grantor, for their exclusive benefit, to a final judgment, in which the interest which they had acquired from him was taxed for its proportion of the costs of the partition, the obligation to pay such costs to those beneficially entitled to them arose, not only from operation of the law under which the land was partitioned, but from such contract, and upon a breach of their obligation the persons for whose benefit the costs were adjudged to be due and owing could maintain an action to recover the same.

Department 1. Appeal from superior court, city and county of San Francisco.

Latimer & Morrow, Calhoun Benham, and Stanley, Stoney & Hayes, for appellant.

E. J. Pringle, for respondent.

McKEE, J. This was an action to recover the sum of \$4,496, awarded to the plaintiff's assignor as fees due him for services rendered in an action of partition pending in the court of which he was clerk at the time of the rendition of the services. Against the objection and exception of the plaintiff, the court struck from the complaint all allegations of a statement of facts constituting a cause of action upon an implied promise of the defendants to pay the moneys awarded to the clerk, and tried the case upon averments of a statement of facts constituting a cause of action upon an express promise; and, after hearing the evidence offered and given by plaintiff and defendants upon the issues joined upon these averments, it ordered, upon motion of defendants, that a nonsuit be granted, and subsequently denied a motion for a new trial. It is insisted that in each of these orders the court erred.

The evidence taken in the case tended to show that in May, 1860, Horace Gates commenced an action in the then district court of Sonoma county against Francis Salmon, Gustave Touchard, and many other persons, named as defendants, for partition between said plaintiff and defendants, as tenants in common of a large tract of land, situated in the counties of Marin and Sonoma, known as the "Laguna San Antonio" or "Bojorquez" rancho. All persons named in the

complaint as defendants regularly appeared and answered, setting forth the interests in the ranch which they respectively claimed. Up to September, 1865, while proceedings were pending, there were incurred by the plaintiff, for the common benefit of all the tenants in common, costs which were due and owing to the clerk of the court for services therein. In that condition of the case defendants associated themselves for the purpose of buying from Gates, the plaintiff in the action, for their mutual benefit, his estate and interest in the ranch, and his right of action in the partition suit; and, to accomplish that purpose, they entered into an agreement in writing, which, among other things, recited as follows:

"This indenture, executed and delivered this first day of September, 1865, witnesseth that whereas, each of the parties is in possession of a portion of the tract of land known as the 'Bojorquez Rancho,' under claim of title; and whereas, the action entitled *Gates v. Salmon and others*, for the partition of said Bojorquez rancho, directly affects the parties hereto by and through the portion of said rancho so in their possession; and whereas, it is by the parties hereto deemed advisable that the title of said Gates and of divers other persons, and the costs already incurred in the said action, should become the property of these parties for the purpose of perfecting their several titles to the tracts of land so in their possession, and for other purposes: Now, therefore, * * * it is hereby mutually agreed, each with all and one with another, that the purchases of title of said Gates and others, and of said costs, shall be made; and, in order that the funds requisite for so doing may be raised, it is hereby agreed that: * * * *Third.* An executive committee consisting of H. Meacham, C. Railsback, G. Warner, W. H. Dalton, S. M. Martin, and E. Denman is hereby appointed for the transaction of business under the agreement, and to carry the same into effect," etc.

The executive committee, whom the defendants appointed to act for them, subsequently—i. e., on the twenty-sixth of October, 1865—contracted in writing with Gates to buy in his entire interest in the ranch and in the partition suit for \$10,000, payable to him according to the terms of the contract; and in the contract it was mutually agreed between Gates and them that the purchase of his interest was not to render them liable for any costs incurred by him "in said suit, except such as are properly chargeable as costs in said action, and which may be taxed as costs therein, and made a lien upon his interest * * * in said tract of land; but they, as parties of the second part, agree to take said land conditioned as above, and subject to all legal costs chargeable against the interest of the party of the first part in the said tract of land." They also agreed to prosecute the partition suit to final judgment, and for that purpose to retain and employ attorneys. For the purpose of performing the contract between him and the executive committee of the associated defendants, Gates, on November 7, 1865, transferred all his interest in the ranch to A. W. Thompson, who was his attorney of record in the partition suit; and on January 22, 1866, Thompson, by his deed, conveyed his interest to "E. Denman, W. H. Dalton, C. Railsback, S. M. Martin, G. Warner, and H. Meacham, executive committee and

trustees of the Bojorquez Land Association, and in trust for the said association." The deed recited as the consideration thereof the sum of \$10,000; and, upon being acknowledged and delivered, it was recorded in the recorder's office of Sonoma county, on March 26, 1866. Thereafter the attorney of record for Gates withdrew from the case. Gates ceased to have any interest in the ranch, or in the partition suit; but the defendants, as the only tenants in common of the ranch, employed attorneys, who continued the action in the name of Gates, and prosecuted it to final judgment for their benefit.

The interlocutory decree in the action was rendered on the twenty-second of June, 1872. By the decree it was ascertained and determined that Gates was, at the commencement of the action, entitled to an undivided one-ninth interest in the ranch; and that interest was subsequently allotted and set apart in severalty in his name. Final judgment confirmatory of the partition was entered and recorded in March, 1877. By it the court, after adjudging that the partition be effectual forever, ordered "that the costs of the plaintiff and defendants be taxed as between party and party, and apportioned as between plaintiff and defendants, according to their respective interests in the lands partitioned; and that each of the several parties whose bill of costs as taxed exceeds the amount of his share of the whole costs and expenses have execution against the other or others for the balance there is due, as ascertained and settled by the court."

The costs of the partition amounted to \$36,237. Of that sum \$6,810 was allowed in the name of Gates, as representative of the one-ninth part of the ranch allotted in his name. The allowance exceeded the amount of the costs taxed and apportioned to the interest allotted to him by \$2,784, and the court adjudged that the excess should be paid to him by all the defendants. But the allowance was made to him for costs incurred in the action for the common benefit of all persons interested in the ranch, and he had not, in fact, paid them. They were due and owing as fees in the action to the officers who had rendered the services, and the court adjudged payment of the same to him for the benefit of those who were entitled to them. The clerk of the district court of Sonoma county, assignor of the plaintiff, was entitled to receive \$4,496 of the costs allowed in the name of Gates. The defendants paid for the benefit of those entitled the \$2,784 in excess of the proportion of the costs chargeable to the interest in the ranch allotted to Gates, but they refused to pay the plaintiff the costs incurred in the action which were due and owing to his assignor, and the court below held they were not expressly or impliedly bound to pay.

We think the judgment is erroneous. For the costs which were allowed and taxed in the name of Gates for the benefit of the officers who had rendered the services in the action for which they were allowed, were incurred for the common benefit of the real parties to the action. These were the defendants in the action, each of them being

an actor in the action, who, after the acquisition of Gates' title and interest, were the real owners of the ranch, and prosecuted the action for their exclusive benefit; they, and they only, being entitled to the fruits of the judgment. The interest allotted to Gates, therefore, belonged to them, and they were legally bound as owners of the interest for the payment of the costs chargeable upon it.

The law under which the defendants prosecuted the partition proceedings in the name of Gates provided as follows:

"The costs of partition, including reasonable counsel fees expended by the plaintiff, or either of the defendants, for the common benefit, * * * must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment." Sections 796, 798, Code Civil Proc.

As the only parties "entitled to share in the lands divided," the defendants were therefore under the law liable for the just proportion of the costs of the partition charged upon the interest which belonged to them, although the interest was nominally allotted and set apart in severalty to their grantor. Having acquired it for their use and benefit in an action which was thereafter to be prosecuted in the name of Gates for their purposes, they took the land and the action *cum onere*, entitled to the benefit, and subject to the liabilities, incurred in the action by their assignor. *Jordan v. Sherwood*, 10 Wend. 622; *Miller v. Franklin*, 20 Wend. 632.

Besides, when the defendants, by their "executive committee," contracted to buy from Gates his interest in the ranch and the partition suit, they assumed payment of all the costs which would be chargeable upon the interest, and especially agreed to "take it subject to all legal costs chargeable against it." Under that contract Gates did transfer his interest in the ranch to them, and they prosecuted the action in his name for their exclusive benefit to a final judgment, in which the interest which they had acquired from him was taxed for its proportion of the costs of the partition. That being so, the obligation to pay such costs to those beneficially entitled to them arose, not only from the operation of the law under which the ranch was partitioned, but from the contract by which the defendants had acquired the title to the interest in the ranch, upon which the costs were charged; and, upon the breach of their obligation, the persons for whose benefit the costs were adjudged to be due and owing were entitled to maintain an action for their recovery. Section 1559, Civil Code.

The nonsuit was improperly granted.

Judgment reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MCKINSTRY, J.

(68 Cal. 422)

WHARTON v. HARLAN and others. (No. 11,234.)

Filed January 28, 1886.

1. JUDGMENT BY DEFAULT—SETTING ASIDE—APPLICATION, WHEN MUST BE MADE.

A judgment by default, entered by the clerk, may be set aside by the court at any time when it appears by the judgment roll that the clerk had no power to enter it, and in such case section 473 of the California Code of Civil Procedure, which requires that an application for summary relief must be made within six months after the judgment was entered, is not applicable.

2. SAME—ENTRY IS MINISTERIAL.

The acts of a clerk in entering default judgment are merely ministerial, and he exercises no judicial functions. The judgment is authorized by statute, and the clerk is only the agent who is to write it out and place it among the records of the court, and he must therefore, in so doing, follow the statute strictly, or his acts will not be binding.

3. SAME—JOINT OBLIGORS—JUDGMENT BY DEFAULT.

In an action to recover damages against joint obligors on a contract, the clerk has no power to separately enter the defaults; but he has power to enter a judgment against the part of the defendants only who have been summoned, and have failed to answer. The clerk may enter a joint judgment against defendants served and defaulted, although the other defendants named in the complaint have not been served.

Department 1. Appeal from superior court, county of Fresno.

L. Shaw and J. R. Webb, for appellant.

Hinds & Stewart, for respondents.

MCKINSTRY, J. This is an appeal from an order setting aside the defaults entered against certain of the defendants by the clerk of the superior court for failure to answer. The motion to set aside the judgment by default was made on the ground of "surprise." The notice of motion was filed and served more than six months after the judgment was entered. As an application under section 473 of the Code of Civil Procedure it was made too late. The application for summary relief by motion must, by the terms of that section, be made within the six months. The application must be made within six months, even though the "mistake, inadvertence, surprise, or excusable neglect" has been caused or brought about by fraud practiced by the party in whose favor the judgment or proceeding was taken. After that period the questions of "mistake," etc., (whatever the remedy in equity,) cannot be tried by affidavit. But where the judgment is void on the face of the roll, is the court debarred from declaring it null by the limitation of time found in section 473 of the Code of Civil Procedure? If not debarred, it is immaterial in what manner the attention of the court is called to its invalidity.

The clause of the sixty-eighth section of the former practice act—as the same stood when *Bell v. Thompson*, 19 Cal. 706, was decided—read:

"Or [the court] may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. When from any cause the summons and the copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant

or his legal representatives, at any time within six months after the rendition of a judgment in such action, to answer to the merits of the original action."

In *Bell v. Thompson*, Mr. Justice NORTON construed the last of the clauses just quoted, and seems to have held that the six-months limitation applied as well where the defendant was not served at all as where the service was by publication, as opposed to "personal" service. The learned judge deemed that he was bound so to hold in deference to prior decisions. However general the language of the opinion, that was the point decided in that case. It will be observed that, as the statute then read, a party was not required by its terms to apply for relief on the ground of "mistake," etc., within the time limited. But the court had held that "after the adjournment of the term the court loses control of its judgments." This technical rule as to action during the same term never applied to a pretended judgment in fact void, and could never have applied to statutory judgments entered by the clerk, which may be entered in vacation.

The New York Code provides:

"The court may likewise, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

In that state it is held that the power to vacate judgments is inherent, and is not limited by this section, which only has reference to ordinary defaults, (*Dinsmore v. Adams*, 48 How. Pr. 274;) and that the limitation does not apply to an unauthorized judgment, nor to a judgment entered without service of process. *Simonson v. Blake*, 20 How. Pr. 484; *S. C.* 12 Abb. Pr. 331; *Simpson v. McKay*, 3 Thomp. & C. 65; *Baldwin v. Kimmel*, 16 Abb. Pr. 353. See, also, *Hallett v. Richters*, 13 How. Pr. 43; *Dederick's Adm'r's v. Richley*, 19 Wend. 108; *Manufacturers' Bank v. Boyd*, 3 Denio, 257.

Besides, the very language of the statute, "may relieve a party" from a judgment, implies a judgment which, if not set aside, may be directly enforced by execution. It is admitted that when the judgment is void the court may perpetually stay execution. It would be difficult to define the distinction, in legal effect, between such an order and one setting aside a judgment in form, entered by the clerk without authority, and which merely incumbers the record of the court. The judgment considered in *Bell v. Thompson* was a judgment by the court. We are not aware that it has been held that a void judgment, entered on default by the clerk, must be attacked by motion within six months.

Moreover, since service of summons may be proved by affidavit, and the proof of non-service may also be by affidavit, thus sometimes making an issue of fact, there may possibly be some reason for sending a defendant into a court of equity in that case which does not apply when the judgment is void for defects appearing in the roll, (Code

Civil Proc. 670, subd. 1,) and which thus bears on its face the evidence of its invalidity. We are convinced that the court may at any time set aside a judgment by default by the clerk when it appears from the roll that the clerk had no power to enter it.

The present action was brought against 17 defendants (upon their joint contract,) 16 of whom were served with summons. The clerk, on application of the plaintiff, entered the default of 11 of the defendants for failure to answer, and entered a judgment against 10 of the 11. The power of the clerk to enter a judgment by default is limited to the cases provided for in the first subdivision of section 585 of the Code of Civil Procedure. The subdivision reads:

"In an action arising upon contract for the recovery of damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendants or against one or more of several defendants, in the cases provided for in section 414."

Section 414 is:

"When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

Thus, since the adoption of the Code, the clerk is authorized to enter default and judgment against those of the defendants served with process, where others have not been served, and all the defendants are jointly liable upon a contract "for the recovery of damages only." In *Junkans v. Bergin*, 64 Cal. 203, as we are assured, the judgment by default was entered against all the defendants alleged to be jointly liable,—as well those served as those not served.

Section 414 of the Code of Civil Procedure is a substitute for section 32 of the former practice act, which provided:

"When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: *First*, if the action be against the defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or, *second*, if the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants."

While the practice act was in force it was held that when the action was on the joint obligation of two defendants, and one of them only was served, the clerk had no power, on default, to enter any other judgment than that provided for in section 32. *Stearns v. Aguirre*, 7 Cal. 449; *Kelly v. Van Austin*, 17 Cal. 564. In the cases cited the power of the clerk was referred to sections 32 and 150 of the practice act, which correspond to sections 414 and 585 of the Code of Civil

Procedure. While the sections of the Code, however, permit a judgment by default against one or more less than all joint debtors, what is said in *Kelly v. Van Austin* with reference to the power of the clerk is still the law:

"The clerk in entering judgments by default, acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only the agent by whom it is written out and placed among the records of the court. He must therefore conform strictly to the provisions of the statute, or his proceedings will be without any binding force."

Section 414 of the Code authorizes the plaintiff to proceed against those served (when the liability is joint) as if they alone were joint obligors. It does not authorize him or the clerk to treat each one of those served, if more than one, (jointly liable with the others,) as if the contract were his several contract. The defaults of each may, perhaps, be separately entered as each becomes due, but the clerk cannot relieve any of the defendants from the consequences of his default. While the defendants in court cannot now insist that the judgment shall be against all jointly liable with them, they have a right to be protected in the interest they still retain that all who have been summoned, and who have failed to answer, shall be made subject to the joint judgment. The sections of the Code do not empower the clerk to enter a judgment such as was entered by him in this action, and the court could have properly set it aside.

But the order should be modified. It directs that the defaults of certain of the defendants shall be set aside. The clerk had jurisdiction to enter the *defaults*, but none to enter the judgment. The application was to set aside the "judgment by default." As we have seen, the application to be relieved of the default on the ground of "surprise" came too late. The plaintiff may still apply for a default against each of the defendants served, (who has not appeared,) unless he shall demur or answer in the mean time; and, in such case, the clerk will have power to enter such defaults. And the clerk will have power, under sections 414 and 585, to enter a joint judgment against the defendants served and defaulted, although other of the defendants named in the complaint have not been served. If the defendants, or any of them, were misled, or prevented from appearing by the fraud of the plaintiff, they may seek relief in equity within a reasonable time.

The order is reversed, and cause remanded, with direction to the court below to set aside the judgment, leaving the defaults standing.

We concur: ROSS, J.; McKEE, J.

68 Cal. 466

OSMENT v. McELRATH. (No. 9,345.)

Filed January 29, 1886.

1. SUFFICIENCY OF FINDINGS—WHETHER CONTRADICTORY.

Where, in an action, the amended answer alleges certain facts which are also stated in the complaint, findings on all the facts alleged in the complaint, and a general finding that "all and singular the allegations contained in defendant's amended answer are untrue," are not contradictory findings, the requirement for findings being that they should be limited to the conflicting allegations of the pleadings.

2. ADMISSION OF EVIDENCE—IMMATERIAL ERRORS.

A judgment is never reversed for harmless and immaterial errors in the admission of evidence.

3. PARTNERSHIP—DISSOLUTION—WINDING UP BUSINESS.

Where a partnership between attorneys is dissolved, an agreement by one of the partners to wind up the business, and to pay the other his portion of the proceeds, is not void as being without consideration, and the fact that it was not expected that the business would all be wound up within a year does not bring the agreement within the statute of frauds.

4. SAME—DISTRIBUTION OF PROCEEDS.

Upon the dissolution of a partnership between attorneys, each is entitled to share in the fees collected for the unfinished firm business.

5. STATUTE OF LIMITATIONS—ACKNOWLEDGMENT OF DEBT IN WRITING.

Letters from defendant to plaintiff, written and signed by the former, considered, and *held* to be sufficient acknowledgment of the obligation to constitute a contract or liability founded upon an instrument in writing.¹

6. SAME—WAIVER OF.

The statute of limitations, unless pleaded, is deemed to have been waived.¹

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

William H. Fifield, for appellant.

H. N. Clement, for respondent.

BELCHER, C. C. In July, 1869, the plaintiff and defendant entered into partnership as attorneys and counselors at law, and took an office in the city of San Francisco. The partnership was continued until the seventh of November, 1874, and then dissolved by mutual consent. At the time of its dissolution all moneys on hand, and all other assets and property of the firm, were equally divided between the partners. There were some fees due, but uncollected, for business which had been finished, and they had several cases in the courts, in some of which the fees were, and in others were not, contingent upon their success. Shortly after the dissolution the plaintiff removed to the state of Tennessee, and there engaged in the practice of the law, while the defendant remained and continued to practice his profession in the city of San Francisco. During the next two years the defendant attended to the unfinished business of the firm, and disposed of most of it. He won some of the cases in which the fees were

¹ For full discussion of the subject of the statute of limitations, and of the question of what acknowledgment will take a debt out of the operation of the statute, and also of the waiver of the bar of the statute by failure to set it up, see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-641; and *Cameron v. City and County of San Francisco*, (Cal.) 9 Pac. Rep. 430, and note.

contingent, and lost others. He collected fees which were earned before, and others which were earned after, the dissolution. From early in 1875 until 1881, a correspondence was kept up between the parties about the business of the late firm, and the division of the money collected by the defendant therefor. In July, 1881, the plaintiff returned to this state, and on the sixth of August commenced this action for a settlement of the partnership accounts.

It is alleged in the amended complaint "that upon the dissolution of the firm, as aforesaid, the defendant voluntarily undertook to attend to all the business, and to conduct all the litigation then pending or necessary, which had been intrusted to said firm, to collect the fees and to wind up the old business of the firm, and to account to plaintiff for his share of said fees;" that the business was substantially wound up, and, according to the information and belief of the plaintiff, the defendant had received "the sum of about \$20,000 for fees due from the business of the old firm on hand at the time of its dissolution," and had refused to pay to plaintiff any part of the fees so collected.

The defendant demurred to the complaint, and his demurrer was overruled. He then answered, and, among other things, denied that he had "received since the dissolution of said firm the sum of \$20,000 as fees, or otherwise, or any sum as fees, or otherwise, growing out of the old business of said firm, in excess of \$10,000." He subsequently filed an amended answer, and in that denied that he had received "any sum as fees; or otherwise, growing out of the old business of said firm, in excess of \$6,534.86;" and he alleged that the action was barred by the provisions of section 339 of subdivision 1 of the Code of Civil Procedure.

The court below found that since the dissolution of the partnership the defendant had collected and received from the business of the firm, committed to his hands at the time of the dissolution, the gross sum of \$7,144.86; that he had paid out of that sum for necessary costs and expenses the sum of \$305; that the reasonable value of his services and labor in the conduct and management of the business so left in his hands was \$2,000; and that the plaintiff's action was not barred by the statute of limitations. After deducting from the gross amount received \$305, paid out for expenses, and \$2,000 for value of services, judgment was entered in favor of plaintiff for one-half of the remainder, but without costs.

The defendant appeals from the judgment, and from an order denying a new trial, and assigns numerous errors.

1. The demurrer was properly overruled. It was an ordinary complaint for an account and settlement of partnership affairs, and we think stated all the necessary facts and with sufficient certainty.

2. The objection that the findings are contradictory cannot be sustained. The court found upon all the facts alleged in the complaint, some of them being also alleged in the answer, and then found

generally that "all and singular the allegations contained in defendant's amended answer are untrue." In *Carey v. Brown*, 58 Cal. 184, this court overruled a similar objection, and said: "The findings are upon the issues of fact, and, in this case, must be limited to the conflicting allegations of the pleadings."

3. When the plaintiff was testifying in his own behalf, after stating what defendant volunteered to do about the unfinished business, he was going to state what he "understood." An objection was interposed, but the witness went on, and stated he did not "suppose" defendant intended to charge— Immediately defendant's counsel moved to strike out as irrelevant and immaterial what the witness supposed. The motion was denied, and exception reserved.

Conceding that the ruling was erroneous, still it worked no harm to the defendant, as he was afterwards allowed to charge for his services, and was awarded what the court considered to be full compensation therefor. The rule is well settled that for harmless and immaterial errors judgments are never reversed.

4. There is nothing in the point that the defendant's undertaking to wind up the business, and to pay to the plaintiff his share of the fees, was without consideration, and therefore void; nor in the further point that, as the business was not expected to be all wound up within a year, the agreement was within the statute of frauds. The business was intrusted to the firm, and it was the duty of both parties to conduct it to an end. This duty they owed to the clients and to each other, and it continued after the dissolution as to all unfinished business. But as between themselves they might divide the labor and the fees as they pleased; and it cannot be said, as matter of law, that because the defendant gratuitously undertook to do, and has done, all the work in particular cases, the plaintiff is therefore not entitled to any share of the compensation received in such cases; nor can it be said, after the work is done, that the defendant is entitled to claim all the compensation, because, when he undertook to do it, it was not expected to be completed within a year. Doubtless the defendant might have refused to go on and attend to the cases alone, but he did not do so, and now the objection cannot avail him.

5. The court permitted the plaintiff, against the objections of the defendant, to read in evidence that portion of the original answer which denied that the defendant had received as fees for the old business to exceed \$10,000. The original answer had been superseded by an amended answer, and the ruling was clearly erroneous. *Ponce v. McElvy*, 51 Cal. 223. The error did not, however, work any injury to the defendant. Taking his report of the amounts collected, in his letter to the plaintiff under date of October 4, 1879, and his testimony on the stand, showing that he collected in *Hitchcock v. Clark*, \$500, and in *Allen v. Chittick*, \$1,100, more than was reported, it clearly appears that he had received a considerably larger sum than was found by the court.

6. It is insisted for the defendant that the plaintiff is not entitled to any share in the fees which were contingent and were earned after the dissolution, and, if he is entitled to some share, still the amount allowed him, in view of the labor and expenses of the defendant, was far too large. It is evident from the correspondence which was carried on between the parties during all the time the work was being done by the defendant that it was understood by both of them that the plaintiff was to share in the fees, and the only difficulty which finally arose was as to what that share should be. Thus, in a letter written to the plaintiff in January, 1877, the defendant says:

"I am desirous of settling up our old business. Since you left here in November, 1874, I have collected various sums from the partnership business. In some instances the cases in which the collections were made had been terminated; in others some service had been rendered by us, and the payments were on account. In the first class of cases it is just to divide the amounts received by me since your departure; in the other class an equitable apportionment should be made."

The general rule is that a partner is not entitled to any compensation for services rendered by him to the partnership, (section 2413, Civil Code,) and it applies after as well as before dissolution.

Collyer states the rule as follows:

"As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit of the partnership, it follows that he must do it without any reward or compensation, unless there is an express stipulation to that effect; and there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount. As the power of partners with respect to rights created pending the partnership remains after the dissolution, as also do their mutual obligations, it is therefore the duty of those who are appointed to wind up the affairs of the partnership to do everything for the utmost advantage of the concern. No partner can make any use of the property inconsistent with that purpose, nor, in performance of this business, can he claim to himself any particular reward or compensation for his trouble." Collyer, Partn. §§ 183, 199.

This is the rule of commercial partnerships, and, as said by the supreme court of the United States, "there may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with which we are acquainted, recognize any such distinction." *Denver v. Roane*, 99 U. S. 359. We are not called upon to say whether the distinction referred to should have been made in this case, as it was made by the court below when it allowed the defendant \$2,000 for his services, and the plaintiff acquiesces in the allowance. We are satisfied that the plaintiff was entitled to share in the fees collected for the unfinished business, and, in view of the conflicting testimony as to what the defendant's services were reasonably worth, we cannot say that the apportionment was not equitable and just.

7. It is claimed that the action was barred because not commenced within two years after the money was collected. The claim cannot be maintained. In the letters written by defendant to plaintiff his obligation to pay over a share of the money is frequently referred to and admitted. In one he says: "Porter has paid the money, so has Campbell, and I will shortly transmit your portion of that, and of all other money that I collect." In another: "I certainly will have plenty of money in a very short time, and the moment I can get it I shall not fail to forward all that is coming to you. I sincerely trust that you can comfortably get along until I can pay you." In another: "I hope to be able to forward you the money I owe you very soon, and would have done so before now, but have been unable to do so." In another, speaking of the early settlement of a case, he says: "The moment it is done I will be 'flush,' and will then make you a remittance." In another: "I would like to settle with you, but have no ready money. * * * The very earliest moment possible I will settle up." In another: "I wish you would look over the amounts received, and write me back what you think it fair for me to pay you, and I will do what is right." In another: "We are having very hard times in California now, and money was never scarcer, but I hope within the next two months to square up my account with you to our mutual satisfaction. I hope you can be patient, for I know you are not hard pressed,—not near so much as I am. I intended to have written you, as you requested, stating what my opinion was as to what would be a fair share for you to have of our contingent business, but have not done so." The letters were all signed by the defendant, and the portions quoted from them are sufficient acknowledgments to constitute a contract, obligation, or liability, founded upon an instrument in writing. *Ashley v. Vischer*, 24 Cal. 322; *Farrell v. Palmer*, 36 Cal. 187. But the defendant did not plead the four-years limitation, and cannot now avail himself of it.

On the whole we can see no error in the record prejudicial to the appellant, and the judgment and order should be affirmed.

SEARLS, C. I concur.

FOOTE, C., did not participate in this case.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 444

HAGGIN and others v. CLARK. (No. 9,280.)

Filed January 30, 1886.

JUDGMENT—SATISFACTION OF—LAW OF THE CASE.

The decision of the supreme court, on an appeal in a case determining the proportion of the judgment to which, as between himself and his co-plaintiff, the appellant is entitled, becomes the law of the case to the extent thus determined, and upon a tender thereof by the defendant he becomes entitled to a satisfaction of the judgment.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Cobb & Tevis, for appellants.

Sawyer & Ball, for respondent.

SEARLS, C. The court below, on motion of defendant, ordered satisfaction of a judgment in favor of plaintiffs under section 675 of the Code of Civil Procedure. From this order plaintiffs appeal. This action was originally brought to recover rents, issues, and profits of certain premises situated in the city and county of San Francisco, and which premises had before that time been recovered from the defendant in certain actions of ejectment. The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of the plaintiffs for \$17,408. Of this sum \$12,008 was for interest. An appeal was taken to this court, and the judgment of the court below was modified by striking out the sum of \$12,008, allowed as interest, and the court below instructed to modify its judgment accordingly. 51 Cal. 112. This was done by the entry of a judgment in favor of plaintiffs for \$5,400. That judgment so modified was satisfied of record. Plaintiff Haggin moved the court below for an order setting aside the satisfactions of the judgment, upon the ground that they were improperly entered. The order was granted, except as to \$2,150. Defendant, Clark, appealed from this last order, and this court affirmed the action of the court below (61 Cal. 1) in the following opinion:

"THORNTON, J. This is an appeal from an order setting aside certain satisfactions of the judgment in this action. The satisfactions were set aside by the order appealed from except as to \$2,150. The motion on which the order appealed from was made was tried on affidavits and the deposition of B. S. Brooks, and the court decided to grant the motion as above. On examining the evidence we think the order was correct. Haggin has not received the amount due him, nor has it been paid to any one authorized to receive it for him. Though satisfaction of this judgment was given by Leroy, we are not satisfied from the evidence that the whole amount of the judgment was paid him, and only on payment was he, as a co-judgment creditor, authorized to enter satisfaction without the consent of Haggin; Leroy only received his share. We affirm the order, without deciding what precise amount is due to Haggin, indicating, however, on what *data* the computation is to be made. There is no doubt that Haggin owned during the whole period for which mesne profits were allowed (the judgment was recovered in an action for mesne profits) four-sixteenths of the land for the detention of which the rents

and profits were claimed. They were allowed for three years, ending on the twentieth of November, 1866, when Haggin and Leroy were restored to possession, and amounted to \$10,800. On the eighteenth of June, 1866, Haggin acquired three-sixteenths additional. He is then entitled to four-sixteenths of the amount of the judgment up to the eighteenth of June, 1866, and to seven-sixteenths from the date just named to the twentieth of November, 1866. The deed of eighteenth of June, 1866, only conveyed the land,—it transferred none of the antecedent rents and profits. These latter were no part of the land, and did not pass by the deed. The computation made on the foregoing *data* will show that more is due to Haggin than he has received. The ruling of the court below in vacating the satisfaction is without error. Leroy was really represented by the defendant, Clark, who had purchased his interest in the judgment prior to the making of the motion to vacate the order affirmed."

Thereafter defendant, Clark, tendered to Haggin the sum of money found due him, calculated on the basis of the foregoing opinion, less one-half of certain costs adjudged by the court to be paid defendant by the plaintiffs, and, upon his refusal to receive said sum, the same, amounting to \$1,213, was paid into court for said Haggin. Thereupon, and on an order to show cause, after a hearing, in which the findings of the court, affidavits, etc., were used, the court below, on the second day of March, 1883, made an order denying a motion to vacate the judgment in favor of Clark and against Haggin for \$79.50 for the costs of appeal, and at the same time ordered that the judgment in *Haggin and Leroy v. Clark* be satisfied of record.

Ordinarily the determination of an action between the parties, plaintiff and defendant, decides only the rights of the parties claiming adversely to one another, and does not attempt to adjudicate the rights of plaintiffs, between whom no issues are made, as between themselves, or as between defendants similarly situated. Where, however, in the progress of an action, it becomes necessary to do so, for any purpose within the power of the court to accomplish, it may do so; "and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Code Civil Proc. § 578. Such action seems to have been taken in this case, in the court below, when it set aside the satisfactions of judgment, which had been entered of record therein, upon the ground, as we must conclude, that plaintiff Haggin had not received the portion of the proceeds of such judgment to which he was entitled. The proportion of the judgment to which, as between himself and his co-plaintiff, he was entitled, became a controlling factor in determining the motion.

Upon the appeal from that order this court affirmed the same, and with the record before it upon which the lower court had acted, designated, not the gross sum to which the plaintiff Haggin was entitled, but the proportion, or, as the court expressed it, "on what *data* the computation is to be made." This left nothing necessary but a computation to determine the sum to which he was entitled. As that is certain which is capable of being made certain by computation, we

may conclude it was, in legal intendment and effect, certain. Upon the *data* thus furnished—the basis thus established—the court below acted in making the order from which this appeal is taken. The relative rights of the parties having been thus settled by this court, its decision is, as to that subject, and to the extent thus determined, the law of this case. *Davidson v. Dallas*, 15 Cal. 75; *Leese v. Clark*, 20 Cal. 387; *Pico v. Cuyas*, 48 Cal. 639.

If we concede, however, that the action of this court was not final in the premises, and that further testimony to vary the rights of the parties was permissible, we are still of opinion that there was such a conflict in the evidence that the decision of the court thereon should not be disturbed, and, consequently, that the order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

68 Cal. 528

MURPHY v. BENNETT. (No. 8, 602.)

Filed February 19, 1886.

1. FINDINGS ON MATERIAL ISSUES—ERROR WITHOUT PREJUDICE.

When it is apparent that the failure to find on a particular issue is in no way prejudicial to the appellant, the judgment will not be reversed for want of a finding on such issue.

2. FINDING AS TO OWNERSHIP—MATERIALITY—CONVERSION.

In an action for damages for tearing down a barn, and converting the materials thereof, a finding that the plaintiff was not and that the defendant was the owner of the barn in question is a sufficient finding on an issue as to the ownership, and in such case the failure of the court to find on a plea of justification by the defendant is not to the prejudice of the plaintiff.

McKEE and THORNTON, JJ., dissent.

Commissioners' decision.

In bank. Appeal from superior court, county of Stanislaus.

W. E. Turner, for appellant.

Wright & Hazen, for respondent.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment in favor of the defendant, and it comes here on the judgment roll. The only question presented is as to the sufficiency of the findings. The action was commenced to recover damages from the defendant for tearing down a barn, and converting the materials thereof to his own use. The complaint alleged that the plaintiff was the owner of the barn, and in the lawful and peaceable possession of the land on which it was situated, and that on or about the ninth day of October, 1880, the defendant, without right or authority, and against the will of the plaintiff, willfully and maliciously tore down the said building, and removed the whole of it from the premises where it stood, and converted the same to his own use. The answer

denied that the plaintiff was at the times, or at any time named in the complaint, the owner of the barn, or in possession of the premises on which it was situated, and then set up two affirmative defenses. The court found that the plaintiff was at the times mentioned in his complaint in the lawful and peaceful possession of the half section of land on which the barn was alleged to have been situated; and then "that the plaintiff was not the owner of the frame building situate on the tract of land described in his complaint at the time the same was torn down and removed by the defendant; that the defendant was the owner of said building at the time he tore the same down and removed it." There was no finding upon the affirmative matters set up in the answer.

It is insisted for the appellant that the findings above quoted are not findings of fact, but conclusions of law, and that for want of findings upon the affirmative matters the judgment must be reversed. Findings should be statements of the ultimate facts in controversy, and not of probative facts, or mere conclusions of law. *Mathews v. Kinsell*, 41 Cal. 514; *Pico v. Cuyas*, 47 Cal. 174. Findings of probative facts are sometimes held sufficient, but only when the ultimate fact necessarily results from the probative facts. *Downing v. Graves*, 55 Cal. 544; *Biddel v. Brizzolara*, 56 Cal. 381. The facts should be found, and not mere conclusions of law stated.

But a finding "that the plaintiff did not own the several tracts of land described in the several answers of defendants, but that the defendants owned the same in severalty, as set forth in their answers," has been held sufficient to support the judgment in an action of ejectment. *Smith v. Acker*, 52 Cal. 217. So a finding that the defendant "has a good and perfect title to said property" has been held sufficient. *Frazier v. Crowell*, 52 Cal. 399. So a finding "that the plaintiff was the owner and in possession of the property on the day that the defendant seized upon it, and removed it from her possession, custody, and control," has been held sufficient in an action to recover damages for the conversion of personal property. *Haley v. Nunan*, 9 Pac. C. Law J. 523. There should be findings upon all the material issues in the case, but a judgment will not be reversed for want of a finding on a particular issue, where it is apparent that the failure to find on that issue is in no way prejudicial to the appellant. *Porter v. Woodward*, 57 Cal. 535; *McCourtney v. Fortune*, 57 Cal. 617; *People v. Center*, 6 Pac. Rep. 481.

Here the allegation in the complaint is that the plaintiff "was the owner of a certain frame building, situate," etc. The answer denied that the plaintiff was the owner of the building. Whether the plaintiff did own the building or not was then the ultimate fact to be determined, and upon the issue thus raised the court found against the plaintiff. We think it clear that the findings referred to are findings of fact, and not conclusions of law. This being so, we are unable to see how the plaintiff is prejudiced by the failure of the court to

find upon the affirmative defenses set up in the answer, as, if the plaintiff was not the owner of the building, it is of no moment whether the defendant justified his taking of it or not. In support of his position that he was entitled to findings upon the affirmative defenses, counsel for appellant cites *Billings v. Everett*, 52 Cal. 661. But that case is not in point. There the defendant set up an affirmative defense, and, without any finding upon it, judgment was given in favor of plaintiff. This court held in effect that if the facts set up in the answer were true they constituted a defense to the action, and that no judgment could properly be rendered in favor of plaintiff until there was a finding as to whether they were or were not true.

The judgment we think should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

McKEE, J., dissents.

THORNTON, J. I dissent. The finding that plaintiff was not the owner of a building, but that the defendant was, is neither a finding of an ultimate nor probative fact, but a general verdict reached by application of rules of law to the facts found. Whether A. is the owner of certain property is a mixed question of law and fact. Such an issue, when contested, can only be determined after a trial in which evidence is introduced and the law applied to the facts found. When tried before a jury, they should be, and usually are, instructed as to the rules of law to be applied to the facts which they find to exist. The court usually instructs the jury as to every phase which the case may assume upon the evidence before them, and are or should be told the rules of law which should govern them in their deliberations, and be applied to the facts as they find them to exist. Facts, then, as it was said by Justice BLACK, are "*the raw material of verdicts.*" Verdicts are elaborated from them. A general verdict is synthetic,—a compound of law and fact. The special verdict is analytic. It finds the facts, and submits the law to the court. Such a verdict concludes by a statement that, as they (the jury) are ignorant of the law, they find the facts as set forth in the verdict, and submit the questions of law arising on them to the court, and if the court should be of opinion that on the facts found the law is for the plaintiff, they find for the plaintiff, and if for defendant, they so find. Steph. Plead. *91; Abb. Law Dict. word "Verdict." The *naked facts*, as Blackstone styles them, (3 Bl. Comm. 377,) are alone found, from which every element of law is eliminated. These facts are the ultimate facts, and are the facts separated from the law on which the rights of the parties are to be determined. The jury did this—re-

frained from finding the law—that they might escape an attain for a false verdict. See *Emeric v. Alvarado*, 64 Cal. 603-605; S. C. 2 Pac. Rep. 418.

How can it, then, be said that a finding that A. is the owner of property is a finding of a fact, when this can only be determined in the case of a contest, after hearing all the evidence, determining which facts exist, and applying to them the rules which the law furnishes for the admeasurement of the rights of the parties? The facts must be so found that the appellate court may see that they warrant the conclusion of law reached and the judgment entered; that the judicial mind may perceive that the rules of law, on being applied to the facts found, lead to the conclusion of law and judgment arrived at. The mind of the court is not called on to act at all when the finding is that the plaintiff is not the owner of the property sued for, but that the defendant is. If this is a proper finding of the facts, the duty of the court becomes wholly that of a servant bound to obey, and must enter judgment as on a general verdict. In fact *the verdict is a general one*. A general verdict is one which the jury finds in the terms of the issue. Abb. Law Dict. word "Verdict." Here the finding is in such words. Coke, illustrating this point, says:

"There be two kindes of verdicts, viz., one generall, and another at large or especiall. As in an assize of *novel disseisin*, brought by A. against B., the plaintife makes his plaint, *Quod B. disseisivit eum de 20 acris terræ cum pertinentiis*; the tenant pleades, *Quod ipse nullam injuriam seu disseisinam præfato A. inde fecit, &c.* The recognitors of the assize doe finde, *Quod prædict A. injuste & sine judicio disseisivit prædict. B. de prædict 20 acris terræ cum pertinent, &c.* This is a generall verdict." 2 Co. Litt. 226b.

If the finding by the jury that "the aforesaid A. unjustly, and without judgment, (right,) disseised the aforesaid B. from the aforesaid twenty acres, with their appurtenances," is a general verdict, why is not a finding that "the plaintiff is the owner of the thing sued for" a general verdict. *Stephens v. Westwood*, 25 Ala. 716; *Chedoteau v. Dominguez*, 7 La. (O. S.) 521; *Gonzales v. Leon*, 31 Cal. 98; *Mendelsohn v. Anaheim*, 40 Cal. 657; *Downing v. Bourlier*, 21 Mo. 149; *Allison v. Darton*, 24 Mo. 343; *Bailey v. Wilson*, 29 Mo. 21; *Foster v. Jackson*, Hobart, 52-56, etc. I can perceive no difference. The one verdict, as the other, is compounded of law and fact, and the facts are not separated from the law, as is the case in a special verdict; and the court on such verdict has no discretion in entering judgment. The judgment must follow the verdict.

Now the court in the case under consideration was bound to find the facts separately from its conclusions of law. Such is the statute. Code Civil Proc. § 638. This is done, for the reason indicated above, that a court may examine the facts found, and see that they justify the conclusions of law and judgment pronounced on them. The statute is intended, *inter alia*, to furnish a criterion or test by which to determine whether the court below has applied the law correctly to the

facts found. In the case of the finding here, the court has nothing to which to apply this test. If the finding is a proper one, the court below has conclusively determined it, and this court is furnished with nothing by which it can determine whether the proper rules of law have been applied or not. The record as to the *data* on which to determine such question is an utter blank. This court must determine *blindly* whether the court below has ruled correctly or not. By adopting the findings as correct, the parties are deprived of a safeguard which the law intended to supply to them, viz., such a setting forth of facts in the findings that the appellate tribunal may see by looking at the facts found that the court below did not err in its legal conclusions. On what does the judgment of this court operate in examining a finding which says that the plaintiff is not the owner of a certain house and the defendant is the owner? There is clearly nothing in such a finding for the judicial mind to take hold of. Nor is such a finding a probative fact. A probative fact is a fact which proves, or tends to prove, something. It is an *evidential* fact. What is to be proved when it said A. is the owner or B. is not the owner? The result has been reached, and no evidence is required.

This court may have the right under the constitution, as an appellate tribunal, to infer one fact from another in a special verdict, or a finding of facts, where the result is determined by a fixed and certain rule of law. Otherwise, when it infers one fact from another fact, it is exercising original jurisdiction, and assuming a power which has not been conferred on it. This it is always bound to avoid. I cannot agree that the facts are properly found herein, and in my opinion, the judgment should be reversed, and the cause remanded for a new trial.

Porter v. Woodward, 57 Cal. 538, is in line with everything said above. *Possessed or not possessed is a naked fact.* There is no question of law mixed with it. This was so held in *Porter v. Woodward*. The court held that plaintiff, and those from whom he derived his right, who claimed under the Van Ness ordinance, never had any possession of the land in suit. If they never had a possession, as a title under the ordinance could only arise on a possession, they never had a title. It was then determined that inasmuch as plaintiff never had any title, it was unnecessary to find on the defense of the statute of limitations set up by defendant. It then became immaterial. If plaintiff had no title to recover on, how was he injured by a failure to find on a defense set up by his adversary. It was in reference to this view that the court said that it was not error "even if the court failed to find all the facts involved in such defense." If there was no finding at all on this issue, it was not error. *A fortiori* it was not error if a part only of the facts was found.

Smith v. Acker, 52 Cal. 219, is very imperfectly reported. The report says that the court found the ultimate facts in issue, which were filed July 24, 1876. The court then found the additional facts men-

tioned. These additional facts were *probative facts*, going through with the deraignment of title from the time the ranch was granted by the Mexican government, in 1844, to Stephen Smith, the father of the plaintiff.

If a party's chain of title—the grant and the conveyances under which he claims—are not ultimate facts, it is impossible to state what are such facts. The highest authority states the mode of finding facts in a special verdict is to find the documents according to their substance, or *in hæc verba*. Section 10, Bac. Abr. verb. "Verdict," 314; *Rowe v. Huntington*, Vaughan, 77; *Pilkington v. Dalton*, Cro. Eliz. 575; *Mauleverer v. Hawxby*, 2 Wms. Saund. 74c; *Buszard v. Capel*, 8 Barn. & C. 141.

A deed may be a medium of proof, but it is a fact,—an ultimate fact,—also. Questions of law may arise on it, and when this is the case it is eminently proper to insert it *in totidem verbis* in the findings, that it may go into the judgment roll for consideration by a court of error. It would have been better if the reporter had inserted the findings in the report, or a specimen of them at least, that it might have been seen whether the facts found were such as should go into a special verdict, or finding of facts, by a court. See special verdicts in the following cases, where the documents constituting title are found inserted as above stated: *Dartmouth College v. Woodward*, 4 Wheat. 518; *Taylor v. Horde*, 1 Burr. 60; S. C. 2 Smith, Lead. Cas. 597. That the finding of facts by a court is, in substance, a special verdict, see *Garfield v. Knight's F. & T. M. W. Co.*, 17 Cal. 512; *Breeze v. Doyle*, 19 Cal. 101; *Jones v. Block*, 30 Cal. 229; *Insurance Co. v. Folsom*, 18 Wall. 249; *Van Slyke v. Hyatt*, 46 N. Y. 262; *Meacham v. Burke*, 54 N. Y. 218.

Conclusions of law are sometimes allowed to be pleaded, as in the common counts in debt. These counts have been sustained here. See Gould, Plead. c. 3, rules 12–20, and notes. With us it is allowed to aver that a party is the owner, and entitled to the possession, of property, and issue is joined by the denying such ownership. But it does not follow from this that the findings must be in the terms of the issue, (which is, as we have seen, a general verdict.)

An illustration of this is seen in *Van Slyke v. Hyatt*, 46 N. Y. 259–262. The complaint in this case set forth various loans of money and negotiable paper, and also a sale of merchandise made by one Covert to the defendant; that on account of said matters the defendant was indebted to Covert, and that Covert had assigned his claims to the plaintiff. The answer denied any indebtedness to Covert or to the plaintiff. It also set up that before and at the time of the commencement of the action Covert was indebted to the plaintiff for money lent him at his request in a sum exceeding the amount claimed in the complaint. The plaintiff replied to this latter part of the answer by a general denial. The only findings of fact and conclusions of law by the referee were as follows:

"As matters of fact: *First*, that at the time mentioned in the complaint the defendant was not indebted to Covert in any sum whatever; *second*, that the defendant is not indebted to the plaintiff, as alleged in this action. And as a conclusion of law that the defendant is not indebted to the plaintiff, as alleged in this action, and is entitled to judgment against the plaintiff for his costs."

As to these findings the court said:

"It was doubtless the right of the plaintiff to have separate findings of fact and conclusions of law inserted by the referee in his report. This right is secured by statute, and it is substantial, inasmuch as these findings and conclusions enable the unsuccessful party to determine whether or not to appeal; and, in case he desires to appeal, they are indispensable to enable him to frame and serve his exceptions in due time, and to present the case in proper form for review. *Tilman v. Keane*, 1 Abb. Pr. (N. S.) 24; *Rogers v. Beard*, 20 How. Pr. 282. The decision to the contrary in *Johnson v. Whitlock*, 13 N. Y. 344, was based upon the then existing provisions of section 267 of the Code, relating to trials by the court. But the amendment of that section adopted in 1860 removes the foundation of that decision. The report should contain a sufficient statement of facts to form a basis for the conclusions of law, and substantially show the disposition made by the referee of the specific issues in the cause, or of such of them as are embraced in his determination. *A mere general conclusion of indebtedness or no indebtedness is not a sufficient compliance with the provision of the Code*, and serves none of the purposes for which it was intended." 46 N. Y. 262, 263.

Here, although a conclusion of law was pleaded, a finding in the same terms was held not allowable. The practice of making such findings as were made in this case should be disallowed. It is not in accordance with the statute, and deprives parties of substantial rights on appeal. If the facts are properly found, they are before this court, and it can then determine on them whether the proper legal conclusion has been reached. This is very important to a litigant in a court of error or appeal. The correctness of the judgment of the court below cannot be determined by this court where the right as determined, and the facts on which it is based, are not set forth in the findings. In such case the right secured by statute to a litigant is ignored. In fact he is virtually deprived of it.

For these reasons I think the cause should be sent back to the lower court, that the facts on which the title to the house rests should be found.

SUPREME COURT OF CALIFORNIA.

67 Cal. 627

PEOPLE *ex rel.* LEVERSON v. THOMPSON, Secretary, etc. (No. 9,846.)

Filed October 30, 1885.

1. ELECTIONS—CONGRESSMEN AT LARGE.

Mandate directing secretary of state to certify to the governor that two of petitioners were elected to congress refused, because no election for congressmen at large, as claimed, was had, under the act of March 30, 1883.

2. SAME—NOTICE OF ELECTION TO FILL VACANCY.

When a vacancy in office has occurred by reason of death or resignation, the voters are not bound to take notice of such vacancy; and where no notice of an election has been given, the casting of votes for a candidate to fill such vacancy will not constitute an election.

3. SAME—PROCLAMATION—SPECIAL ELECTIONS.

In cases of special elections to fill a vacancy a proclamation is necessary, even although the special election be held at the same time as a general election.

In bank.

E. C. Marshall, Atty. Gen., *M. R. Leverson*, and *George W. Chamberlain*, for petitioner.

Horace G. Platt, *amicus curiæ*, for respondent.

MCKINSTRY, J. The petitioners are not entitled to a mandate directing the secretary of state to certify to the governor that two of them were duly elected congressmen at large, and that each of the others was elected a member of the house of representatives, in a congressional district created by the act of the legislature of 1872. If it should be conceded that the act of 1883 is invalid, because of non-compliance by the legislature with certain formalities required by the constitution, yet, as appears from the petition and facts, of which we take judicial notice, the electors throughout the state did not vote for two members of congress at large, nor did the electors within the limits of each of the congressional districts, as prescribed by the act of 1872, vote for a member of congress to represent the people of such district. Notice to the electors lies at the foundation of any popular system of government. It has sometimes been held that the existence of a law fixing the time of an election, and the offices to be filled, is of itself notice. It may be conceded that when a term of office is to expire at a certain date after a general election, no other election to intervene, the electors take notice the office is to be filled at such general election. Some decisions have gone so far. But it is well settled that when a vacancy has occurred by reason of death or resignation the voters are not bound to take notice of such vacancy, and the casting of votes for a candidate or candidates to fill the vacancy does not constitute an election. The facts of the present case bring it within the principle of the decisions which hold that, in cases of special elections to fill a vacancy, a proclamation is necessary, even although the special election be held at the same time as

a general election. The principle is that a notice by proclamation is necessary whenever the voters are not bound by law to take notice of the time of the election and of the officers then to be chosen. The contrary not being averred in the petition, it must be presumed that the governor, who had approved the act of 1883, issued his proclamation for the election of a member of congress in each of the districts defined by that act.

The general rule is that all are bound to know the law. But the recognition of this general rule does not compel us to hold that the electors, as matter of fact, knew that the act of 1883 was of no force or effect. It does not compel us to hold that, as matter of law, the electors throughout the state were bound to know, under penalty of disfranchisement, that a statute regular in form, certified to have been properly passed by the appropriate officers, published as other statutes are published, approved by the governor, and by him acted under when he issued his proclamation, was *void*, because of matters not appearing on the face of the statute, but which could be ascertained only by an examination of the journals of the two houses of the legislature; that thus taking notice of the invalidity of the act of 1883 the electors were bound to know that the law of 1872 was still in full force and operation. That the electors did not know all it is claimed they ought to have known is apparent from the matters set forth in the petition, and from the fact that the petitioners have found it necessary to ask that the secretary of state be prohibited from estimating the votes cast for members of the house of representatives of the United States in the respective districts created, or attempted to be created, by the act of 1883.

Courts of justice in this state take judicial notice, perhaps, of the contents of the journals of the two houses of the legislature. The citizens at large are not required to take legal notice of the entries in the journals. The people had not actually been notified of such entries when the election was held. They had before them (let us assume) the statute of 1883, approved by the governor and published as statutes are required to be published, and the governor's proclamation. We are asked to decide that all the voters should have inquired whether the statute was invalid by reason of matters of which they had not been notified; that the duty was imposed upon them to make investigation into the history in the legislature of the bill for the act of 1883; to consider questions as to the validity of the law arising out of the proceedings in the legislature which preceded its final passage; to determine such questions correctly, or as petitioners claim they should be determined, (questions, it may be, difficult of solution by the courts, with the aid of counsel learned in the law,) and then to vote for officers not mentioned in the governor's proclamation, in districts not defined in the law so as aforesaid to be mentally determined to be invalid, and not recognized as continuing in existence by the executive or other officers of the state. Thus to de-

cide would be a formal acknowledgment by this court of results which cannot be treated as an intelligent and binding expression of the voice of the people, and which are entirely beyond any consequence legitimately derivative from the maxim that all are supposed to know the law. Whether anybody else was or was not elected to the house of representatives of the United States at the general election, we are quite certain that the petitioners were not.

Writ denied and petition dismissed.

McKEE, J., THORNTON, J., and MORRISON, C. J., concurred.

Ross, J., (*concurring*.) I concur, in the main, in the views expressed by Mr. Justice McKINSTRY. I wish to add that, in my opinion, the act of 1883 is a constitutional and valid law. Section 15 of article 4 of the present constitution provides: "No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members, nor shall any bill become a law unless the same be read on three several days in each house, unless, in case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of ayes and noes, dispense with this provision. Any bill may originate in either house, but may be amended or rejected by the other; and on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal; and no bill shall become a law without a concurrence of a majority of the members elected to each house."

It is earnestly insisted by the petitioners for the writ that under this provision of the constitution it is requisite to the validity of a bill that each and every amendment thereto should have been read on three several days in each house. It is very certain that the constitution does not so provide in terms. The provision with respect to the passage of bills is extremely explicit. Express authority is given for the amendment of any bill in either house, and it is expressly declared that no bill shall be put upon its final passage until the same, *with the amendments thereto*, shall have been printed for the use of the members. If it had been intended to provide that, except in case of urgency, no bill shall become a law unless the same, *with the amendments thereto*, be read on three several days in each house, it would have been an easy matter to have said so. The insertion of the words "with the amendments thereto" in the first clause and their omission from the second is, to my mind, very strong evidence that the clause from which they were omitted was not intended to apply to them.

In *Miller v. State*, 3 Ohio St. 479, it appeared that a bill originally introduced in the senate, after being read twice, and on different days, was committed to a select committee, who reported it back with

one amendment, to-wit: "Strike out all after the enacting clause, and insert a new bill;" that on a subsequent day, April 12th, this amendment, after being itself amended, was agreed to, and the bill, as amended, ordered to be engrossed and read a third time "to-morrow;" that on the morrow, April 13th, it was "read the third time," and passed; and having afterwards passed the house, and been duly enrolled, was signed by the presiding officers of the two houses, filed in the proper office, and published among the laws. The constitution of the state then provided that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending, shall dispense with this rule." In that case it was claimed, as it is claimed here, that the amendment was in fact a "new bill," and that it was only read once, and therefore invalid under the constitutional provision quoted. In the course of the opinion the court, speaking through Judge THURMAN, said:

"But, for argument's sake, let it be admitted that the bill as amended was read but once in the senate, is the act for that reason void? That, counting the two readings before the amendment and the final reading, the bill was read three times is conceded, for these readings are shown by the journal; and it is also conceded that, in general, three readings of an amendment are not necessary. But inasmuch as the amendment in this case is styled in the journal a 'new bill,' it is said that three readings were necessary. Why necessary? The amendment was none the less an amendment because of the name given it. It is not unusual in parliamentary proceedings to amend a bill upon striking out all after the enacting clause and inserting a new bill. Jefferson's Manual, § 35. When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days; but when there is no such vital alteration, three readings of the amendment are not required."

What is here said by the learned judge covers both points made by the petitioners; for, apart from their claim that every amendment must be read in each house on three several days, it is contended that the purported amendment to the bill in question was in fact no amendment, but a new bill. The original bill was one to divide the state of California into congressional districts, and the amendment adopted did but change the lines of the districts as fixed in the original bill. "The subject or proposition of the bill" was not at all changed. When that is done the bill as amended should undoubtedly, as observed by Judge THURMAN, be read on three several days, for it then becomes in effect a new bill; but not so when there is no such vital alteration.

In the case of *People v. Wallace*, 70 Ill. 680, the supreme court of that state held that the constitutional provision of the state requiring bills to be read on three several days before their passage, did not apply to amendments, the court saying:

"It is also objected that the tenth section of the act was not constitutionally adopted, because it was ingrafted as an amendment while the bill was being considered, and was not read on three several days in the house adopt-

ing it as an amendment. We are clearly of opinion that the requirement does not apply to an amendment, and the objection cannot prevail." See, also, *McCulloch v. State*, 11 Ind. 434, 435.

Nothing here said conflicts with the decision in *Weill v. Kenfield*, 54 Cal. 111, of the correctness of which I have no question.

MYRICK, J. For the reasons given in the opinion of Mr. Justice Ross, I am of the opinion that the act of 1883 is constitutional and valid. I therefore concur in the judgment.

68 Cal. 599

GOODNOW v. GRISWOLD and others. (No. 9,976.)

Filed February 25, 1886.

TRIAL—FINDINGS, SUFFICIENCY OF.

Where a court finds that "the several allegations of said complaint not in conflict with the foregoing findings are true," and the court does not further specify which of the other findings were, in its opinion, in conflict with the findings referred to as the "foregoing findings," such general method of finding is insufficient, and is ground for a reversal.

In bank. Appeal from superior court, county of Yolo.

Ball & Craig and S. C. Denson, for appellant.

Harding & Grow and R. Clark, for respondent.

BY THE COURT. The court below found: "The court finds that the several allegations of said complaint *not in conflict* with the foregoing findings are true." We are not informed which of the other findings were, in the opinion of the court below, in conflict with the findings referred to as the "foregoing findings."

In *Harlan v. Ely*, 55 Cal. 340, a finding, "all and singular the allegations of the amended answer are untrue, except so far as the same accord with the foregoing facts," was held insufficient. This court there said:

"The court below should have assumed the labor of comparing the allegations of the answer with the facts by it found. As it is, we are not informed which of the allegations of the answer were, in the opinion of the court below, true; which untrue. We cannot assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony or to the facts actually found."

The finding here is subject to a like objection, and on the authority of *Harlan v. Ely* the judgment and order should be reversed.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J. I concur in the judgment. The findings in this cause are as follows:

"The court finds that it is untrue that O. E. Parker and W. H. Troop ever agreed to an equal division of that portion of lot or block No. 2 of William Gordon's subdivision of Rancho Canada de Capay lying within said *rancho*, by a line drawn in the center thereof so as to divide said tract into two equal parts, or that they ever employed a surveyor for that purpose, or caused any survey for such purpose to be made, or that they, or either of them, executed

or delivered any deed or deeds for such purpose; that it is not true that the deed from O. E. Parker to W. H. Troop was made through or in consequence of mutual or other mistake by said Parker or Troop, or that it describes or conveys any property not intended by said Troop and Parker to be conveyed thereby, or that it was intended to convey any property not described therein; that it is not true that the deed from W. H. Troop to O. E. Parker was made through or in consequence of mutual or other mistake of said Parker or Troop, or that it describes or conveys any property not intended by said Troop and Parker to be conveyed thereby, or that it was intended to convey any property not described therein. It is not true that said Troop and Parker erected a partition fence upon the line described in the complaint as a partition line or that they ever established such partition line. It is not true, as alleged in the complaint, that W. H. Troop entered into the sole possession of that portion of the tract of land described in the complaint as lying south of the partition line described in the complaint. It is not true that, as alleged in said complaint, said Troop ever bargained or sold to plaintiff the southerly half lot or block, as contained in the Rancho Canada de Capay, or any lands except such as are described in the deed made by W. H. Troop to plaintiff on February 13, 1877; or that any land was intended by said Troop or plaintiff to be conveyed by said deed which is not conveyed thereby, nor is any land omitted from said deed which was intended by the parties thereto to be conveyed thereby, nor was there any mutual or other mistake made in the execution or delivery of said deed, nor did plaintiff enter into possession of any land other than that described in and conveyed by said deed. It is not true that the deed alleged in the complaint to have been made by O. E. Parker to H. M. Griswold was not made in exact accordance with the intentions of said Parker and Griswold. It is not true that the plaintiff is the owner of any land described in the complaint, in equity or otherwise, except the land conveyed to him by deed from W. H. Troop, as alleged in said complaint; but it is true that O. E. Parker is the owner of all the land described in and conveyed to him by deed of W. H. Troop as alleged in the complaint, and as afterwards reconveyed to him by deed of H. M. Griswold; and it is untrue that the last-mentioned deed was made by, through, or in consequence of any mutual or other mistake of the parties thereto, or that it is not in form as intended by the parties thereto. The court finds that the several allegations of said complaint not in conflict with the foregoing findings are true; that all and singular the allegations of defendants' answer to the said complaint are true, except the allegation that by the judgment described therein was determined and adjudged all the matters at issue in this action, which is not true, nor is it true that any of the matters in issue in this action were by said judgment determined or adjudicated; that the references in these findings to the deeds mentioned is made to the effect of said deeds as described in said complaint."

"(1) As conclusions of law the court finds that the defendants are entitled to recover judgments for costs."

The court finds that several matters are not true, and then proceeds to find that the several allegations of said complaint not in conflict with the foregoing findings are true. This is not in accordance with the statute, (Code Civil Proc. § 632,) which requires the court below to find facts. Such duty is not imposed on this court. The court below must find the facts and place them in its decision, so that this court may see, when an appeal is taken, what facts the lower court has found, and whether the correct judgment has been pronounced on them. This court is not called on to determine what allegations of a complaint are not in conflict with certain matters

found not to be true. Moreover, the court below has not performed its duty, when it finds certain matters not to be true. Such a finding does not fix or determine a fact, but finds that something is not a fact, but the opposite,—that it is false. The statute devolves on the lower court the labor and duty of finding facts. This such court cannot turn over to this court, or any other tribunal or person. The parties litigant have a right—a substantial right—to have the facts found by the court *a quo*. They have a right, secured to them by the statute, to have the judgment of that court as to the facts found to exist. The finding of the judgment set up by defendant is totally insufficient. The judgment should be found *in hæc verba*, or in substance, and the issues determined by it, so that on appeal this court can see what was determined by such judgment, and how far it had determined the matters in issue in this action.

The judgment and order are properly reversed, and the cause goes back that the court below may itself find the facts.

68 Cal. 566

McGURREN v. GARRITY and others. (No. 9,294.)

Filed February 25, 1886.

SUPPLEMENTARY PROCEEDINGS—MORTGAGE DEBTS—GARNISHMENT.

Debts secured by mortgage, like other debts, can be attached by garnishment only, and in no other way, as a mortgage, in California, passes no interest in the land, either before or after condition broken; and the payment of such debt, so attached, may be enforced under the provisions of the California Code of Civil Procedure relating to proceedings supplementary to execution.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Mateo.

J. B. Hart, for appellant.

E. F. Fitzpatrick, for respondent.

BELCHER, C. C. It is alleged in the complaint that the plaintiff, Ellen McGurrien, had a judgment for \$2,261.50 against the defendant Thomas Garrity, and that Garrity had a note for \$500 and interest, made by defendants Myles and Mary Swift, and secured by a mortgage on their real property; that an execution was issued on the judgment, and placed in the hands of the sheriff, who "duly and legally levied upon the right, title, and interest of the said Thomas Garrity in said mortgaged premises, designating his interest therein as a mortgagee, and duly and legally served the execution upon the said Myles Swift and Mary, his wife;" that the note was at that time due, and was in the possession of and owned by the defendant Garrity; that the defendants Swift subsequently admitted that they had made the note and mortgage, and were indebted to Garrity thereon, and "then and there agreed with the plaintiff to pay their said indebtedness upon said note and mortgage to the sheriff of said San Mateo county, for account of plaintiff, to be credited upon

her execution against said Thomas Garrity." The prayer is for a "decree that the amount due and owing by the defendants Myles Swift and wife upon said note and mortgage, with interest, is due and going to the plaintiff, and that she is entitled as of right to receive the same from them; that they have ten days from the decree within which to pay the amount due upon the note and mortgage, interest, and costs of this case to the plaintiff herein; otherwise that the mortgaged premises be sold according to law, and proceeds applied upon the judgment and execution in favor of plaintiff against the defendant Thomas Garrity."

The defendants severally demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrers were sustained. The plaintiff declined to amend, and judgment was then entered against her.

The demurrers were properly sustained. In this state a mortgage is a mere security, and under it no estate in the land passes to the mortgagee, either before or after condition broken. *Johnson v. Sherman*, 15 Cal. 287; *Mack v. Wetzlar*, 39 Cal. 247; *Carpentier v. Brenham*, 40 Cal. 221. Debts secured by mortgage, like other debts, may be attached by garnishment, but in no other way; and their payment may be enforced under the provisions of the Code relating to proceedings supplementary to execution. Sections 714-721, Code Civil Proc.

As the defendant Garrity had no attachable interest in the mortgaged premises, and as it does not appear that any garnishment was served on the defendants Swift, it is clear that the complaint states no cause of action. The judgment was that the plaintiff take nothing by her action, and for costs, and there was no error in entering a joint judgment in favor of all the defendants.

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

68 Cal. 575

GRIMLEY v. COUNTY OF SANTA CLARA. (No. 8,965.)

Filed February 25, 1886.

TAXES VOLUNTARILY PAID—RECOVERY BACK.

In an action to recover money alleged to have been illegally and erroneously collected for license taxes, if it appears from the complaint that the money sued for was not on account of any property taxes assessed, and was voluntarily paid, plaintiff cannot recover under section 3804 of the Political Code.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

Montgomery & Ryland, for appellant.

J. H. Campbell, for respondent.

FOOTE, C. The plaintiff sued the county of Santa Clara to recover a sum of money alleged to have been "illegally and erroneously" collected for license taxes paid by him. A demurrer was filed, which alleged as one of the grounds thereof that the facts stated in the complaint were not sufficient to constitute a cause of action. It was sustained, and the plaintiff declining to answer over, judgment passed for the defendant, and for costs, and this appeal was taken therefrom. As appears from the complaint, the money sued for was not on account of any *property taxes assessed*, and it was *voluntarily paid*. The plaintiff relied on section 3804 of the Political Code as upholding his contention, but in this he was mistaken, as it does not apply to an action such as the one under consideration, and no rule of law exists which authorizes him to recover. *Harper v. Rowe*, 53 Cal. 234; *Loomis v. County of Los Angeles*, 59 Cal. 456; *O'Brien v. Colusa Co.*, 8 Pac. Rep. 37.

The demurrer was properly sustained, and the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

2 Cal. Unrep. 645

TULLY v. TULLY. (No. 8,492.)

Filed February 25, 1886.

TENANTS IN COMMON—ADVERSE POSSESSION.

A claim of an interest in land as a co-tenant is of no avail as against the person having possession of the land, who has held the same adversely under a claim of title for a period of 20 years prior to the commencement of the action.

Department 2. Appeal from superior court, county of Santa Clara. *W. G. Lorigan* and *S. F. Lieb*, for appellant.

Archer & Lovell, for respondent.

FOOTE, C. Supposing a certain piece of land to belong to the United States government, and wishing to pre-empt it, John Tully bought the possessory right thereto from, and paid the price therefor to, one Murphy. He procured the deed to be made to himself and his brother Owen without Owen's knowledge. John let Owen into possession of the land as his tenant, but not as a claimant to any part thereof. A few years after, upon demand, Owen yielded possession of the land to John, the latter claiming to be the sole owner thereof. After this, John finding that he could not pre-empt the land, either in his own or Owen's name, bought from the vendees of Chaboya, the Mexican grantee, and patentee of the United States government, and paid for it the purchase price, and continued the

possession adverse to Owen he had obtained under Murphy. After the lapse of about 20 years from this last purchase Owen instituted the present action, to be let into possession by John as his co-tenant of half the land, without having ever contributed a cent to purchase it, or asserted any claim thereto until about one year before the commencement of his suit. The defendant set up the plea of the statute of limitations of five years, and the provisions of section 319 of the Code of Civil Procedure, and his superior title under his deed from the Chaboya vendees, in bar of plaintiff's right to recover. It is plain that Owen never had or claimed any interest in the land other than as tenant of John, while in possession thereof. He delivered its possession to John, who was then asserting, adversely to him, a right thereto as absolute owner. John remained in such adverse possession for about 20 years before this action was instituted. Under such state of facts no co-tenancy ever existed between the parties. Therefore it was competent for John to introduce in evidence the deed to himself from the Chaboya vendees. Admitting, without deciding, that section 319, Code Civil Proc., is not applicable to prevent a recovery in such a case, section 318, Code Civil Proc.,—the statute of limitations of five years,—is pleaded in bar, and the court finds in the affirmative upon the issue it presents.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 588

HAGLE v. HAGLE. (No. 9,887.)

Filed February 25, 1886.

HUSBAND AND WIFE—DIVORCE, DENIAL OF—ALLOWANCE FOR WIFE'S MAINTENANCE DISCRETIONARY.

Where a divorce is denied the court may, under section 136 of the California Civil Code, allow the wife a certain sum for her maintenance, and such allowance is discretionary, and in the absence of abuse of such discretion in regard thereto the judgment of the trial court will not be disturbed. ROSS and MCKINSTRY, JJ., dissent.

Commissioners' decision.

In bank. Appeal from superior court, county of Sacramento.

S. C. Denson and *W. H. Beatty*, for appellant.

Hart & White, for respondent.

FOOTE, C. The plaintiff sought a divorce from her husband, the defendant. The court applied to disallowed the divorce, but granted the wife \$25 per month as maintenance under section 136, Civil Code. From that part of the judgment providing for the wife's maintenance, the defendant appealed. The court found that while defendant was

not guilty of anything amounting to legal cruelty, which was the ground relied on for a divorce, nevertheless his conduct as a husband was cold, harsh, and disagreeable, making it unpleasant for the plaintiff to live with him; that the wife's conduct was not free from blame; that the marriage had been unhappy from the beginning; that the wife was a good many years older than her husband, and love or affection no longer existed between them; that at the time of their marriage the woman was hard working, and had accumulated, from saving her wages, about \$500; that the man was possessed of about a similar sum of money; that putting their acquisitions together they purchased a farm, which is their homestead, and stocked it; that the husband afterwards inherited about \$1,500 in money; that he rented land with a crop growing on it, and made some money out of it; that of the \$10,000 worth of property of which the husband was in possession the greater part in value was community property; that there was no probability of the parties ever living together as husband and wife; that the wife was growing old, and would soon be incapacitated from making a living by her work; that \$25 was a reasonable sum per month to be paid her by the defendant to provide for her maintenance, she having no children. It is argued for the defendant that his wife's allegations against him as a cruel husband being disproved, and her application for a divorce from him disallowed, she ought not to have maintenance at his hands unless she returns to his home, from which she is now absent through no fault of his. It is our opinion that the section of the Civil Code (No. 136) under which the judgment complained of was rendered, allows in such a case as the one under consideration the exercise of a sound discretion to the trial court. We observe no abuse of that discretion in the matter when before that tribunal, and are therefore satisfied that its judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

We dissent: ROSS, J.; MCKINSTRY, J.

68 Cal. 455

OAKLAND BANK OF SAVINGS v. MURFEY and others. (No. 9,077.)

Filed January 29, 1886.

1. NOTARY PUBLIC—LIABILITY FOR NEGLIGENCE—PROXIMATE CAUSE.

A notary public is not liable on his official bond to a bank for negligence in taking the acknowledgment of a grantor in a deed, and therein certifying to his identity, when in reality the notary does not know the party, the result of which certificate is to aid in securing to the latter by means of such conveyance, which proves to be a forgery, a loan from said bank, and to cause a consequent loss to the bank, if the bank officials, in making the loan, rely entirely

upon such deed for the identity of such person, without having any knowledge or making any inquiry in regard thereto beyond the certificate to the deed, their negligence in failing to have the party properly or satisfactorily identified constituting the proximate cause of the loss.¹

2. EVIDENCE—FINDINGS.

Evidence reviewed, and held to support the findings, and the findings held sufficient.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

E. McGraw, for appellant.

Mastick, Belcher & Mastick, for respondents.

SEARLS, C. This is an action to recover damages upon the bond of defendant Murfey as a notary public. Defendant had judgment, from which, and from an order denying a motion for a new trial, the plaintiff appeals. The findings in the case show, among other things:

(1) That the defendant Murfey was, on the third day of June, 1876, appointed a notary public for San Francisco, and gave bond in \$5,000, with Theodore Leroy and Michael Reese as sureties.

(2) That on the twenty-ninth of November, 1876, Wright Leroy came to the office of Murfey in San Francisco, and, introducing himself as M. B. West, requested Murfey to draw a deed from him to Henry Harmon for a lot in Oakland, the consideration expressed to be \$7,500.

(3) Murfey prepared the deed as directed, Leroy signed the name "M. B. West" to it, and in that name acknowledged the execution. Murfey thereupon made and affixed to the deed his certificate, certifying in substance that M. B. West, the person described in and who had executed the deed as grantor, was personally known to him, and had acknowledged before him, on the day named in the certificate, that he executed the deed. Having affixed his notarial certificate, Murfey handed the deed to Leroy, and he carried it away.

(4) In the latter part of February, 1877, Leroy presented himself at the banking-house of the plaintiff in Oakland, and introduced himself under the name "Henry Harmon" to Mr. E. C. Sessions, the plaintiff's president; stated that he desired to borrow \$4,000 on the lot, 75x80 feet, at the northeast corner of Grove and Fifteenth streets, in Oakland. Mr. Sessions had a block-book of Oakland before him, and, turning to the lot mentioned, saw that it stood in the name of M. B. West, and so stated to Leroy, who, by way of explanation, said that he had made a trade with West by which West was to convey to him this lot in Oakland in exchange for a gravel mine and a cash payment; that West had made the deed and left it in escrow, and he wanted the money to enable him to make the cash payment and close the transaction.

(5) Mr. Sessions being satisfied with the explanation, took Leroy to the loan teller's desk, and directed the teller to make out and take the application, which he did.

(6) The plaintiff's board of directors granted the application, and when Leroy came in a second time he was so advised, and assented to the terms proposed by the board.

(7) The examination of the title was then referred to the plaintiff's searcher, who reported the record title in M. B. West. Then a note and a mortgage.

¹See note at end of case.

in which "Henry Harmon, of Butte county," was named as mortgagor, and the plaintiff as mortgagee, were prepared. A day or two later, Leroy again presented himself at the president's room in the bank, and handed Mr. Sessions the forged deed. He looked at it, and then took Leroy to Garthwait, the note teller, and requested him to attend to the note and mortgage. Garthwait handed the papers to Dusenbury, one of the tellers, who was also a notary. Leroy then signed the name "Henry Harmon" to the note and mortgage, and Garthwait signed his name as witness. Dusenbury thereupon, as notary, made and attached to the mortgage his certificate, certifying in substance that Henry Harmon, the person described in and who had executed the mortgage, was personally known to him, and had acknowledged before him, on the day named in his certificate, that he executed the mortgage. The deed and mortgage were then sent by the plaintiff to the recorder's office for record, and the \$4,000, less \$110 for interest and charges, was paid over.

(8) No one of the officers of the plaintiff had ever seen Leroy until the day he first came and introduced himself to Mr. Sessions as Henry Harmon, nor was any inquiry made by any one of them, at any time during the negotiations for the loan, as to his identity.

(9) That the defendant Murfey was careless and negligent in taking and certifying the acknowledgment to said deed without personally knowing, or requiring proof, that the person subscribing the name "M. B. West" to said deed was in fact M. B. West.

(10) That the plaintiff was careless and negligent in making a loan and taking a note and mortgage therefor from a person who was not personally known or proven to its president or some of its officers to be the person whose name was subscribed to such note and mortgage, and without any inquiry as to his identity, or who had held the said deed in escrow, or how the person exhibiting and leaving it with the president of the plaintiff obtained the possession thereof; and that the carelessness and negligence of the plaintiff was the proximate and immediate cause of all the loss and damage sustained by the plaintiff.

"For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Pol. Code, § 801.

Section 1714 of the Civil Code reads as follows:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has willfully, or by want of ordinary care, brought the injury upon himself."

Murfey was guilty of negligence as a notary in taking the acknowledgment of the *pseudo* West as a grantor in a deed without personal knowledge or proof of his identity, and for such neglect he and his bondsmen are liable to those damnified thereby. Did the damage which resulted to plaintiff follow as a proximate and legal result of the negligence of the notary, or was it the negligence of plaintiff that was the direct and proximate cause of the loss and damage sustained by it? The court below finds that plaintiff was guilty of carelessness and negligence, and that such negligence was the proximate cause of its loss. The earliest reported case in the English law on the distinctive question of contributory negligence is believed to be that of *Butterfield v. Forrester*, 11 East, 60, decided by Lord

ELLENBOROUGH in 1809. It is a marvel of brevity, but enunciates the principle underlying all subsequent cases on the subject, and is as follows:

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them; one person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

In the case at bar we have the spurious deed executed by a pretender in the name of West, and negligently certified by Murfey, the notary. In other words, we find the defendant Murfey *in fault*. This, however, did not absolve the plaintiff from the exercise of ordinary care. Could the plaintiff by the exercise of such ordinary care have avoided the consequences of the defendant's negligence? We think this question must be answered in the affirmative. We may even go further, and add that we do not see how the negligence of defendant was the direct and proximate cause of the injury to plaintiff. He had, it is true, certified that West had executed a deed of the real estate to one Henry Harmon, but he had not in any way certified, and it was not his duty to identify or certify, to the identity of Harmon, the grantee in such deed. Armed with this document, Leroy, who had represented himself as West, and executed the deed as West, goes to the plaintiff, an entire stranger, and represents himself as Harmon, the grantee named in the deed, and without inquiry or identification plaintiff loans him \$4,000, and takes from him, under the name of Harmon, a mortgage upon the property.

Suppose West, the real owner of the property, had executed this very deed to a man named Harmon, and that Leroy, having procured possession of such deed, had made the precise declarations to plaintiff which were made by him, and had procured the money upon a mortgage just as he did procure it, the loss to plaintiff would have been the same, and would have been produced in the same way, viz., by the negligence of the plaintiff in assuming, without proof or knowledge, that Leroy was Harmon, when in fact he was not. If we are correct in this, it must follow that the proximate—the juridical—cause of the injury suffered by the plaintiff was its credulity in taking the mere word of Leroy, and assuming without further proof that he was Harmon. It seems that plaintiff not only took the assertion of Leroy that he was Harmon, but that one of its officers or servants, who was a notary public, by direction of the plaintiff, took and certified the acknowledgment of Leroy, as Harmon, to the mortgage, and thereupon the spurious deed and mortgage were both placed of record. Can we absolve the plaintiff and its notary from

the negligence which thus led them to loan the money of plaintiff to a knave, and at the same time hold the defendant responsible for his remote connection with the subject-matter? We think not.

Plaintiff's negligence was the proximate cause of such injury; that is, it was in the order of causation next to and produced the result. It must not be understood that the negligence of defendant was not one of the *conditions* of the injury to plaintiff. On the contrary, it constituted a condition, in the order of causation, by which plaintiff's injury was brought about. To illustrate what we mean by the terms "*condition*" and "*proximate cause*:" Suppose A. takes passage from San Francisco for Sacramento by railroad. At Port Costa the train is wrecked by the carelessness of the railroad company, and A. is injured. The negligence being the immediate cause of the injury, is said to be the proximate—the juridical—cause thereof. Again, suppose the same case, except that the train is wrecked without injury to A., who thereupon takes passage by steamer owned by B. for the remainder of the journey; that by the negligence of B. the steamer is wrecked, and A. is injured. In this last case the negligence of B. becomes the proximate cause of such injury. True, but for the accident to the train the injury to A. would not have occurred, for he would not have sought passage by steam-boat; yet it was but a remote cause—a *condition*—in the chain of causation which produced the result, and there could be no just cause for holding the railroad company liable. "An act is the proximate cause of an event when, in the natural order of things, and under the circumstances, it would necessarily produce that event; when it is the first and direct power producing the result,—the *causa causans* of the school-men." Beach, Con. Neg. § 10. "If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action." Cooley, Torts, § 69.

For remote or secondary causes men are not responsible. *Causa proxima, non remota spectatur*. It may with propriety, we think, be said that plaintiff had a right to rest upon the presumption that a public officer, who is shown to have performed an official act, has done so properly; but if the evidence stops short with showing that he was guilty of negligence, and fails to show that plaintiff was injured thereby, or if it proceeds further, and shows an injury sustained, but which was not the proximate result of such negligence, but was the natural and proximate outgrowth of some new and independent act or acts of negligence on the part of the plaintiff, there can be no recovery. There is nothing in this rule in conflict with the doctrine of *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463; S. C. 2 Pac. Rep. 46. That case, in common with numerous other authorities to the same point, holds that "the act or omission on the

part of a plaintiff claimed to have contributed to the injury must have direct relation to the act or omission charged to be negligence on the part of a defendant." *There*, the act of the defendant was the cause of the injury, and it was liable unless the negligence of the plaintiff had so commingled with it as to prevent a recovery; *here*, the injury was not the direct or immediate effect of the defendant's negligence; it was not proximate in time or causation, but required the interposition of new and independent agencies, which in turn became the fruitful cause of plaintiff's injury.

2. The objections to the findings seem to us technical and for the most part unimportant. The fifth finding, after stating that Leroy presented himself at the banking house of the plaintiff, and introduced himself to its president, E. C. Sessions, as Henry Harmon, and stated that he wanted to borrow \$4,000 upon the lot of land in question; that the title to the lot stood upon the records in the name of M. B. West, of Butte county, but that said West, in exchange for certain mining property belonging to him in said county of Butte, "and certain payments to be made," had bargained said lot to him, and had made and left a deed thereof in escrow with some person whom he did not name, "to be delivered upon the payment of the remainder of the purchase money, and that he wished the money to close the transaction." We have placed in quotations the portions of this finding which it is objected are not supported by the evidence.

The testimony of E. C. Sessions, the president of plaintiff, is too lengthy for reproduction here. It substantially, as we think, supports the finding. He does not, it is true, specifically state that Leroy said he wanted the \$4,000 to make the final payment on the land, and that certain payments were to be made, and that he wished the money to close the transaction; but he does say that Leroy told him he "wanted to borrow some money." "I asked him how much and on what security?" He said \$4,000, naming the property, and said he had purchased the property of Mr. M. B. West, who lived in Butte county. * * * He said he had exchanged some property, —was trading with Mr. West a gravel mine, and he was in that line of business; that he had completed the transaction,—that is, they had agreed upon the transaction,—and that the deed was deposited in escrow, and that he wanted to close the transaction up, and he would need some money." We are not at all surprised that from this testimony the court should draw the very natural deduction that the money was wanted to pay a balance due on the purchase price of the land. But the purpose to which the money was to be applied does not seem to us very important, and may well be treated as surplusage. "And now the transaction was about to be closed up, and then the deed would pass to his hands," was testimony from which, coupled with other testimony in the case, the court was justified in finding the deed "was to be delivered upon payment of the remainder of the purchase money." *See* *Cal. v. Jones*, 104 Cal. 104, 105.

The objections to the thirteenth, fourteenth, and fifteenth findings are purely technical, and relate to the identity of Harmon and Leroy.

The court finds, in substance, that Harmon did not execute the mortgage, etc.; that Harmon did not borrow the money from plaintiff; that Harmon did not leave with plaintiff the deed from West. This was most certainly warranted by the testimony. Leroy falsely assumed to be Harmon, and did all of these things in the name of the latter.

The objection to the seventeenth finding is without merit. That finding is to the effect that plaintiff was careless and negligent in making a loan and taking a note, etc.; and that the carelessness and negligence of the plaintiff was the proximate and immediate cause of all the loss, etc.

We are of opinion the evidence supports the findings, that the findings cover all the essential issues in the case, and that the conclusions of law and the judgment are correct.

It follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

Where several concurring acts or conditions of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded the proximate cause of the injury, if the injury be one which might reasonably be anticipated from the act or omission, and which would not have occurred without it. *Campbell v. City of Stillwater*, (Minn.) 20 N. W. Rep. 320.

In *McMahon v. Davidson*, 12 Minn. 357, (Gil. 232,) it is laid down as the rule that it is immaterial how many others may have been in fault if the defendant's act or negligence was an efficient cause of the injury.

In *Nelson v. Chicago, M. & St. P. Ry. Co.*, (Minn.) 14 N. W. Rep. 360, which was an action for injuries caused by the defendant's failure to fence its road, it was said that if the injury was one which a man of ordinary experience and sagacity could foresee might probably ensue from a failure to fence, then the damage would be sufficiently proximate and direct to entitle the injured party to recover. See, also, *Maher v. Winona & St. P. R. Co.*, (Minn.) 18 N. W. Rep. 105.

The plaintiff, to recover for an injury caused by another's negligence, must make out a *prima facie* case in his own favor, showing that the damages resulted from the defendant's negligence, and if from the evidence it affirmatively appears that the plaintiff's want of due care was the proximate cause of the injury, he cannot recover; but if it merely appear that he contributed to the injury without being in fault in so doing, his right to recover is not affected. *Dufour v. Central Pac. R. Co.*, (Cal.) 7 Pac. Rep. 769.

Where a passenger receives an injury in a collision caused by the negligence of the servants of a railroad company, and disease is excited or developed by such an injury, the injury may be considered as the proximate cause of the disease. *Louisville, N. A., etc., R. Co. v. Falvey*, (Ind.) 3 N. E. Rep. 339. See same case affirmed on rehearing, 4 N. E. Rep. —, and note.

In *Jucker v. Chicago & N. W. R. Co.*, (Wis.) 8 N. W. Rep. 862, the court say: "The general rule laid down by Chief Justice APPLETON, in *Moulton v. Sanford*, 51 Me. 134, and cited approvingly by Chief Justice DIXON in *Sutton v. Town of Wauwatosa*, 29 Wis. 21, is as follows: 'The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one

consequence. Ordinarily that condition is usually termed the "cause" whose share in the matter *is the most conspicuous, and is the most immediately preceding and proximate to the event.* In further exposition of the rule, it has been said, in *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223: 'The maxim, however, is not to be controlled by time and distance, but by the succession of the events,' and that 'the natural and ordinary means' to produce the alleged consequence must be shown; and as in *Whart. Neg. § 78 et seq.*, that the party 'might have reasonably expected' such a consequence of his negligence, or that such a result would be 'an ordinary natural sequence from such a cause;' or, as said by Chief Justice COCKBURN, in *Clark v. Chambers*, 13 Amer. Law Rev. 175, such a consequence as would be 'probable' from such a cause. In illustration of the rule, and in its application to that case, it is said, in *Perley v. Eastern R. Co.*, 98 Mass. 414: 'It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received; yet these are called proximate effects, though the actual effects of the injury may be greatly modified in every case by bodily constitution, habits of life, and accidental circumstances.' It may be properly added, further, that the cause of the alleged consequence itself must have been 'adequate and efficient.' *Whart. Neg. § 73.*

In *Atchison, T. & S. F. R. Co. v. Morgan*, (Kan.) 1 Pac. Rep. 298, it was held erroneously to instruct the jury that "if there was any negligence on the part of both parties, and they find that the negligence of the plaintiff was only slight, compared with that of the defendant, the verdict must be for the plaintiff." The court say: "We do not indorse the doctrine of comparative negligence. The rule is properly laid down in *Sawyer v. Sauer*, 10 Kan. 466. If the trial court had instructed the jury that if the negligence of the plaintiff was only slight, or the remote cause of the injury, he might still recover, notwithstanding such slight or remote cause, the instruction would have been within the rule; but when the jury were instructed to compare the negligence of the plaintiff with that of the defendant, the direction passed beyond the authoritative line and became misdirection."

The question of proximate cause is one for the jury. *Fairbanks v. Kerr*, 70 Pa. St. 86; *Toledo, etc., Ry. Co. v. Pindar*, 53 Ill. 447; *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223; *Webb v. Rome, etc., R. Co.*, 49 N. Y. 420; *Lehigh Valley Ry. Co. v. McKeen*, 90 Pa. St. 122.

68 Cal. 479

BYRNE v. ALAS and others. (No. 11,249.)

Filed January 29, 1886.

JUDGMENT BY DEFAULT AGAINST INDIANS—WHEN JUDGMENT OPENED—AFFIDAVIT OF MERITS BY COUNSEL.

Where a judgment by default in an action of ejectment has been entered against Indians who are ignorant and unacquainted with modes of judicial proceedings, it may be reopened, and affidavits of merits, though made by counsel, received as sufficient.

Appeal from an order of the superior court, San Diego county.

A. B. Hotchkiss, for appellants.

Wells, Van Dyke, & Lee, for respondents.

THORNTON, J. This is an appeal from an order vacating a default. The case is a very peculiar one in its facts. The action is ejectment to recover land from Mission Indians, whose ancestors and the defendants have occupied the land for a long period,—much more than five years before the commencement of the action. They are very ignorant and helpless, totally unacquainted with our modes of judicial proceedings, and are utterly incapable of attending to their interests, if they have any, in regard to the land in controversy. The defendants are ignorant of the English language, with, perhaps, one or two exceptions. The above facts appear by affidavit. Under these circumstances we do not think a very rigid rule should be applied to them on the question of default. The affidavit of merits, though made by their counsel, we think, owing to the ignorance of the de-

fendants, should be received as sufficient. There is reason to believe that none of the defendants could state the facts in relation to their connection with the land, and if they had any title, would be capable of explaining it. Under these circumstances we cannot say that the court below erred in vacating the default, and in allowing the defendants to answer and set up such title as they have, that the question may be deliberately determined on a trial had according to law.

The order is therefore affirmed. Ordered accordingly.

SHARPSTEIN and MYRICK, JJ., concurred.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 636

GATES *v.* McLEAN. (No. 9,926.)

Filed February 19, 1886.

1. EJECTMENT—COMPLAINT—SUFFICIENCY.

Where a complaint in an action of ejectment brought by a vendor against a vendee avers ownership of the property in the plaintiff, the making of a contract for the sale thereof to defendant, the payment of a part of the contract price by defendant, his entry into possession, the tender of a deed, demand and refusal of payment, notice of rescission of contract by plaintiff, tender to the defendant of the money paid, with interest, and demand of possession, which was refused, it is sufficient.

2. VENDOR AND VENDEE—CONTRACT FOR SALE OF LAND—VENDOR'S REMEDY WHEN VENDEE REFUSES TO PERFORM.

Where a vendor of real estate has kept all his covenants in a contract of sale, and the vendee refuses to perform his part, the vendor may rescind the contract or sue for specific performance.

3. ESTOPPEL—JUDGMENT OF NONSUIT—ADMISSION AS EVIDENCE—ERROR.

A judgment of nonsuit is not final, and determines nothing, and the admission of such a judgment as evidence to establish title to land is error.

In bank. Appeal from superior court, county of Stanislaus.

William L. Dudley, William O. Minor, L. J. Maddux and Wright & Hazen, for appellant.

W. E. Turner, for respondent.

SEARLS, C. This is an action of ejectment to recover certain lots of land in the town of Modesto. Plaintiff had judgment, from which, and from an order denying a new trial, defendant appeals. The demurrer to the complaint was properly overruled. The pleading demurred to avers ownership of the property in plaintiff, the making of a contract for the sale thereof to defendant, payment of \$300 on account of the purchase price by defendant, his entry into possession, tender of a deed, demand of payment, and refusal to pay, rescission of the contract by plaintiff, notice thereof and tender to defendant of the money paid, with interest, and demand of possession, which was refused. If the allegations of the complaint are true, plaintiff on his part had kept and performed all the covenants of the agreement to sell, by him to be kept and performed, and defendant had refused to pay the balance of the purchase price. This would entitle plaintiff to a specific performance of the contract, or to a rescission of the agreement and recovery in ejectment.

On the fifteenth day of August, 1881, plaintiff executed and delivered to defendant an agreement in the following language:

"AN AGREEMENT BETWEEN SAMUEL GATES AND SAMUEL M. McLEAN.

"The said Gates sells and binds himself to give a good and sufficient deed and possession to Samuel M. McLean of the five lots known as the Walden property, on which is the Walden house and the Barney Garner house, being on the corner of Jay and Eleventh streets, opposite J. D. Spencer's, for the sum of two thousand eight hundred dollars, so to be paid as follows: Two hundred dollars cash in hand, one thousand two hundred dollars in thirty

days, and the remainder, one thousand four hundred dollars, in sixty days, and interest on the two thousand six hundred dollars as soon as McLean is placed in possession of the property.

"Fifteenth of August, 1881."

"It is agreed and understood that if Samuel Gates cannot give a deed to the above property, on account of any legal inability, there shall be no damages charged or received.

[Signed] _____ "S. GATES."

On or about October 8, 1881, McLean paid Gates \$300 on account of the purchase price of the lots, and received the following receipt:

"Received of S. M. McLean the sum of three hundred dollars, part payment of the purchase price of lots Nos. twelve, (12,) thirteen, (13,) fourteen, (14,) fifteen, (15,) and sixteen, (16,) in block No. sixty-eight, (68,) in the town of Modesto, county of Stanislaus; and I hereby agree to make, execute, and deliver to the said McLean a good and sufficient title to the above lots, free from all incumbrances, save and except the present tax liens, upon payment to me of the further sum of two thousand five hundred dollars, with one per cent. per month interest from date until paid.

SAMUEL GATES.

"Dated Modesto, October 8, 1881."

Thereupon McLean entered into, and ever since has retained, possession of the demanded premises.

At the time the contract of sale was entered into it was well understood that one Brusie claimed title to the premises adverse to plaintiff, under and by virtue of a sheriff's deed executed pursuant to a sale under execution issued upon a judgment rendered in a justice's court against one Minor Walden, the grantor of plaintiff. Brusie subsequently instituted an action against the tenants of McLean to recover possession of the property, in which action plaintiff Gates intervened, and, upon a trial, Brusie suffered judgment of nonsuit. Plaintiff, as appears from the evidence, tendered a deed of the premises and demanded payment of the purchase money; which being refused for alleged defect in plaintiff's title, he thereupon gave notice of a rescission of the contract of sale, offered to repay the \$300 received on account of the purchase, with interest, and demanded possession, which being refused, this action was instituted.

The question which at the trial dominated all others was as to the validity of the title which plaintiff offered to convey. The contention of defendant was that there was an outstanding title in Brusie, which under the contract plaintiff was bound to extinguish or secure before he could convey in accordance with his contract. For the purpose of proving the invalidity of the Brusie title, plaintiff was permitted, under objection, to introduce the judgment roll in Brusie against the tenants of defendant, hereinbefore mentioned, in which a nonsuit was entered, and this action of the court is assigned as error. A judgment of nonsuit determines nothing, except the right of plaintiff to proceed in the present action. It has been said a nonsuit "is but like the blowing out of a candle, which a man at his own pleasure may light again." Under no circumstances will such a judgment be deemed final, whether entered before or at the trial. Freem. Judgm.

§ 261; *Clapp v. Thomas*, 5 Allen, 158. It follows that the admission of the judgment roll was error.

Appellant suffered no injury from the admission of the deeds from the Central Pacific Railroad Company to the Contract & Finance Company, and from the latter to Minor Walden. The title to the lots in question is averred by the answer to have been in Walden, hence it was unnecessary to introduce the conveyances, but doing so could not harm defendant.

For the error indicated we are of opinion the judgment and order should be reversed, and a new trial granted.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 639

McKAY v. JOY, Adm'r, etc. (No. 9,719.)

Filed February 19, 1886.

1. PARTNERSHIP—DEATH OF PARTNER—RIGHT OF SURVIVING PARTNER.

Under section 1585, Code Civil Proc., where a partnership is dissolved by the death of one of the partners the surviving partner is entitled to all the assets of the firm and to settle up the business.

2. SAME—ADMINISTRATOR TAKING ASSETS—SUIT FOR ACCOUNTING.

Where all the assets have been taken possession of by the administrator of a deceased partner, under section 1493 of the Code of Civil Procedure, the surviving partner cannot bring suit against such administrator for his interest in such assets without first presenting his claim to such administrator.

In bank. Appeal from superior court, county of Amador.

A. C. Brown, for appellant.

Eagon & Armstrong, for respondent.

BELCHER, C. C. Plaintiff and Jarius A. Joy were partners in the business of farming. In January, 1883, Joy died, and on the first day of February the defendant was appointed administrator of his estate. It is alleged in the complaint that at the time of his death there was personal property belonging to the partnership of the value of nearly \$500, and that the partnership was indebted to the plaintiff for money paid, laid out, and expended for boarding Joy and the hands on the ranch, and for the services of Mrs. McKay in cooking, washing, etc., in a sum exceeding \$1,000. It is also alleged that the claim on which this action is brought was duly presented to the defendant, as administrator, for allowance, on the thirtieth day of April, 1883, and was by him rejected on the first day of May, 1883. It appears from the bill of exceptions that in February, 1883, all of such personal property was taken from the possession of the plaintiff and delivered to the defendant by the sheriff, under a writ of replevin, but it does not appear by whom or why the action of replevin was commenced, or what became of it.

This action was commenced in November, 1883, and the prayer of the complaint is that an accounting be taken of all the said co-partnership dealings and transactions from the commencement thereof, and of the money and of the effects received and paid by the plaintiff and the said Jarius A. Joy, respectively, in relation thereto; that the property of the firm be divided between the plaintiff and the estate of the said Joy, according to their respective interests; that the defendant, as administrator, be adjudged to pay the plaintiff the amount which shall appear or be found to be due him after the accounting and full settlement of said partnership business; and for such other and further relief as may be just, with costs of this action.

When the case was on trial it was admitted by the plaintiff and his counsel in open court that his present cause of action was based upon a claim which had never been presented to the defendant as administrator for allowance. Thereupon counsel for defendant moved the court for a nonsuit and dismissal of the action upon the ground that the claim was one which must be presented for allowance and rejected before any action could be maintained upon it. The court granted the motion, and the appeal is from the judgment of nonsuit.

There was only one question presented by the appeal, and that is whether the plaintiff could maintain his action without first presenting his claim to the administrator for allowance. As surviving partner the plaintiff had the right to continue in possession of all the property of the partnership, settle its business, pay its debts out of the assets if sufficient, and wind up its affairs. Code Civil Proc. § 1585. If before this was accomplished an action was commenced to take from him the possession of the property, he could have made a successful defense to it, and thus have maintained his rights; and if, without action, the property was tortiously taken from him, he could have recovered it back.

Here the action is not for a tortious taking of the property, but for an accounting; and the plaintiff claims that when that accounting is had a balance will be found due him, for which he asks judgment. It is just such an action as is usually resorted to where one partner seeks to have the affairs of the partnership settled up, after its dissolution, and the assets are all in the hands of the defendant. It is based upon a claim made against the estate of the decedent, which may be contingent and uncertain in amount, but clearly arises upon contract.

Section 1493 of the Code of Civil Procedure provides:

"All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever."

And section 1500 of the same Code provides:

"No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in

the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

It is urged by counsel for appellant that the claim of the plaintiff has never been in condition to be presented to the administrator for allowance, there being no definite or ascertained amount to present, and that there can be none until the settlement of the partnership accounts and effects for which this suit is brought; and he cites *Gleason v. White*, 34 Cal. 258, in support of his position that the claim of a surviving partner should not and cannot be presented until the partnership affairs are wound up.

By turning to the case cited, it will be seen that the law at that time provided:

"If a claim be not presented within ten months after the first publication of notice, it shall be barred forever: provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute."

The court said:

"The surviving partner's claim is contingent, within the meaning of section 130 of the probate act, until the partnership affairs are settled and the claim becomes absolute."

The claim was not presented within 10 months after the first publication of notice, but it was afterwards presented, and the court held it to be in time. Since that case was before the court the law has been changed so as to require all claims, whether due or not due, or contingent, to be presented within the time limited in the notice. The difficulties of presenting a contingent claim are met by the Code, which requires only that "the particulars of such claim must be stated." Code Civil Proc. § 1494. The case is not within the exception provided for in section 1500, above quoted. The action was not brought to enforce a mortgage or lien against the property of the estate.

We think the judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

68 Cal. 545

CHASE v. WHITMORE. (No. 9,848.)

Filed February 19, 1886.

PRINCIPAL AND AGENT—TRANSFER OF PRINCIPAL'S PROPERTY TO PAY AGENT'S DEBT.

Where a party intrusts a lawyer or agent with money to loan and otherwise invest, and such agent purchases a negotiable note past due with a portion of the money intrusted to him, and afterwards transfers such note to a third party in payment of a debt due from him to such third party, and receives the difference in cash, such third person acquires no title to such note.

In bank. Appeal from superior court, county of Stanislaus.

Kittrell & Cole, for appellant.

Thomas B. Bond and W. O. Minor, for respondent.

BELCHER, C. C. This is an action to recover the value of a promissory note alleged to have been wrongfully converted by the defendant. The case was tried and judgment rendered in favor of the plaintiff, from which and from an order denying a new trial the appeal is taken. The note in question is dated November 3, 1877, and was payable to the Farmers' Savings Bank of Stanislaus County, 30 days after its date. It bore interest at the rate of $1\frac{1}{2}$ per cent. per month, compounding monthly, and provided for the payment of a reasonable attorney's fee in case suit should be brought thereon. It was assigned by the payee named to the Modesto Bank, and by the last-named bank was held and owned until November, 1879. At that time, and until March, 1883, George W. Schell and R. B. Treat were partners, doing business as attorneys at law at Modesto. They did business for the plaintiff, and had money which she had left with them for investment. On the fourteenth day of that month Schell bought the note of the Modesto Bank for the plaintiff, and paid for it with her money, she at the time having no knowledge of the transaction. The note had on its back a general indorsement made by the payee named in it. Schell received the note, and placed it in an envelope, on which he wrote the plaintiff's name, and then placed the note and envelope in a safe in his office. Shortly afterwards he reported the transaction to the plaintiff, who was satisfied with it, and wished to let the note run as long as it could safely, because of the large rate of interest it bore. Neither Schell nor Treat had any authority to sell or pledge the note. The note remained in the safe where it was placed until June, 1881, when, without the knowledge of plaintiff or Schell, Treat took it out and sold it to defendant. The sale was made in payment of an indebtedness of \$100 from Treat to the defendant, and for the balance of its face value in money. Afterwards Treat told the plaintiff that he had collected the note and loaned the money out again on a mortgage. The plaintiff wished to see the mortgage, but he said he had a place in the bank where he kept such things, and he had put it there.

The mortgage was not produced, and the plaintiff had no further knowledge in reference to the matter until March, 1883, and after Schell & Treat had dissolved partnership. Then she met Treat and they talked over her business. It was found that he had of her money, including this note, which he said he had collected, the sum of \$485. He asked her if she would take him as paymaster, and she said she would if he would give her a first-rate indorser. He then wrote a promissory note for the amount, which he signed and handed to her, and then wrote a paper showing a full settlement of all her affairs with him, and asked her to sign it. She declined to do so until he paid the money or gave her a good indorser of his note. He there-

went away, leaving this note in her hands, which is still unpaid. Some time after this the plaintiff learned that Treat sold the note in controversy here to the defendant, and that he had collected the full amount due on it from the makers. She then demanded from the defendant that he pay her the money which he had collected on the note, and he refused to do so. When the defendant bought the note, Treat represented that he owned it, and defendant believed his statement to be true. Upon these facts the court below held, and we think rightly, that the defendant acquired no title to the note by his purchase of it, and that the plaintiff had a right to recover from him its value in this action.

The general rule is that one in possession of personal property can transfer to another, by pledge or sale, no greater interest in the property than he himself has. *Wright v. Solomon*, 19 Cal. 64; *Kohler v. Hayes*, 41 Cal. 455; *Barstow v. Savage M. Co.*, 64 Cal. 388; S. C. 1 Pac. Rep. 349; *Covill v. Hill*, 4 Denio, 323; *Cowdrey v. Vandenhurgh*, 101 U. S. 572. There are exceptions to this rule where the property consists of negotiable instruments, or what comes under the general denomination of currency, and where the owner of the property clothes another with the apparent title to or power of disposition over it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner being, in such case, held estopped from afterwards asserting his title. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41. This case is not within the exceptions.

1. When the defendant purchased the note it was long past its apparent maturity, and he was not "an indorser in due course," and did not "acquire an absolute title thereto, so that it is valid in his hands, * * * notwithstanding any defect in the title of the person from whom he acquired it." Civil Code, §§ 3123, 3124. Besides, the note provided for the payment of a reasonable attorney's fee, and that, under our Code, destroyed its negotiability. Civil Code, §§ 3087, 3093. In other states the rule is not uniform upon this subject, some of them holding that such a provision does, and others that it does not, destroy the negotiable character of the instrument. See *Woods v. North*, 84 Pa. St. 407; *First Nat. Bank v. Bynum*, 84 N. C. 24; *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank v. Marlow*, 71 Mo. 618; *First Nat. Bank v. Jacobs*, 73 Mo. 35; *Jones v. Radatz*, 27 Minn. 240; S. C. 6 N. W. Rep. 800. *Contra: Sperry v. Horr*, 32 Iowa, 184; *Stoneman v. Pyle*, 35 Ind. 103; *Strough v. Gear*, 48 Ind. 100; *Bullock v. Taylor*, 39 Mich. 137; *Myer v. Hart*, 40 Mich. 517; *Nickerson v. Sheldon*, 33 Ill. 372.

2. The appellant cannot invoke the doctrine of estoppel against the plaintiff for the reason that she did not clothe Treat with any apparent title or power of disposition over the note. When it was bought for plaintiff it had the blank indorsement of the payee on its back,

and was then deposited in his safe by Schell. Schell & Treat became then merely the depositaries or bailees of the note for the plaintiff. They had the possession of it, but that alone did not authorize them in any way to sell or dispose of it. As said in *Covill v. Hill*, *supra*: "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title."

3. It is claimed for the appellant that when the plaintiff received and retained the note for \$485, in March, 1883, she ratified and confirmed the acts of Treat in selling her note. The court below found otherwise, and there was testimony to support the finding. The plaintiff testified:

"I took the note on account of knowing what was coming to me. * * * The note was not taken as a settlement. I refused to accept the note, and Treat asked me to take it on account of knowing what was coming to me,—to fix the amount that was due from him until he could get the indorser or pay the money. At this time I did not know that Treat had sold the note to Whitmore or any person, but I then supposed the note was paid. * * * I never offered to return the note to Treat, because he was gone."

The judgment and order should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 643

CHIELOVICH v. KRAUSS and others. (No. 11,007.)

Filed February 19, 1886.

1. ACTION TO QUIET TITLE—TITLE FOUNDED ON FRAUDULENT JUDGMENT—ALLEGATIONS.

Where in an action to quiet title to land it appears that the title of plaintiff is derived through a fraudulent judgment, it must be made to appear that the parties defrauded, where they had notice of such fraudulent judgment, took proper steps to avoid the consequence of such judgment by filing a motion under section 473, Code Civil Proc., to have the fraudulent judgment set aside.

2. TRIAL—RULE OF TRIAL COURT—WHEN SET ASIDE.

A rule of the trial court established for the promotion of justice may, in the discretion of the court, and to meet the ends of justice, be set aside.

3. MORTGAGE—TENDER AFTER DUE—EFFECT ON LIEN.

The tender of the amount due on a debt which is secured by mortgage, after due, will not release the mortgage lien.

In bank. Appeal from superior court, county of Yolo.

Charles L. Quen and Ball & Craig, for appellant.

W. B. Treadwell and Grove L. Johnson, for respondents.

FOOTE, C. Action to quiet title by plaintiff against Krauss. Roth intervened. Demurrers were interposed to the answer and complaint in intervention, and were both overruled. Judgment was then rendered against the plaintiff, and his motion for a new trial denied. From

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the judgment and order he appealed. The point is made by respondents that the court erred in settling and considering the statement on motion for a new trial against their objection, and that it should not be considered on appeal. The ground of the objection urged is that the court set aside its own rules, which required, in all cases where an extension of time to prepare, serve, and file such statement was granted, that as a condition precedent to its validity the order made in the premises should be served on opposing counsel, or the party he represented, which course was not taken in this case.

A rule of that description is intended to meet the ends of justice, and a court can, in the exercise of a proper and legal discretion, set it aside. *People v. Williams*, 32 Cal. 282-289; *Pickett v. Wallace*, 54 Cal. 147, 148. In the absence of anything in the record to show what reason controlled the action of the court, as in this case, it is to be presumed that a proper one existed, and that tribunal acted upon it. The demurrers to the answer and complaint in intervention should have been sustained.

In both the pleadings objected to it was affirmatively pleaded that plaintiff's attorney had practiced a fraud on the defendant Roth in obtaining a judgment in an action on a promissory note, which judgment was the foundation of the title which in the present action plaintiff sought to have quieted. But nowhere was it alleged that Roth, or his attorney Treadwell, who had notice of that judgment, and opportunity for doing it, ever endeavored to have it set aside on motion, under section 473 of the Code of Civil Procedure; or that they had been prevented from so doing by any artifice, deception, or fraud on the part of plaintiff or his attorney. This course of action should have been taken, as otherwise it would appear that the party complaining of fraud, etc., had not used due and proper diligence to avoid its effect. *Bibend v. Kreutz*, 20 Cal. 109; *Ketchum v. Crippen*, 37 Cal. 223; *Ede v. Hazen*, 61 Cal. 360. For the same reason the evidence of Treadwell on that point was inadmissible.

There was no allegation in the answer filed in the action on the promissory note of date the fourth of April, 1878, denying its making and execution as of that date. On the contrary, it contained a positive averment that the note "was made, executed, and delivered" in the state of Nevada, and not in California. There was nothing in the answer, or the complaint in intervention, filed in the present action, which averred a date different from that shown by the note. Therefore evidence tending to show a date other than that on its face was, under the pleadings, inadmissible.

Appellant contends that a tender of the amount due on a debt, which is secured by mortgage, made after the debt falls due, releases the lien of the mortgage. This is not the law of California. *Himmelmann v. Fitzpatrick*, 50 Cal. 650.

The other questions raised it is unnecessary to determine; for should amendments to the pleadings be allowed and made in the court

below, testimony may become pertinent which might, perhaps, under the present issues, be inadmissible, although this we do not now decide.

The judgment and order should be reversed, and cause remanded for a new trial.

BELCHER, C. C., and SEARLS, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

68 Cal. 522

HARLAN and others v. ELY. (No. 9,616.)

Filed February 19, 1886.

CHATTEL MORTGAGE—SALE OF GRAIN UNDER—NEGLIGENCE.

Where a debtor executes a chattel mortgage on a growing crop to secure a debt, and the mortgagee takes possession of the grain when harvested, and sells the same in the usual course of business, and accepts a time-check, without the assent of the mortgagor, and the purchaser fails, and the price of the grain is lost, the mortgagee is responsible therefor.

In bank. Appeal from superior court, county of Yolo.

J. H. McKune, for appellants.

J. C. Ball and *J. W. Armstrong*, for respondent.

SEARLS, C. This is an action upon a promissory note dated October, 31, 1877, made by defendant and one D. F. Scoggins for \$3,000, and interest, payable one day after date to plaintiffs or their order. The cause was here on a former appeal from a judgment in favor of plaintiffs, and the decision reversing the judgment and remanding the cause for a new trial is reported in 55 Cal. 340. Since that appeal the cause has been again tried before a jury, and a general verdict rendered in favor of defendant.

In addition to the general verdict, the jury were instructed to find upon a large number of questions submitted to them, all of which were answered and from which it appears that D. F. Scoggins, (who by the pleadings and evidence is shown to have been a joint and several maker with defendant of the promissory note upon which this action is brought, and who executed the chattel mortgages to plaintiffs upon the growing crop, to secure, among other things, the said promissory note as specified in the answer,) in the summer of 1878, delivered in the name of plaintiffs, at the warehouse in Madison, a lot of wheat of the value of \$6,000; that such wheat was delivered under the mortgages of plaintiffs held as security for the payment of the promissory note in controversy in this cause; that plaintiffs sold the wheat to one Mansfield; that plaintiffs took possession of the wheat under the mortgage to pay the note in suit; that in delivering the wheat to Mansfield the plaintiffs acted as a prudent man would have done in his own important business, and that they were not guilty of any negligence in making a sale

of the wheat to Mansfield; that they did not sell, or agree to sell, the wheat on credit, but that, such sale having been made, they knowingly and voluntarily accepted a check at 10 days after sight; that they had not previously agreed to do so, but that having received the time-check they consented to retain it, which was in contravention of the usages of trade in selling wheat, the practice being to sell for cash or sight drafts; that plaintiffs were guilty of a want of ordinary prudence in connection with the check received by them for the wheat; that neither defendant nor Scoggins consented to a sale of the wheat on credit or to taking a time-check in payment therefor; that Scoggins consented to and concurred in the sale of the wheat by plaintiffs to Mansfield, but did not authorize or consent to a credit sale of the wheat, or to taking a time-check therefor. There are other facts found from which it appears the sum of \$3,000 was loaned by plaintiffs to Scoggins, who, to secure the payment thereof, gave them the joint and several note of himself and defendant, Ely, and as additional security a chattel mortgage on his growing crop; that defendant received no part of the money, and was, as between himself and Scoggins, but a surety for the latter, though in form a joint and several maker of the note, and for aught that appears was liable as such to plaintiffs.

The case seems to have turned upon the question whether or not plaintiffs, after receiving the wheat, the proceeds of the growing crop covered by the chattel mortgage, and selling the same to Mansfield by consent of the mortgagor, were guilty of such negligence as rendered them liable. The practice of merchants in the vicinity was to sell for cash only, or to receive sight drafts in payment. They contracted, so far as appears, to sell for cash, but, without consent of the mortgagor or defendant, accepted a time-check in payment, which, according to the evidence, was not paid by reason of the failure in business of the drawer. Had the money been received on this check it would have satisfied the note in full. Under these circumstances the jury found a general verdict for defendant in addition to the special findings.

The apparent relation of defendant, Ely, to plaintiffs was that of a principal debtor. He was a joint and several maker with Scoggins of a promissory note to plaintiffs for \$3,000; and the testimony was ample to show that the actual relation of defendant to plaintiffs was, in fact, what his apparent relation indicated, and the jury has so found the fact. This being true, we do not see that he is subject or entitled to other or different consideration than Scoggins, who was a joint and several maker with him of the note. Plaintiffs held a chattel mortgage to secure the payment of the note upon the growing crop of wheat owned by Scoggins. Plaintiffs also found it necessary to advance funds for Scoggins to defray the expense of harvesting the wheat, to secure which they took a second chattel mortgage covering, not only this last indebtedness, but also the amount due on the note

now in suit. Upon being harvested the wheat was delivered by Scoggins at a warehouse in Madison, in the name of and subject to the order of plaintiffs, and was by them sold to one Mansfield. Scoggins had previously contracted the wheat to Mansfield, but, having had some misunderstanding with him, objected, as he claims, to having it delivered to him. There was a conflict in the evidence as to whether Scoggins consented to the sale by plaintiffs to Mansfield, and the finding of the jury is that he did not consent. In our view of the case, his concurrence or non-concurrence as to the person to whom the sale was made was of no importance. It was made in the ordinary course of business, so far as appears, the price obtained was not disproportionate to the market price, and the jury finds that in delivering the wheat to Mansfield plaintiffs acted in a prudent manner. The whole contention between plaintiffs and defendant is concentrated upon a given point. The former sold the wheat to Mansfield without receiving payment therefor, received a check in payment payable 10 days after date, and before the maturity of the check Mansfield failed, whereby the purchase price of the grain was lost. It does not appear that the contract of plaintiffs was for a sale on credit, but that upon a sale fairly conducted, and in which they were entitled to immediate payment, they delivered the wheat without receiving compensation, and when the time-check was forwarded to them did not, so far as appears, object thereto or take steps to secure payment until too late.

The jury in their special findings absolve them from all negligence in making the sale, but find that the usual custom of business men engaged in the wheat trade at that place was to sell for cash or sight drafts; that they knowingly and voluntarily accepted the time-check; that defendant did not consent thereto; and that plaintiffs were guilty of a want of ordinary business prudence in connection with the check. It was admitted at the trial "that the wheat delivered by Scoggins to the order of plaintiffs was of the value of six thousand dollars, and sufficient to cover note and expense of harvesting and marketing." Respondent claims that the plaintiffs, by failing to sell the property in the mode provided by the Civil Code, §§ 3002, 3003, 3005, and by selling it at private sale, were guilty of a conversion. The first mortgage made no express provision for a sale of the property except such as is implied by law. The second mortgage authorized the plaintiffs, upon default in the payment of the note at maturity, to take possession of the property, and to sell the same as by law provided. Scoggins, the mortgagor, had a right to waive his privilege of having the property disposed of in a given manner; and while the jury finds he did not consent to the sale to Mansfield, we think it is apparent from the general tenor of the evidence, his own included, that he delivered the wheat to plaintiffs to be sold in the usual manner known to merchants dealing in a like article.

But we think the plaintiffs, by their negligence in delivering the wheat, which they had contracted for cash, without receiving pay-

ment, and in accepting a time-check in violation of the usual custom of merchants, took upon themselves the risk of non-payment, and rendered themselves liable for the sum of money which they ought to have received, and which but for their own carelessness they would have received. The loss was occasioned by their negligence, and, though burdensome and grievous to bear, it is more in consonance with justice that they who, by stepping aside from the beaten track known to those in the trade to lead to safe results, have brought about the loss should suffer, than that defendant, Ely, who, though a principal debtor, had nothing to say or do in the matter, should be called upon to make good such a loss incurred under such circumstances.

There was no error by which plaintiffs were injured in the action of the court in sustaining the objection to plaintiffs' question put to the witness L. D. Stephens, as to the capacity in which he regarded Mr. Ely in delivering him (Scoggins) that money,—whether he signed for himself, or in some other capacity. The object of the question was, no doubt, to show that the witness, who was one of the plaintiffs, regarded Ely as a principal upon the note. The jury found, in effect, that Ely was a principal upon the note, and not a surety merely. As this was all plaintiffs could ask, they were in nowise injured by any adverse rulings of the court upon the question. It is proper, however, to say that the court below allowed the witness to state the facts tending to show that plaintiffs looked to Ely as a principal, and not as a surety.

The instructions given by the court were, in the main, correct expositions of the law applicable to the case made by the testimony, and we find in them no error sufficient to call for a reversal of the judgment, and are of opinion the judgment and order denying a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

CALIFORNIA REPORTER

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SUPREME COURT OF CALIFORNIA.

68 Cal. 551

PEOPLE v. NORTH PACIFIC COAST R. Co. (No. 11,298.)

Filed February 24, 1886.

TAXES—COLLECTION OF TAX ON RAILROAD—DELINQUENT TAXES, INTEREST ON.

In a suit to recover delinquent taxes assessed against a railroad operated in more than one county, under the Political Code of California, § 3670, on recovery of judgment by the plaintiff, it is not entitled to recover interest on the taxes at the rate of 2 per cent. per month from the time they became delinquent.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

W. T. Baggett and James A. Waymire, for appellant.

W. H. L. Barnes, for respondent.

BELCHER, C. C. This is an action to recover taxes assessed for the year 1883 upon the defendant's railroad, situated in Marin and Sonoma counties. The action was commenced under the provisions of section 3670 of the Political Code, and in the court below judgment was entered in favor of the plaintiff for the full amount claimed for taxes, with 5 per cent. added for non-payment and 10 per cent. for counsel fees and for costs. The appeal is by the plaintiff, and the only question presented for decision is, was the plaintiff also entitled to recover interest on the taxes at the rate of 2 per cent. per month from the time they became delinquent? The question is answered by the Political Code.

In 1883 an act was passed by the legislature amending sections 3664 and 3665 of that Code, and adding thereto other sections numbered consecutively up to 3671. St. & Amend. Codes 1883, p. 65. By these sections full provision is made for the assessment of all railroads operated in more than one county in this state, and the collection of the taxes levied upon such assessments. The assessment is to be made by the state board of equalization in the month of August, and within 10 days after the third Monday of that month the board is to apportion the total assessments to the counties, or cities and counties, in which the roads are located. The board must prepare each year a book, to be called "Record of Assessment of Railways," in which must be entered each assessment made by the board; and another book, to be called "Record of Apportionment of Railway Assessments," in which must be entered, among other things, the total assessment, and the amount of the apportionment of such assessment to each county, and city and county. Duplicates of these two books are to be made and transmitted to the comptroller of state, and they "constitute the warrant for the comptroller to collect the state and county, and city and county, taxes levied upon such property assessed

by the board." Within 10 days after the fourth Monday in October the comptroller is required to publish a notice that he has received the "duplicates," and that the taxes are payable and will be delinquent on the last Monday of December, at 6 o'clock p. m., and that unless paid to the state treasurer, at the capitol, prior thereto, 5 per cent. will be added to the amount thereof. All taxes not paid before the time named are delinquent, and thereafter there must be collected by the state treasurer, or other proper officer, an addition of 5 per centum. After the first Monday of February of each year the comptroller is required to commence an action in the proper court, in the name of the people of the state, to collect the delinquent taxes, and the form of the complaint to be used by him is prescribed.

In the complaint it is alleged that the defendant is indebted to the plaintiff for state and county taxes in certain sums, "with five per cent. added for non-payment," and judgment is asked for the several sums named. If in such action plaintiff recovers judgment, there must be included in the judgment, as counsel fees, such sum as the court may determine to be reasonable and just.

In all of these provisions, as is seen, nothing is said about interest, and it is not claimed for appellant that they authorize the collection of interest. But it is urged that under section 3803 of the same Code interest at the rate of 2 per cent. per month on certain delinquent taxes may be collected, and that that section should be construed to apply to taxes such as are sued for in this action. We are satisfied that the section cannot be so construed. It refers only to the delinquent taxes mentioned in the sections immediately preceding it, and has no application to other taxes than those so mentioned. *Harper v. Rowe*, 53 Cal. 236; *Lake Co. v. Sulphur Bank Q. M. Co.*, 4 Pac. Rep. 876. If it had been intended that interest should be collected on all taxes which the comptroller might sue for and recover, the complaint, formulated by the legislature for their collection, would, in our opinion, have demanded judgment for that interest, as well as for the "five per cent. added for non-payment."

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

69 Cal. 32

In re COWDERY. (No. 11,255.)

Filed February 27, 1886.

ATTORNEYS AT LAW—DISBARMENT FOR UNPROFESSIONAL CONDUCT.

An attorney at law who held the office of the city and county attorney for San Francisco, and had the management of all its cases, is guilty of unprofessional conduct, and violation of his oath as attorney and counselor at law, if, after his office has expired, he accepts a retainer in one of the city cases of which he had charge, on the side opposed to the city, though he perform no services for this retainer other than that he agrees not to disclose a point arising in the case, and within his knowledge, which would be favorable to the city and probably fatal to the suit of the other party.¹ MYRICK, J., dissenting.

In bank. Proceeding for disbarment of attorney.

William Matthews, E. R. Taylor, and H. J. Tilden, for prosecution.

THORNTON, J. J. F. Cowdery, at the times hereafter mentioned and prior thereto an attorney and counselor of this court, is accused as follows: That Cowdery was in December, 1881, the attorney and counselor of the city and county of San Francisco, and continued so to be up to the fifth day of January, 1883; that while he was such attorney and counselor he took appeals in the cases of *Bonnet v. City and County of San Francisco* and *Parker v. Same* from the judgments which had been given and made in each of said cases against the city and county, which appeals were pending at the expiration of his term of office; that after the expiration of his term of office, and in April, 1883, he informed one D. H. Whittemore, also an attorney and counselor of this court, that there was a point in each of said causes which would be fatal to the respondents if it was presented to this court; that thereupon Whittemore, in consideration that he would not disclose the point to his successor in office, and would not be retained by said city and county to represent it in either of said cases, paid to him \$100; that he agreed in consideration of such payment and promised Whittemore that he would not disclose to any person the point, and would not permit himself to be retained in either of said cases by the city and county; that he performed no professional or other services for this payment, and that it was not expected that he should; that at the time of the said agreement and said payment both Cowdery and Whittemore believed that said point if presented to this court would result in reversing the judgments above mentioned; that by reason of the foregoing Cowdery has violated his oath as attorney and counselor at law, and the duties imposed on him, and should be removed from his office as attorney and counselor.

In his answer Cowdery denies the following averments: That he ever told Whittemore that there was a point in either of the cases above mentioned which would be fatal if presented to the supreme court; that Whittemore, in consideration that respondent would not disclose such or any point to his successor in office, and would not be

¹ See note at end of case.

retained by the city and county to represent her in either of said cases, paid to him \$100; that in consideration of the payment of this sum of money he promised Whittemore, or any other person, that he would not disclose to any person any point in the cases, or either of them; that at the time of the agreement between him and Whittemore he (Cowdery) believed that the point alluded to would result in reversing the judgment in each or either of these causes.

On the issues joined the cause came on for trial in this court.

The statute of this state provides that "every person on his admission [as attorney and counselor at law] must take an oath to support the constitution of the United States, and the constitution of the state of California, and to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability.

* * * Section 278, Code Civil Proc.

It is provided in section 282, Code Civil Proc., *inter alia*, that it is the duty of an attorney and counselor at law: "(1) To support the constitution and laws of the United States and of this state. * * * (5) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

In section 287, Code Civil Proc., it is provided that "an attorney or counselor may be removed or suspended by the supreme court, or any department thereof, or by any superior court of the state, for either of the following causes, arising after his admission to practice: * * * "(2) * * * Any violation of the oath taken by him, or of his duties as such attorney and counselor."

The duties of an attorney and counselor at law spring from his obligations, and those obligations are defined and limited by law. One of the principal obligations which bind him is that of fidelity, under all circumstances, to his client; the maintaining inviolate the confidence reposed in him by those who employ him; and, at every peril to himself, to preserve the secrets of his client. Section 282, Code Civil Proc. This obligation is a very high and stringent one. If it is ever relaxed it is under exceptional circumstances, which rarely occur. If relaxed without the consent of the client, it is of most infrequent occurrence. The public is interested in the strict maintenance of this obligation, for without it there can be no assurance that the duties which devolve upon such officials as ministers of justice will be properly discharged. It is essential to the administration of justice, and of the respect which the tribunals for its administration should command, that these officers should discharge with the highest fidelity, and with the utmost good faith, the responsible duties which devolve on them.

The following facts are, in our opinion, established in the cause:

The respondent in December, 1881, entered upon the discharge of his duties as attorney and counselor for the city and county of San Francisco, having been elected to that position at an election held a short time before. He continued to be such attorney until the first

Monday in January, 1883, (fifth of that month,) when his term expired. When he went into office there were a large number of cases pending, (some 800,) in which the city and county was a party, involving street work, and which were in his office; that he was unable to make himself acquainted with the merits of all these cases during his one year's incumbency; that he was not acquainted with the two cases whose titles are given above; these two cases were pending when respondent took office; they had been tried in the court below, and judgments had been rendered against the city, and motions for new trials had been made and denied; that he knew nothing of the facts or law points involved in them, but determined to appeal them as a matter of official care and caution, and directed his assistants to appeal all cases to this court which were in a condition to be appealed; that the two cases aforementioned were, with others, so appealed, and the transcripts brought up to this court; that in December, 1882, D. H. Whittemore called on him, and asked him to stipulate to advance these causes on the calendar of this court; that he refused to stipulate, saying that he did not wish to hamper his successor, who would in a few days come into office; that he never knew at any time anything of the testimony or of the questions of law or fact involved in the cases, and had never read the transcript, and knew nothing of the testimony in either of these cases; that in a report sent to the board of supervisors, and signed by him as such attorney and counselor, these cases were mentioned as pending in the supreme court; but though this report was signed by him, he had never read it, and did not know its contents. On or about the twelfth day of April, 1883, he met Whittemore on Montgomery street, in the city of San Francisco, and had a conversation with him.

The supreme court on the tenth of April, 1883, affirmed the judgment in the *Bonnet and Parker Cases* above mentioned. Respondent was aware of this when he had the conversation with Whittemore on the twelfth of same month. He said to Whittemore: "Hello! You have won your *Parker Case*. Now you have won your case, how are you going to get your money? Does not the Brickwedel decision cut you off?" He said he would see about getting his money, and I said: "Whittemore, did they raise the point on you that I raised in the *Blum and Lieu Case*,—that there was not sufficient allegation of presentation of claim to the board of supervisors before suit." He said: "No; there is nothing in that point any way. The supreme court has decided it twice in the *Gurney and Parker Cases*, and I care nothing about it. If there is, there could only be a delay for a new trial; it is nothing on the merits. As a matter of fact, the complaint alleged presentation and rejection by the supervisors, and the court had found in both cases that the claims had been presented and rejected." After some remarks about one Sam Davis buying the judgments, he (Whittemore) said to him: "Are you in a position to accept a fee in this case" to which respondent replied: "Yes; I have had nothing to do

with the cases, and know nothing about them, and had not been employed by the city, and I thought I was in a condition to accept a fee." Respondent said at the same time: "Mr. Whittemore, I can do nothing against the city in this case, and I do not want, for appearance sake, to be consulted in them." He (Whittemore) said he did not want him to do anything in the case. All that he wanted was that he should not be employed against him. Respondent said: "All right. The city had not attempted to employ me, and she had got other counsel, and that I would accept \$100." On the same day c the next this money was sent by Whittemore to respondent. After this employment Cowdery had nothing further to do with the cases. He offered to give any information to his successor, Craig, about any cases in his office. Isaac N. Thorne had the management of these and other street cases as an assistant to Cowdery, and Thorne was directed to give all information about these and all other cases in the office to Craig. It does not appear that any information was ever given to Craig by either of them in relation to the *Bonnet and Parker Cases*. Respondent was a salaried officer of the city and county, and received all the salary due him. He was furnished with assistants, who also were paid salaries during their employment as assistants.

It is contended that Cowdery violated his duty as attorney and counselor in accepting this employment from Whittemore in the *Bonnet and Parker Cases* after having had control of them as the attorney and counselor for the city; that having been the attorney and counsel of said city while the causes were pending, he could not accept any employment in regard to them which would put him in a position hostile to his former client. On the other hand, the contention is that Cowdery having acquired no knowledge of the facts, and received no confidential communications from his client in the cases after the expiration of his term of office, he was at liberty to be employed by the adverse party.

The questions arising on these contentions have been elaborately argued, and are before us for decision.

The case of *Cholmondeley v. Clinton*, 19 Ves. 261, S. C. 1 Coop. 80, is cited on behalf of respondent. In this case a motion was made by defendant for an injunction restraining the plaintiff, Earl Cholmondeley, from employing William Montriou as his solicitor in the action above entitled, or as his attorney or solicitor in any other suit in equity or action at law commenced, or to be commenced, by Earl Cholmondeley against Lord Clinton, in respect of any estates or property the title whereof came to the knowledge of Montriou as the clerk of William Seymour, one of the defendants, while he was the attorney and solicitor of the defendant, Lord Clinton, or which came to the knowledge of Montriou as solicitor for Lord Clinton while in partnership with Seymour, or with Seymour & Squibb; and also restraining Montriou from acting as solicitor or attorney for plaintiff in any suits or actions, and from communicating to the plaintiff, his

counsel, solicitors, attorneys, or agents, any information relating to the matters in dispute in such suits or actions which has come to the knowledge of Montriau as clerk to Seymour, or as solicitor to Lord Clinton, as above mentioned. It appeared that Montriau had been clerk with Seymour and afterwards his partner. Subsequently Squibb was taken into the partnership. During the period that Montriau was clerk for Seymour the latter was solicitor for Lord Clinton. While the partnerships existed he and Seymour, and subsequently he and Seymour & Squibb, were solicitors for Lord Clinton. In 1812, during the period above mentioned, the bill in this suit was filed to recover considerable estates of Lord Clinton, in the counties of Devon and Cornwall, claimed by the plaintiff; and Montriau, while clerk and partner with Seymour, became intimately acquainted with the affairs and property of Lord Clinton, and the titles of the estates, the subject of the suit, preparing abstracts, deeds, etc., relating to them, and Seymour conferred with him upon the title and the defense. The answer was prepared in 1812. The partnership was dissolved some time in 1813 as to Montriau, who in December, 1814, communicated his appointment to be solicitor to the plaintiff, Earl Cholmondeley, for conducting his suits against Lord Clinton.

It was stated in the affidavits of Seymour and Squibb, and two of their clerks, that Montriau, as such clerk and partner, acquired such information touching the titles, estates, and affairs of Lord Clinton, and his defense, etc., as would, in the judgment and belief of affiants, render his being concerned in the management of the suit as solicitor for the plaintiff highly prejudicial and injurious to Lord Clinton; and they could point out particulars did they not believe that they should thereby produce great part of the mischief which the application for an injunction was intended to avert. Montriau's affidavit stated that he was never consulted confidentially by Lord Clinton, while Seymour was; that Seymour had the whole management and control of the case; all letters were confidential, and addressed to him; and all deeds, papers, etc., relating to the estates were collected by Seymour, in 1812, and secured in his private office. He admitted his acquaintance with some of Lord Clinton's affairs. When he was clerk he revised an old abstract relating to the estates in question, but did not recollect that he prepared any deeds, etc., or that Seymour conferred with him on the title further than by informing him of plaintiff's claim and the objection on which it was founded; admitted that he was well acquainted with the abstract of defendant's title, which does not contain any deed or statement not appearing on the pleadings; that the application to become plaintiff's solicitor came from plaintiff's agent. He denied that he possessed any information acquired as clerk or partner that would, in his judgment or belief, render his being concerned for plaintiff highly prejudicial to the defendant; and stated that the treaty for the dissolution of partnership commenced and was concluded very soon after Lord Clinton appeared to the bill in No-

vember, 1812. It was admitted that one stipulation in the articles of dissolution was that Montrion should not act as solicitor for Lord Clinton. In deciding the case the lord chancellor discussed many points regarding the relation of attorney and client, and closed his opinion as follows, as reported in 19 Ves.:

"Upon many of the grounds that have been agitated, I shall not give any judgment. I shall decide this case upon the dry question whether this plaintiff has a legal right to employ Mr. Montrion, and whether he has a legal right to accept that employment. With regard to the propriety or delicacy of conduct I do not sit in this place to communicate my opinion upon such subjects; and therefore shall follow the example of Lord THURLOW, who, upon a question as to the interest of a debt, which a noble lord then sitting by him admitted he ought to pay, said he should decide only on the legal right; desiring that the arguments of propriety and delicacy, submitted to him as lord chancellor for his legal judgment, should be addressed to that noble lord himself. So I shall refer the arguments addressed to me upon those motives of propriety and delicacy to the plaintiff and Mr. Montrion, and shall consider only the dry question whether the attorney of the plaintiff, being removed, not by the discharge of the plaintiff, can, in that very cause in which he had been employed by him, become the attorney for the defendant. That depends upon a principle applying to cases both in this court and at law, upon which I shall soon have an opportunity of consulting the judges, and will then give my opinion on that question of law; again disavowing a right to give my opinion upon any other view of this case."

"The lord chancellor," on a subsequent day, "declared the unanimous opinion of all the judges and the barons of the exchequer; the master of the rolls and the vice-chancellor agreeing with his lordship that an attorney or solicitor is not at liberty to act in the manner proposed by Mr. Montrion; and that, having thus left the cause, he is not in the situation of a solicitor discharged by the client, and therefore cannot become the solicitor for the other party in the same cause." 19 Ves. 275, 276.

The report in 1 Coop. 80. is substantially the same, but in stating the result of his consultation with the law judges he used this language:

"His lordship this day stated that he had requested the chief justices of the courts of king's bench and common pleas, and the chief baron of the exchequer, to inform him of the opinions of their respective courts upon the above point; that he had been informed by Lord ELLENBOROUGH and Lord Chief Justice GIBBS that the opinions of their two courts were that an attorney could not be allowed so to act; that he had also spoken to the master of the rolls and the vice-chancellor, and that they concurred in the opinion; but he had not yet been able to learn the opinion of the court of exchequer, which, however, he would communicate as soon as he received it."

February 3, 1815: "This morning the lord chancellor informed the counsel in this cause that since the subject was last mentioned he had received from the lord chief baron of the court of exchequer the opinion of that court, which was that no solicitor who had been employed as such on one side could afterwards be employed on the other. His lordship stated that the opinion of all the courts and judges he had communicated with also was that Montrion did not stand in the situation of a discharge solicitor. He added that he should say no more in judgment upon the motion, as Montrion had been advised by

counsel that he might become the solicitor of the plaintiffs in the cause, and had acted upon that advice, believing it to be right." 1 Coop. 88, 89.

In this case Lord ELDON decided, and intended to decide, but two points: *First*, that a solicitor who had been employed as such on one side of a cause could not afterwards, having voluntarily quit the cause, be employed on the other; *second*, that Montriau did not stand in the situation of a discharged solicitor.

In *Robinson v. Mullett*, 4 Price, 353, a solicitor had acted, to a certain extent only, for parties defendant in an amicable suit in chancery to procure the opinion of the court upon the construction of a will. In that cause one of the defendants in this case was plaintiff, and the plaintiffs in this case with others (residuary legatees and executors) were defendants. All the defendants in the chancery suit employed the same solicitors to put in their answers. In consequence of disputes afterwards arising between the parties, the plaintiffs in this suit filed their bill against the executors and other parties to have the trusts of the will executed, and for an injunction and receiver, and employed the solicitors who had been employed by themselves, the executors, and the other parties in the suit in chancery to prosecute the suit. An application was made to restrain the solicitors from acting for plaintiffs in this suit, etc. It appeared from the deposition of the solicitors sought to be restrained that they were not in possession of any secrets of defendants, or any information whereby their interests could in the slightest degree be prejudiced; that all communications made by defendants to them had been made in the presence of plaintiffs, or subsequently related to them by defendants. "The court held that the employment of these solicitors for the present plaintiffs by such of the defendants as they had acted for in that suit, and to such an extent only, was too slight a ground for the application to restrain them from acting in this cause, as there did not appear to have been any important confidential matters disclosed to them the knowledge of which might be used in prejudice of the party so applying." The court discharged that part of the order only. The order which had been obtained on the part of the executors restraining these solicitors from acting as attorneys or solicitors in any other suit in law or equity between the parties was allowed to stand. In this case it will be observed the former suit was amicable—one to procure the construction of a will; the solicitors had been engaged for all the defendants; that no important confidential communications were made to them; and that all communications made to the solicitors were made in the presence of the plaintiffs, or subsequently stated to them by the solicitors. The restricted relief granted will also be observed, and an important part of the order of the court was not set aside by the court.

In *Bricheno v. Thorp*, Jac. 300, Lord ELDON refused to restrain one Day, who had been clerk for the solicitor of the plaintiffs (himself one of the plaintiffs) when the action was commenced, from act-

ing as solicitor of defendants, on the ground that it did not appear that he had become possessed of any information while he was clerk which could be prejudicial to the plaintiffs. The court said that the general allegation that he had become possessed of such information, without pointing out the particular information acquired, was not sufficient. But in deciding the cause the court said:

"There may be cases where the mischief which the case of *Cholmondeley v. Clinton* was intended to counteract may equally occur in the case of a clerk. On the other hand, the case may be of such a nature that, though the clerk may be retained for the opposite party, it may be impossible for any information he possesses to do any mischief. But if he is to carry important secrets out of the office, and employ them in the service of others, though I feel that it may operate to the detriment of young gentlemen setting up in business, yet I think that ought not to be permitted. I ought, therefore, to be informed of the nature of the suit, and wish to see the bill and answer. A gentleman going into business for himself must not carry into it the secrets of his master; but, on the other hand, I think it my duty to take care that he may not be prevented from engaging in any business that he may fairly and honorably take." Jac. 301, 302.

It should be observed that this was the case of a clerk afterwards setting up in business as a solicitor. The lord chancellor remarks on this circumstance as distinguishing the case from *Cholmondeley v. Clinton*, *supra*. If it had appeared that he had acquired any information which might be prejudicial to the plaintiffs, the court would have restrained him. In this case Lord ELDON required that the particulars of the information acquired by Day, as clerk, should be pointed out to him, not publicly, on the papers. This was not done, and therefore he refused the order.

In *Beer v. Ward*, Jac. 77, the same court refused to restrain a solicitor from giving evidence of confidential matters in another court, on the ground that the question should be left to the court before which he might appear as a witness. Pages 79, 80. As to restraining a solicitor from making communications of confidential matters to individuals the court said: "You must show me what has been done; for I could not interfere to restrain in this case, any more than in cases of waste, unless something has been done which ought not to have been done." For lack of such showing the restraint as to making communications to individuals was refused.

In *Davies v. Clough*, 8 Sim. 262, Jones had been employed as solicitor for Mrs. Clough in the negotiation of an agreement by virtue of which £3,160 was paid to her. Disputes afterwards arose between Jones and his client as to his bill of costs, which she procured to be taxed, and it was reduced. Jones afterwards filed a bill against Mrs. Clough as solicitor for other parties to set aside this agreement. The court restrained him from so acting, and also from communicating any information relating to the agreement that had come to his knowledge confidentially as solicitor for his former client.

In *Grissell v. Peto*, 9 Bing. 1, the court refused to restrain attor-

neys from acting in a cause for defendant on the ground that they had obtained a knowledge of the plaintiff's case in the course of a chancery suit in which they had been acting in conjunction with plaintiff, and in which defendant had no interest, but in which they had acted for the defendant. The attorneys deposed that they obtained little more information than would have been furnished by plaintiff's bill of particulars. Two of the judges remarked that a case of this sort might occur in which the court would think it right to interfere. Let it be observed here that the information in this case was obtained, not in the case before the court, but in another suit in another court. Yet, under such circumstances, two of the learned justices intimate that a case might occur in which it would be right for the court to restrain.

Johnson v. Marriott, 4 Tyrw. 78; S. C. 2 Crompt. & M. 183; and 2 Dowl. Pr. 343, is also cited. The reports agree as to the point on which the motion was decided. The point for decision arose on a rule *nisi*, calling on defendant to show cause why an order of BAYLEY, B., appointing Cyrus Jay attorney for defendant, should not be set aside, and Jay be restrained from acting as attorney for the defendant in the cause above named. In the report in Tyrwhitt it is stated:

"From affidavits of the present attorney for the plaintiff and his clerk it appeared that in May, 1832, Jay had been appointed attorney to the plaintiffs as assignees of Cochrane, and as their attorney had commenced this action in their names to recover goods of the bankrupt which had been taken in execution. His bill of costs showed that he had delivered the issue, made two copies of the pleadings for briefs, had conferences with the bankrupt, given notice of trial, and taken the opinion of counsel on all the facts of the case. Afterwards, and before the trial, he was discharged by the plaintiffs, who now swore to their belief that he was fully acquainted with all the circumstances of their case, and that the defendant's employing him would injure the plaintiffs."

Three of the judges gave opinions. BAYLEY, B., rested his judgment on the circumstance that the clients, the assignees, (plaintiffs in the case,) made no affidavit. He said:

"But the chief foundation of my opinion here is that the clients, the assignees, make no affidavit. The attorney here having been in the first instance concerned for them, they know and can best tell whether they made confidential communications or not to Jay which it would be material that he should not disclose to the defendant. But no such matter is sworn to by either of them or their solicitor. It has been argued that the case drawn and submitted to counsel for his opinion must have conveyed such information to Mr. Jay. If that were so, the affidavits should have stated that it did contain facts necessary to be kept from the defendant's knowledge in order to prevent injury from accruing to the plaintiffs by the disclosure. If the assignees had sworn that they had made communications to Mr. Jay of that essential importance that if disclosed to the defendant they, as plaintiffs, would be materially prejudiced in their suit, I should have hesitated to discharge this rule, and to suffer Mr. Jay to act for the defendant; but as no assignee or creditor states that a single material fact was communicated to Jay, and the application is rested solely on the affidavits of the plaintiffs' present attorney and his clerk, whose conclusions of the amount of Mr. Jay's knowl-

edge of the facts are drawn from his bill of costs, I am of opinion that no sufficient case is established upon which the court can make this rule absolute." 4 Tyrw. 82, 83.

BOLLAND, B., said:

"I agree with my Brother BAYLEY, and for the same reasons. We are here to decide on the rights of three parties, viz.: of the defendant, who seeks to employ Mr. Jay as his attorney; of Mr. Jay, whose interest is concerned in that employment; and of the plaintiffs, who wish to restrain the defendant from having Mr. Jay's services on this particular occasion. Now the affidavits disclose no facts sufficiently strong to warrant us in exercising our power to restrain him from acting as attorney to the defendant. The only fact on which his so acting is objected to by the plaintiffs is that he has been before employed by them in this case, and afterwards discharged by them, but without any imputation of misconduct. Now, in *Cholmondeley v. Clinton*, Lord ELDON, after consulting all the common-law and equity judges, seems to have been of opinion that a solicitor discharged by his client for any reason other than misconduct is differently situated from a solicitor who has withdrawn voluntarily from the cause in which he had been employed, and that he was therefore clearly at liberty to employ his talents and exertions for the opposite party; though if he afterwards communicated to the latter the secrets of his former client, or in his new employment improperly used that knowledge of them with which he had been confidentially intrusted by his original client, so as to injure or prejudice him, the court might interfere to punish him for so doing. But no facts are here disclosed to warrant the interference prayed for by this rule." Id.

GURNEY, B., said:

"I concur, but I do not say that if an attorney conducted himself so as to procure his client to discharge him a court would not restrain him from acting for the opposite party, and consider his discharge to have been in truth his own act; but in the present case the plaintiffs have not shown in their affidavits that Mr. Jay was acquainted with any confidential communication made by them, the acting on which by Mr. Jay for the defendant, or the disclosure of it by him to the defendant, might prejudice them in the action." Id.

The case manifestly was ruled as it was for want of evidence. It was assumed that it was incumbent on plaintiffs to show that the attorney, Jay, had received confidential information from them which it would be to their prejudice that Jay should disclose or use. BAYLEY, B., said that this must appear by the affidavits made by the clients. BOLLAND, B., agreed with BAYLEY, B., "and for the same reasons."

Nothing was assumed or presumed as to Jay's acquiring any knowledge of the case from the fact that Jay was employed by the plaintiffs in the cause, and that his bill of costs showed that he had delivered the issue, made two copies of the pleadings, given notice of trial, and had taken the opinion of counsel on all the facts of the case. As to the case submitted to counsel for an opinion, BAYLEY, B., laid it out of consideration, because the affidavits did not state that the case contained facts necessary to be kept from defendant's knowledge in order to prevent injury from accruing to plaintiffs by the disclosure; and this though the affidavits of the then attorney and clerk stated that Jay had taken the opinion of counsel on *all the facts of the case*.

The opinion seems to have been placed to some extent on *Bricheno v. Thorp*, which was a case where it was averred, in a general way, that the solicitor ought to be restrained because while clerk he had acquired knowledge of confidential matters which it would be injurious to the plaintiffs to be disclosed. This circumstance is relied on by Lord ELDON in his judgment, and for that reason he required the particular facts to be pointed out to him (not publicly) of which the solicitor had acquired knowledge while clerk; and this manifestly for the reason that a clerk does not always become possessed of the facts confidentially communicated by a client to his employer. This is otherwise of a solicitor or attorney, with whom the client always confers. BAYLEY and BOLLAND, BB., both state that Lord ELDON, in *Cholmondeley v. Clinton*, seemed to be of the opinion that if Montriau had been discharged by Lord CLINTON he could have been employed by the plaintiff. We do not think anything said in the opinion by Lord ELDON justifies such a conclusion. He expressly declined to decide the point,—merely mentioned it among the facts of the case that Montriau did not occupy the position of a solicitor discharged by his client; and in *Bricheno v. Thorp*, in referring to the case of *Cholmondeley v. Clinton*, Lord ELDON said: "If Lord CLINTON had discharged the gentleman, and would not continue to employ him, on such a case no opinion was given." Jac. 303. In the report of *Cholmondeley v. Clinton*, 1 Coop. 88, he asks this question: "But even if an attorney is discharged, can it be that his having been so discharged by one party shall be the very reason why the other party shall employ him?"—but does not decide it. The points determined in the *Cholmondeley Case* have been stated above, and are, we think, stated accurately.

We do not see that *Jackson v. State*, 21 Tex. 668, has any application to this case. The portion of the opinion in that case referred to and quoted in the brief of counsel has only reference to the special verdict in the case and its insufficiencies.

The cases above cited do not hold that an attorney or solicitor, when discharged by his client, though he may be employed by his adversary, can make use of the secrets in relation to the cause obtained from his former client. On the contrary, we understand the cases to hold that a court would restrain an attorney or solicitor from such conduct, and if he could not be otherwise restrained, it would punish such betrayal of confidence by striking him from the roll. In *Johnson v. Marriott* the court refused to act from lack of evidence. If the evidence had been sufficient, would not the defendant have been restrained? We are of opinion that the court in that case would have restrained him, even when he had been unjustly discharged, and he was allowed, as contended, to be employed by the adversary party. The law secures to the client the privilege of objecting at all times and forever to an attorney, solicitor, or counsel from disclosing information in a cause confidentially given while the relation exists. The

client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law. *Wilson v. Rastall*, 4 Term R. 753; *Vaillant v. Dodemead*, 2 Atk. 524; *Sandford v. Remington*, 2 Ves. Jr. 189, note. The cases cited on the other side are *Wilson v. State*, 16 Ind. 392; *Price v. Railroad Co.*, 18 Ind. 137; *Herrick v. Catley*, 1 Daly, 512; *White v. Haffaker*, 27 Ill. 349; *Gaulden v. State*, 11 Ga. 47; *Valentine v. Stewart*, 15 Cal. 387-401; *People v. Spencer*, 61 Cal. 128.

In the Indiana cases the attorney became acquainted with the facts of the case while acting as such, and it was held that he should not be allowed to change sides, and after having acted for one party in a suit to act for his adversary. In both cases the judgment was reversed on the ground above indicated. One of these cases was a civil action, the other criminal. In the case in 16 Ind. the defendant objected to the attorney (Mr. Flagg) assisting in the prosecution of the case, and filed his affidavit, stating, in substance, that "he had employed Flagg to defend him against said charge, executed to him his notes for \$250, and disclosed to him the facts in the case and the evidence for his defense;" that after the return of the indictment Flagg had informed him that he would not act further as his attorney, and had delivered up his notes. Flagg stated by affidavit that he had been desired by defendant to act as his counsel, who stated to affiant that the prosecuting witness and her husband did not desire his services, and on that ground he consented to act; but having subsequently learned that said persons had desired and did then desire his services, and had sent word to him to that effect, he declined to act for defendant, "and returned to him the notes he had received from him for services; that he has received no compensation from defendant, and has not, to his knowledge, learned anything from defendant as to his grounds or means of defense." The objection of defendant was overruled, and Flagg was permitted to assist and did assist in the prosecution. The supreme court observed as follows:

"In searching for the reason upon which a conclusion rests we are often led to consider the results which might flow from the maintenance of an adverse conclusion. For instance, in the case at bar, if the ruling of the court below, and the conduct of Mr. Flagg as an attorney and officer of that court, should be sanctioned as legal, we are constrained to believe that the positive tendency of such ruling would be to defeat the very purpose for which the court was organized, namely, the administration of justice; and if indulged and continued in courts, and the officers thereof, will necessarily result in sapping the foundations of the temple of justice. With what confidence could one arraigned upon a charge of crime confer with his attorney, or reveal to him his evidence, and thereby prepare for his defense, if that officer is permitted, after thus acquiring such knowledge, to change their relative positions, and, instead of standing up as his defender, to stand forth as his accuser. Would he not consider it better to stand mute, dumb, as the sheep before the shearer, rather than disclose the evidence which might thus be turned against him? He might, perhaps, truthfully believe it more to his

interest to return to the practice of a semi-barbarous age, when the prisoner was not heard in his defense by counsel or witnesses in his behalf, than thus to have the weapons of his defense turned against him by those in whom, by the acknowledged law and the statute, he had a right to confide." 16 Ind. 395.

In the case in 18 Ind. the question is stated and decided as follows:

"The next question is upon the refusal of the court to exclude James M. Flagg, Esq., from acting as attorney for the plaintiff in the suit, the one then pending being the second trial of the cause. This cause, as we have seen, was commenced in 1855, and was first tried below in 1856. It came to the supreme court, where the judgment below was reversed, and the cause remanded for another trial. The second trial, from which record the pending appeal was taken, was had in 1860. On the first trial Mr. Flagg acted as attorney for the defendant under the following circumstances: Mr. Price, the defendant, had employed Mr. Ellison, to whom alone he was willing, it seems, to trust his cause; but other persons interested in the question employed Mr. Flagg to act as associate counsel with Mr. Ellison for Mr. Price, in his defense. Mr. Price accepted the services of Mr. Flagg upon these terms, treated him as his attorney, consulted with him fully upon his defense, and Mr. Flagg participated, on the trial, in the examination of the witnesses and the argument of the cause. Beyond doubt, in this state of facts, he is to be regarded as having been the attorney of Mr. Price equally as though he had been feed by him. How he came to take a fee from the plaintiff, on the second trial, does not appear. And now the question arises, can an attorney accept fees on both sides of the same cause? for, though the trials were different, the cause was still the same. On this point there is but one opinion. Says Prof. Sharswood in his *Legal Ethics*: 'The criminal and disgraceful offense of taking fees of two adversaries ought, like parricide in the Athenian law, to be passed over in silence in a code of professional ethics.' 'A pleader is suspendable when he is attainted to have received fees of two adversaries in one cause.' *Mirror Just. c. 2, § 5*. Where an attorney has, in the course of other business or in conducting other suits, obtained a knowledge of matters connected with the suit in question, courts will not, in general, simply on the fact of such knowledge, restrain an attorney from acting against the party through whose business he obtained such knowledge, especially where such party does not desire his services; but he is never allowed to change sides in the same suit. 1 Mon. Pr. 182. See, also, *Wilson v. State*, 16 Ind. 392; *Henry v. Raiman*, 25 Pa. St. 354. And see 1 Selw. N. P. (7th Amer. Ed.) 165, for a large collection of cases relative to attorneys at law." 18 Ind. 140, 141.

In the case from 1 Daly it is held that an attorney cannot serve professionally both parties to a controversy; and where he has been retained by one he cannot recover for professional services rendered in the same matter to the other. The court made these remarks in the case:

"While the relation of attorney and client continued between the plaintiff and the defendant's wife he could not enter into an agreement to act also as the attorney of the husband in a matter so directly connected with the subject of his employment as that of effecting a reconciliation and settling the matter in difficulty between them. He had been employed by the wife to procure a separation, and could not, therefore, engage to act for the husband as his attorney in preventing it. In other words, he could not act on both sides. An attorney, said Chief Justice HOBART, oweth to his client fidelity,

secrecy, diligence, and skill, and cannot take a reward on the other side, (*Yardly v. Ellill*, Hob. 8a; Toml. Law Dict. 'Attorney;') and in *Shire v. King*, Yelv. 32, and *King v. Shore*, Cro. Eliz. 914, it was held that he cannot deal upon both sides, except as an arbitrator." 1 Daly, 514.

In *White v. Haffaker*, 27 Ill. 349, it was held that a solicitor in a case cannot act as a special master to execute the decree. See remarks of court as to relation of client and attorney on page 351, 27 Ill.

In *Gaulden v. State*, *supra*, it appeared that Gaulden, when solicitor general of the district, had, at the April term, 1851, draughted the indictment against James Cody and Patrick Cody for a misdemeanor, upon which the issue for trial was formed; that he consulted with the assistant counsel, and was cognizant of the facts of the case. The case came on for trial at the December term, 1851, when Gaulden appeared as one of the counsel for defendants, and requested his name to be marked upon the docket. It also appeared that the solicitor's fee for drawing the indictment had been allowed by the court, but had not been paid, because there was no fund on hand to pay it. The counsel for the state objected to Gaulden's appearing as counsel for defendants, and the court excluded him. This was assigned for error. The supreme court in its opinion remarked as follows:

"The question made in this case is whether a solicitor general who, in his official capacity, has drawn an indictment against a defendant or defendants, and prosecuted the same as counsel for the state, can be permitted, after the expiration of his term of office, to take a fee from the defendant or defendants in such indictment, and appear as his or their counsel, for the purpose of defending him or them, on the trial for the accusation contained therein. * * * It is urged in behalf of the former solicitor general that in his official capacity he must be considered as standing indifferent between the people of the state and the defendant who is indicted; that when his successor has been elected and qualified the state is to be considered as having *discharged* him from her service, and therefore he is at liberty to appear as counsel for the defendants whom he prosecuted while in office. Admitting that in his *official* capacity he is supposed to stand indifferent, so far as his personal feelings are concerned, yet he is not the less the counsel for the state on that account, and must necessarily become familiar with the facts of the case upon which the state relies for a successful prosecution of the indictment. His position as the counsel for the state enables him to learn the difficulties which may stand in the way of the conviction of one who is really guilty, which no other person would be as likely to know, for the reason that his communication with the prosecutor, the witnesses, and the grand jury affords him the means of ascertaining many facts which only those who are *officially* connected with the government can know. Should he be permitted to make use of the privilege thus officially conferred upon him while in the discharge of his duties as counsel for the state, for the purpose of defending those who have been accused of crime during his official term of office, and that, too, for a reward paid by them to him for such service? * * * Neither can the solicitor general, on the expiration of his term of office, properly be considered as having been *discharged* by the state. The contract between him and the state is that he will perform certain duties enjoined by law for a specified term of time, for a stipulated compensation. Upon the expiration of the period of time for which he was elected, he is out of office, by the *express*

terms of the contract. The state does not discharge him, but his term of service expires by the express stipulation of the contract made between himself and the state; and hence the want of any analogy between such a contract and a contract with a private citizen for professional services, who discharges his counsel from his case before the termination of the suit in which he is employed. The administration of the law should be free from all temptation and suspicion, so far as human agency is capable of accomplishing that object; and, in our judgment, *public policy* most emphatically demands that a solicitor general who has been employed by the state to prosecute defendants for a violation of her laws, for the compensation fixed by law, should not be allowed to defend such defendants from the charge contained in the indictment, after the expiration of his term of office, for a compensation to be paid by them for that purpose. Such a practice will have a tendency to greatly embarrass the administration of the criminal law; for as the term of the office of solicitor general is about to expire, prosecutors, and others who may be intrusted to prosecute offenders, will necessarily be restrained from communicating freely with the state's counsel when he may be employed at the next term of the court to defend the indicted culprit. It is no sufficient answer to say that the law will not allow him to disclose any fact, which may have been communicated to him as the counsel for the state, to her prejudice. If he *knows* the vulnerable points in the case, derived by his official connection with it, there are many ways by which those points might be made available to the defendant, on his trial, by his counsel, besides disclosing them as a witness. If he has knowledge of facts, derived from his official connection with the prosecution, which will operate to the prejudice of the state, and he is permitted to act as counsel for the defendant, that knowledge will be made available in the defense; therefore we place our judgment on the ground that public policy forbids a solicitor general, who has prosecuted a defendant for a violation of the law by preferring an indictment against him, should appear as his counsel to defend him from the charge after the expiration of his term of office." 11 Ga. 49-51.

The supreme court of Georgia affirmed the ruling of the court below.

Valentine v. Stewart, *supra*, was an action to enforce the specific execution of an agreement. The court below, on the trial, dismissed the action on the ground that the agreement was in contravention of public policy and void, and this court affirmed its action. The agreement was to withdraw certain depositions taken before the United States land commission to settle private land claims in this state, taken to defeat a claim as fraudulent, (see 15 Cal. 398-400,) and an attorney, who the court held was in reality an attorney for the United States, was one of the parties so contracting. The court used this language:

"He [speaking of the attorney] had, as counsel for the government, been put in possession of the case of the government; had taken testimony in the name and as agent of the government. The object and the intended effect of this testimony were to defeat the claim; he could not afterwards, in consistency with the position, render any assistance to White and Stewart to maintain the claim. The obvious consequences of such a principle would be to encourage the intermeddling of attorneys in claims of this sort, and then, having got full information and knowledge of the case, proceed to dispose of that knowledge for their own profit to the other side. The true rule is that an attorney, when acting for his client, is bound to the most scrupulous faith,

—*uberrima fides*. His own interests, for wise reasons, are not allowed to be brought in collision with the interests of his client. There can be no antagonism between these parties as to the matters of this delicate agency; the attorney is simply the representative of his client,—not his rival or competitor,—acting for the principal, not for himself. Very little knowledge of human nature is required to convince us that if the law allowed the attorney to deal with the principal as he might with a stranger, these responsible trusts upon which the interests of society so much depend would be turned into means of the grossest fraud and oppression. The law has, therefore, prescribed strict rules of restraint upon the action of the attorney, and will never permit him to take advantage of his position to speculate upon the interests which are intrusted to him. Even in the case of a purchase of the subject of the suit by the attorney, the client may set it aside at his pleasure, unless the attorney show by clear and conclusive proof that no advantage was taken, that everything was explained to the client, and that the price was fair and reasonable. But no case has come to our knowledge where an attorney has been permitted after once acting as such in the prosecution of a suit, and having opportunities for knowing the facts of his client's case, to go over and render assistance to the adverse side, and enforce, in a court of equity, the contract based on such acts, or the agreement to do them." 15 Cal. 401, 402.

In *People v. Spencer*, 61 Cal. 128, the proceeding was to suspend or disbar the respondent for acting on both sides in the case of one Harris. Spencer had drawn an indictment while district attorney against Harris, and afterwards appeared in the superior court of Lassen county as counsel for Harris, and moved to set aside the indictment. The court held that he must be suspended under the statute. Section 162, Pen. Code. It said, further:

"But, independent of statute, there can be no doubt that his conduct was reprehensible. By appearing both for plaintiff and defendant, in the same action, he was guilty of 'a violation of his duty as an attorney,' for which it is our duty to remove or suspend him. Code Civil Proc. § 287."

Monnell, in his work on Practice, cites Ferguson's *Irish Practice*, (a book to which we have not had access,) and makes an extract from it (see 1 Monnell, Pr. 182, 183) as to an attorney changing sides in the same cause. Ferguson says, (1 Ferg. Ir. Pr. 37, 38:)

"Lest any temptation should exist to violate professional confidence, or to make any improper use of the information which an attorney has acquired confidentially, as well as upon principles of public policy, he will not be permitted to be concerned on one side of the proceedings, in which he was originally in a different interest, even though his former client makes no objection; and though discharged many years ago, and feeling himself free to swear that he has forgotten the nature and purport of the communications he had received from the former client, and that they were not confidential; for the court cannot investigate the *plus* or the *minus* of the confidence reposed in him without an absolute disclosure of the facts, nor can it calculate how much of these confidential communications are still in the recollection of the attorney; but the mere circumstance of a retainer sufficiently implies the fact of confidential disclosure, to whatever extent, having been made."

Monnell cites as to this extract from Ferguson, *Lessee of Flynn v. Casual Ejector*, 1 Ir. Law, (O. S.) 59; *Hutchins v. Hutchins*, 1 Hogan, 315; *Keon v. Nesbitt*, 1 Sausse & S. 365, note; *Waller v. Fowler*, Id. 369.

It should be remarked in regard to the cases cited from the English reports that they all relate to attorneys or solicitors, not to counselors or barristers. In this state a person is admitted to the bar as both attorney and counselor, as the respondent here was, and this case is to be looked at in both aspects. It should be remembered that in England an attorney can only recover his bill of costs and necessary disbursements. A barrister has no action to recover compensation for his services. The attorney cannot recover damages for a breach of contract. With us it is otherwise. Both the attorney and counselor can, with us, maintain action for a breach of his contract of employment, and recover compensation therefor in damages. So when an attorney or counselor is unjustly discharged from a case, he can, in this state, recover compensation for any damage he may sustain by reason of such discharge. Owing to this difference of right, the law may be ruled in England in accordance with the contention of respondent.

Further, the respondent cannot be regarded as an attorney and counselor discharged by his client, the city and county of San Francisco. He was elected for a particular period of time or term, and when his term of office expired he was in no sense discharged. He took the term voluntarily, and by operation of law his employment ceased when his term ended. There is no analogy between the respondent's case and that of a private person discharging his attorney or counsel from a cause while it was pending. On this point the remarks of the supreme court of Georgia in *Gaulden v. State*, 11 Ga. 50, above cited, are applicable, and we concur with what is there said on this point. But though his employment ceased, his obligation of fidelity still continued, and nothing appears to have occurred which discharged him from this obligation. Indeed, we much doubt whether the city and county had power to discharge him. Is there any law authorizing it? This question, however, does not arise here, and we do not intend to decide it.

The respondent accepted a fee in the two cases above referred to *to sit out or stand out*, and did nothing at all in such cases. He bargained for and received a fee of \$100 for so doing. He had previously received of the city a fee in such cases in the shape of his salary, which was paid him. Conceding that an attorney and counselor at law may be retained not to act or advise professionally adversely to the person so retaining him, can this be the case where he had been previously employed or retained and paid in the same cause by the adverse party? We think not. The case cited (*McQuesney v. Hiester*, 33 Pa. St. 444) does not go so far. No case has been cited; nor have we been able to find one, where a counselor at law who has been employed and received a fee from one party, has been afterwards allowed to change sides, and accept a retainer from his adversary in the same cause. See *Sharsw. Leg. Ethics*, (5th Ed.) 117,

Some remarks were made by Lord ELDON in *Cholmondeley v. Clinton* which are pertinent just here. "I recollect," he said, "many instances, both as to counsel and attorneys, in which it was extremely difficult for a man to say he should have been employed in both causes; and with regard to that, '*quod dubitas ne feceris*' is a good rule for the regulation of your own conduct; but I do not recollect an instance of a solicitor changing his situation from the defendant to the plaintiff. The case might easily be put that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case, and yet the whole title of his former client might depend on it." 19 Ves. 266, 267.

Further, he said:

"The naked question is whether a person, having been for a considerable time employed in a cause for the plaintiff, can, after discharging himself, as I must take Mr. Montrieu to have done, from the relation of attorney for the plaintiff in that cause, become attorney for the defendant. The answer to the novelty of the application is that the question must be considered open, unless in memory or tradition any instance can be shown of such a fact having actually occurred. I do not recollect, either in my own experience, or from information in the memory of any one, any such instance. The practice of the bar in my time was this: If a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance, and giving him the option. That has, I believe, been relaxed, and the course now is as it has been represented at the bar. I do not admit that he is bound to accept the new brief. My opinion is that he ought not, if he knows anything that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him." Id. 274, 275.

These opinions of Lord ELDON go very far, and lay down a very strict rule as to the duties and obligations of attorneys and counsel. It is not based merely on *sentiment*, but on the rules of duty governing the relation as fixed by law. It will be observed that the lord chancellor is speaking of counsel as well as attorneys. The lord chancellor refers in the above remarks to the course as represented at the bar. In the argument against the motion it was said:

"If a counsel, having advised upon pleadings and evidence, not being retained, the next day receives a retainer on the other side, which he is not only entitled, but as a servant of the public bound, to receive, there is no practice requiring notice to be given of that. This applies equally to the other branch of the profession." 19 Ves. 268.

In reply to this Sir SAMUEL ROMILLY, for the motion, said:

"I do not understand the rule as to counsel to be as it is represented. I concur that a counsel consulted confidentially cannot counsel on the opposite side without giving notice. Great laxity, I admit, prevails as to retainers; a difficulty, when it occurs, is usually referred to some other counsel, and the consequence is that there is no general rule." 19 Ves. 269.

The counsel further stated: "It is admitted a counsel cannot reject a retainer and accept one from the opponent." 19 Ves. 271.

And in this view, as to a solicitor, Lord ELDON concurred. In Coop. 89, he said:

"*I consider the question to be, nakedly, whether a person having been long officiating in a cause as the solicitor, and afterwards discharging himself, as I must take it that Montrieu did in this case by the dissolution of partnership, can afterwards become the attorney on the other side in the cause.*" Coop. 87.

This question he decided, and held against Montrieu. See his observations on page 89.

As we understand the case, the ruling was not on the ground that Montrieu personally knew the facts communicated by Lord CLINTON, but his partner knew them, and under such circumstances Montrieu was restrained from using it as solicitor for Earl Cholmondeley.

In this case the respondent agreed to sit out or stand out, and not argue the causes in the supreme court. He was thus to refrain from exercising the functions of counselor or barrister. He was to do this in cases where he had been employed and paid to act for a former client. He was not discharged by such former client. By the agreement he entered into he could not be employed by his former client. It was a violation of his duty of fidelity to his client as attorney and counsel to be employed and paid under such circumstances. We are of opinion that the rule laid down in *Spencer's Case* is correct, and should be enforced. It is the better rule, and one calculated to insure purity in the administration of justice, and command the confidence of the public in its administration. See 1 Monell, Pr. 182, 183.

It should be remembered that the respondent filled a public office, and the highest obligation of fidelity to the public rested on him. A proper public policy dictates that one employed by the choice of the people for a stated period, in the capacity of attorney and counsel for the state, or any portion of it, should not be allowed to say that he had received no confidential communications in his official capacity, and therefore that he was at liberty to be retained by the adversary in the same cause after his term of office had expired. It would be placing before gentlemen of the bar a temptation to neglect their duties when called to such public employment which no principle of law justifies. A just public policy forbids it. A trustee for sale is not allowed to be a purchaser at his own sale, and *e converso*, on like grounds. See *Michoud v. Girod*, 4 How. 554, 555. A great jurist, Lord LYNCHURST, has said that the rule as to a trustee dealing with his *cestui que trust* had its origin in considerations of public policy; also as to transactions between attorneys and their clients. See *Egerton v. Brownlow*, 4 H. L. 160, 161. These considerations of public policy apply here. See remarks of court in the case above cited from 11 Ga.

Let it be observed that the respondent knew that the cases above named were pending and undecided. Whittemore had spoken to him
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in regard to them before the expiry of his official term. It is immaterial that he did not know all the evidence in the causes. He might have ascertained all the facts by inquiry. That he failed to inquire as to the facts can make no difference. The record was open to him. His abstention from knowledge of the facts, then, is immaterial. In a case where a counselor at law has argued a cause for his client in an appellate court, and where he has obtained his knowledge of the facts from the record alone, would it be permitted that in case of reversal of the judgment that he should change sides and conduct the cause in the court below for the adversary of his former client? Or where the same cause comes again to the court of appeal, that he could appear for the party opposed to that one for whom he had formerly appeared and spoken? Certainly he could not be permitted so to act. What confidence would be reposed in the administration of the law if such conduct would be allowed? With what safety could a client act in retaining an attorney and counsel? Mr. Weeks, in his book on Attorneys at Law, says an attorney may be stricken from the rolls for acting in an action or suit on both sides. Weeks, Attys. at Law, § 81, p. 152, citing *Mason's Case*, 1 Freem. 74, and *Berry v. Jenkins*, 3 Bing. 423.

The measure of punishment is a difficult question. But it should be remembered that at the time Mr. Cowdery accepted this employment, *Spencer's Case* had been decided, on September 21, 1882, by this court; and it should also be remembered that at the time Cowdery was employed by Whittemore he said to the latter, as quoted above: "I can do nothing against the city in this case, and I do not want, for appearance sake, to be consulted in them;" thus showing that the respondent had doubts as to the propriety of his conduct.

On a consideration of the whole case, we are of opinion that the respondent should be suspended from acting as attorney and counselor at law in any matter for the period of six months from the entry of the order herein.

The following order will be entered: In this cause, after hearing the evidence and considering the same, together with the pleadings herein, it is ordered that the respondent, J. F. Cowdery, be suspended from acting as attorney and counselor at law in any court in this state for the period of six months from this date.

We concur: MCKINSTRY, J.; McKEE, J.; ROSS, J.

Justice SHARPSTEIN, was not present at the hearing.

MYRICK, J., (*dissenting*.) Mr. Cowdery, after the expiration of his term of office, owed duties to the city and county as follows: To impart to his successor, on request, whatever information he possessed in regard to the cases, and not to impart to opposing counsel information detrimental to the interests of the city. He did not vio-

late his duty in either of these respects. There is no evidence that he declined to give to his successor in office any information, or that the city and county desired his services. He accepted a retainer not to appear in the cases as attorney for the city and county. He was not in duty bound to accept a retainer from the city and county. However, it was unwise for him to accept the retainer from the opposing counsel, for two reasons: (1) By so doing he subjected himself to a kind of criticism which no attorney should willingly subject himself to; (2) he received a fee with the understanding that he was to render no services therefor. If immediately upon his attention being called to the doubtful propriety of his acceptance of the money he had at once returned it, he would have saved himself and the bar association much unpleasant feeling. In regard to criminal prosecutions, the legislature has by law forbidden an attorney who has prosecuted an action from taking any part in the defense, and has declared that by such act he should forfeit his license to practice law. The wisdom of applying the same rule to civil cases may be for the consideration of the legislature, as may also be the question whether attorneys should accept retainers without expectation of being actively employed.

In view of the whole case, as no harm occurred to the city and county, and none was attempted, I think suspension or revocation of the license a severity not called for.

Mr. Whittemore's position is, in substance, as follows: After the expiration of Mr. Cowdery's term of office he asked the latter if he was free to accept a retainer not to appear in the cases against him, (Whittemore,) and was informed that he was, and thereupon the fee was paid. I think whatever responsibility there was in the transaction, and the decision as to its propriety, was with Mr. Cowdery. Mr. Whittemore did not ask Mr. Cowdery to violate any duty he owed to the city and county, nor to give any information detrimental to its side of the cases.

NOTE.

In the case of *In re Gates*, (Pa.) 2 Atl. Rep. 215, where an attorney at law was suspended from practice on petition of the bar association of the county in which he practiced, on proof of having abstracted from the files in the office of the prothonotary a receipt attached to a *feri facias*, the act of the attorney was held to be such unprofessional conduct as justified the action of the court.

For a full discussion of the question of disbarment of attorneys for unprofessional conduct, see *In re Houghton*, (Cal.) 8 Pac. Rep. 52, and note, 57-59.

69 Cal. 67

In re WHITTEMORE. (No. 11,254.)

Filed February 27, 1886.

ATTORNEYS AT LAW—DISBARMENT FOR UNPROFESSIONAL CONDUCT.

Where the relation of an attorney with a certain party has been that of attorney and client in a suit, and during such relation he has acquired knowledge of a certain point which is favorable to his client and fatal to the case of the other party, and, his relation having ceased, another attorney offers him a fee as a retainer in the suit on the side opposed to that of his former client, for the rendition of no services other than that he shall not disclose said point, the latter, acting with a knowledge of all the facts, is guilty of unprofessional conduct, and a violation of his duty as an attorney and counselor at law, and may be suspended.

In bank. Proceedings for disbarment of an attorney and counselor at law.

William Matthews, E. R. Taylor, and H. J. Tilden, for the prosecution.

THORNTON, J. In this case the facts are the same as in *In re Cowdery*, ante, 47, except that Whittemore was the employer, and in the other case just mentioned Cowdery was the employe.

Whittemore, an attorney and counselor of this court, employed Cowdery with a knowledge of the relations which Cowdery bore to the cases of *Bonnet* and *Parker v. City and County of San Francisco*. He was, when he retained Cowdery, fully aware of the public capacity in which Cowdery had charge of the causes above named, and that Cowdery when he accepted a retainer from him was changing sides in the litigation. In employing Cowdery he violated his duties as an attorney and counselor at law. Ordinarily, when an attorney calls on another attorney and asks him if there is anything in the way of his being employed in a cause, and he replies that there is nothing in the way of his accepting such employment, we should hold that there would be no impropriety in his employing him. But it is different here. Whittemore knew Cowdery's relation to the causes as above stated, and we are of opinion that it was a violation of his duties to the court in so doing.

In this cause the following order will be entered: This cause having been heard on the pleadings and proofs, and considered by the court, and the court having come to the conclusion that Whittemore has violated his duty as an attorney and counselor of this court in employing J. F. Cowdery as attorney and counsel, it is hereby ordered that said D. H. Whittemore be, and is hereby, suspended for the period of six months from this date from appearing or acting as attorney or counselor at law in all the courts of this state.

We concur: ROSS, J.; MCKEE, J.; MCKINSTRY, J.

Mr. Justice SHARPSTEIN was not present at the hearing.

(69 Cal. 1)

In re BUCKLEY. (No. 20,131.)

Filed February 27, 1886

1. CONTEMPT—CLAIMING TO HAVE IMPROPER INFLUENCE WITH COURT.

Claiming to have influence with a court, and to be able through such influence to be able to obtain a decision favorable to a particular party, is a contempt of court.

2. SAME—CRIMINAL PROCEEDING—ESTABLISHMENT OF GUILT.

Contempt is a criminal, or *quasi* criminal, proceeding, and therefore the evidence of guilt of the respondent must be established beyond a reasonable doubt, by clear and satisfactory evidence, and the mere preponderance of proof is not sufficient to establish the guilt of the accused.

3. SAME—TRIAL OF PARTY CHARGED.

In case of a contempt not committed in the presence of the court, a trial must be had on pleadings and evidence.

4. SAME—ACCOMPLICE, CONVICTION ON EVIDENCE OF.

A conviction cannot be had in a criminal case on the testimony of an accomplice alone, under section 1111 of the California Penal Code, and this rule is applicable to contempt cases.

ROSS, MCKINSTRY, and MCKEE, JJ., dissent.

In bank. Proceeding against respondent for alleged contempt of court.

The Attorney General, for the prosecution.

Preston & McPike and D. H. Regensburger, for the defense.

THORNTON, J. This is a proceeding taken against the respondent, Buckley, for an alleged contempt of this court. The contempt charged relates to the cases of *Bonnet v. City and County of San Francisco*, 3 Pac. Rep. 815, and *Parker v. Same Defendant*, 3 Pac. Rep. 816, which were pending in this court on appeal before, on, and after the tenth day of May, 1884. In each of these causes judgment of affirmance was rendered by this court on the day last named. These judgments of affirmance were in favor of Bonnet and Parker. The contempt charged is that on the said day the defendant, well knowing that these causes had been decided by this court in favor of the parties above mentioned, affirming judgments in their favor given in the court below, for and in consideration of the sum of \$500, which Bonnet agreed to pay him, agreed and undertook with Bonnet that he (Buckley) would procure to be given and made by this court a judgment in favor of Bonnet and Parker, respectively, in the cases above stated; that Bonnet was at the same time assured by Buckley, and was made to believe, that he (Buckley) possessed such influence with this court, and the members thereof, that he could procure through his influence said judgments in said actions to be given and made respectively in favor of said Bonnet and Parker.

Buckley, in obedience to an order to show cause, appeared herein, and in a verified answer denied the charge in every particular.

That the conduct with which respondent is here charged is a con-

tempt of this court we have no doubt. This is a proposition of law to us so plain that we think it unnecessary to discuss it further.

The material question to be considered relates to the guilt of respondent. The guilt of respondent must be established as a fact by clear and satisfactory evidence. If not so established, this court has no right to punish him. It should be remembered that the proceeding here taken is criminal or *quasi* criminal. It was so held by this court in *Ex parte Crittenden*, 62 Cal. 534, following *New Orleans v. Steam-ship Co.*, 20 Wall. 392, where it is said: "Contempt of court is a specific criminal offense." See, also, *Hummel's Case*, 9 Watts, 421; *Cartwright's Case*, 114 Mass. 230; *Durant v. Supervisors*, 1 Woolw. 377; Com. Dig. "Attachment," 4; 4 Bl. Comm. 288.

The punishment for a contempt may be fine or imprisonment, or both,—a punishment appropriate to criminal offenses. See Code Civ. Proc. §§ 1218, 1219. Under such circumstances the guilt of the party charged should be proved and established by clear and satisfactory evidence. A mere preponderance of evidence would not be sufficient to warrant the infliction of so serious a punishment. We know of no rule of law in this state authorizing any court to fine and imprison a person on a mere preponderance of evidence as to his guilt. The guilt must be established by clear and satisfactory proof, and generally, if not always, in criminal actions, beyond a reasonable doubt. It would be against all correct rules of law and principles of justice to permit guilt, under such circumstances, on a conviction of which punishment so serious and severe may follow, to be established by less than clear and satisfactory proofs.

In the matter of the application to disbar R. E. Houghton, an attorney of this court, (8 Pac. Rep. 52,) it was said:

"A judgment against the respondent will deprive him of personal and property rights. Unless we are clearly satisfied of respondent's guilt, we ought not to remove or suspend him from the practice of his profession. As we are not so satisfied, we decline to strike his name from the roll."

These remarks apply to this case. Such, in our judgment, is the legal result deducible from our statute relating to contempts, (Code Civil Proc. §§ 1209, 1210, *et seq.*) by which an issue is required to be made up and tried as to the guilt of the accused, (Code Civil Proc. §§ 1217-1219.

It may be remarked that this was not so at common law. In such proceedings in courts of law not committed *in facie curiæ*, if a party charged with contempt cleared himself by his oath denying his guilt, he was by a court of law discharged. If, however, in making such oath he was perjured, he might be prosecuted for perjury. Such is the statement of Blackstone as to proceedings upon such contempt in courts of law, (see Bl. Comm. 287,) and this is confirmed by the authorities. But in this state the subject is regulated by statute, as stated above; and of contempts not in face of the court an issue is made up by answer, and witnesses are called and examined as in

other causes. In other words, a trial is had as in other cases. In this case, the contempt charged not having been committed in the face of the court, a trial was had on the pleadings and evidence.

The evidence in regard to the transaction in which the contempt is said to have been committed is found in the testimony of B. Bonnet, J. W. Taylor, and the respondent. Bonnet was the plaintiff in the above-named case of *Bonnet v. City and County of San Francisco*. Bonnet testified that:

"On the tenth of May, 1884, he and Joseph W. Taylor met Buckley at his saloon, in the city of San Francisco, about 8 o'clock in the evening. Buckley invited them inside his private place, and then the respondent said to him: 'You got a case in the supreme court?' I told him 'yes.' Taylor told him, before they got to Buckley's saloon: 'Buckley could get a judgment for you right away;' and when we got there, Buckley, in his private room, said: 'I can get judgment for or against you in this case;' and Taylor said: 'I suppose the judges will be down here to-night or to-morrow;' to which Buckley said: 'Oh, yes; there is two already here.' Taylor asked him, [Bonnet:] 'Well, suppose we make a note for \$500.' He asked him if \$500 was satisfactory to him, or something of that kind, and said: 'Suppose we make a note for \$500, and give it to him.' I says: 'I won't pay no \$500. I won't pay it. My brother won't authorize me to do so.' 'Well,' he [Taylor] says: 'I will pay half of it.' 'Well,' I says, 'all right; if you pay half of it we will pay it;' and then Taylor drew a note himself, and gave it to me to sign. I signed the note. I told him, says I: 'Ain't you going to sign?' He says: 'No; I don't want my name to appear, but it is understood I pay half of it;' and I said: 'Mr. Buckley, is that correct? You won't make my brother responsible for more than \$250?' 'Yes,' he says, 'and Taylor will pay over the other half.' 'Well,' he [Buckley] says: 'I can have this judgment rendered immediately, and dated to-day, to-morrow, or Monday, or any time you want it.' I says: 'It is not particular about the date. I don't care about that.' So we met and parted that way, I think. Taylor gave the note to Buckley in his presence, and it was left with him."

The witness, at request of the prosecuting counsel, explained the reference to his brother. The money, he said, belonged to his brother, Eli Bonnet. It appeared that the claims belonged to Eli Bonnet, who had assigned them over to him, which he had assigned to Taylor. The claims in both the *Cases of Bonnet* and *Parker* had been assigned to Taylor some time before as security for money advanced, and the witness was acting for his brother, who was sick. When a settlement was had with Taylor he was present, and \$250 was retained out of the money in payment for that note. When this settlement was had, Taylor, D. H. Whittemore, M. J. Kelly, Eli Bonnet, and himself were present. Buckley was not there,—in fact had gone east. The money was not paid to Kelly, who had the note, but Taylor kept it, and said that he would see that the note was paid. At the time the note for \$500 was given to Buckley, B. Bonnet stated that he did not know that judgment had been rendered in the supreme court; that he did not know of it until the following Monday, the twelfth of May, when he saw it in a newspaper. He then told Taylor not to pay the note; that it was obtained on "*false pretensions*." This is, in sub-

stance, the testimony of Bonnet which has any bearing on the matter of the contract.

Buckley was called, and testified as to the interview with Taylor and Bonnet on the evening of the tenth of May. He said:

"My recollection of the affair is that Mr. Taylor called upon me at my place of business that evening, in May, with a gentleman he said was Mr. Bonnet, and asked me if he could see me privately for a few moments. I went with him into a room in my saloon. Mr. Taylor introduced me to Mr. Bonnet, and said he was very anxious to see me in relation to the matter of these claims that was coming up before the board of supervisors,—was very anxious that I should interest myself for him in trying to have these matters brought before the board. Some conversation in relation to the matter took place. *Question.* State what it was as near as you can recollect it. *Answer.* As near as my recollection serves me it was this: Mr. Taylor told me that in matters of this kind, that before obtaining their money they had to go before the board of supervisors; and recited some cases, and, among others, the name of Phelan, that was adjudicated by the court, and went to the board of supervisors, and there remained some four or five years, going from one board to the other; and the object of my assistance was to have this matter brought up and acted upon by the board of supervisors, and he asked me if I would not interest myself. I told him I did not know what I could do. I had known Mr. Taylor for a long time, and was willing to do anything I could for him. So Mr. Taylor and this other gentleman had a conversation between themselves, and they afterwards returned to me, and said: 'We do not want your services for nothing. We are willing to agree to pay you for it if you will assist us to have this matter brought up. We will pay you \$500, and to secure your payment of it will give you a note,' which they did, and I agreed to assist them, and do what I could in the matter. That is about the conversation, as I recollect it."

Buckley further testified that the name of the supreme court was never mentioned during the conversation; that nothing was said of the members of the supreme court, and their names were never mentioned; nothing was said of his influence with the supreme court, or of his ability to procure decisions; that he never at any time or place had a conversation with Bonnet, or any one else, in relation to the supreme court, or any member of it, or regarding his influence with the supreme court; that he had never stated to any person that he had any influence with the supreme court, or that he could procure decisions; that he had stated to the best of his recollection the whole of the conversation that took place at the time referred to; that Bonnet's statement of the conversation was false from beginning to end, and that no such conversation as that detailed by Bonnet ever took place with him, or in his presence.

It appeared in evidence that a dispatch had been sent from Sacramento on the morning of the tenth of May, 1884, signed by J. W. McCarthy, then clerk of the supreme court, addressed to Buckley, Bush street, San Francisco, in these words: "*Parker and Bonnet v. San Francisco*,—judgment affirmed;" that this dispatch was received in San Francisco at 10:43 A. M., and delivered at Buckley's place of business to one Thomas F. Doran, who was an employe of Buckley,

at 323 Bush street, at 10:48 A. M. Buckley testified that he never received this dispatch, and had no recollection of ever hearing it read until it was read in his presence this morning. His secretary testified to the like effect. Doran was not called. Taylor is called, and gives his version of what took place at Buckley's saloon on the evening of the tenth of May; and testified:

"I know no more or less than that Mr. Bonnet wanted me to go and see Mr. Buckley. He wanted me to take him up there. He did not know him, and wanted to see him,—to help us through the board,—and I took him up there. * * * I told him I would, and went up there, and met Mr. Buckley, and told him Mr. Bonnet wanted to see him about helping him get some judgments through the board of supervisors. He said that he did not know if he could do much of anything to get the bills through."

The witness referred in this to the payment of the judgments. The witness further stated:

"I told him, I said: 'Mr. Bonnet thinks you can help us, and he would like to have you help us if you can.' He said: 'Taylor, I do not know that I can;' and I said: 'Mr. Bonnet does not want you to do this for nothing, and if you will help us he will give you something; and he said: 'I do not know that I can do anything; and Bonnet said: 'He can, if he likes, help us.' He says: 'If he wants, he can do it.' Bonnet says to me: 'Look here, you had better give something;' and I said: 'What do you want to give him? I am satisfied to let things go as they are,'—I was drawing sixty dollars a month interest; and he said: 'Well, we had better offer him \$500;' and I said: 'All right; if you want to help us through the board, Mr. Bonnet is willing to give you a note for \$500, and whenever the money is paid from the treasury the bill is paid;' and he said: 'I do not know. I will try and do what I can, but I do not know whether I can help you any, Taylor.' Then I drew up the note, and put the name of Bonnet in. I made a common note on a printed form. I drew the note up there. I did not know, and had not heard at that time, that the cases of Bonnet and Parker against the city had been decided. Nothing was said in the conversation of the supreme court or the judges of the court; nor did Buckley speak of his influence with that court. The name of a supreme court judge was never mentioned in the conversation. Never at any time had any conversation with Buckley touching his influence with the supreme court. He never agreed to pay half of the note for \$250."

There was testimony showing that Taylor admitted before the committee of the bar association that when the conversation took place on the evening of the tenth of May, 1884, he knew that the supreme court had decided the *Bonnet and Parker Cases*.

It will thus be seen that Buckley and Taylor contradict Bonnet's testimony as to the conversation of the tenth of May. Buckley and Taylor both state that the supreme court was not mentioned, nor was the name of any of its members mentioned or referred to, nor anything said by Buckley in regard to it.

It is urged that the guilt of the respondent is established by circumstances which appear in evidence. It appears from the testimony that Buckley took some steps to procure the advancement of the *Cases of Bonnet and Parker* by this court. The testimony in relation to this matter is substantially as follows: Not long before the order advancing the cases was made by this court, Buckley states

that Taylor called on him at his place of business, and said that he had an assignment of cases or judgments, and wanted him to procure some information for him from the city and county attorney's office in relation to the trial of this case, (*Bonnet v. City*;) and also to see if he would go among his friends here, attorneys, and see if we could get a place on the calendar,—get them a substitute for the case that they might have on that calendar. For this service he received \$500 from Taylor at the time; that at the time he received the money he did not know that it was the money of B. Bonnet. He ascertained afterwards that the cases were advanced without his aid; and that he has never offered to return the \$500 received by him. He went around among the attorneys and found a place for the cases on the calendar, which they did not use. The case for which they were substituted was an entirely different one. He never represented to Taylor that he had any influence with the supreme court by which he would have the causes advanced. Taylor informed him that the city attorney would not try the cases if they were advanced, and he wished to find out if he would try the cases if they were advanced. He never intimated to Taylor or any one else that he had even an acquaintance with the supreme court, or had any influence over it, in any way, shape, or form. Buckley stated further that he went to the office of the city and county attorney, saw Mr. Craig, who was then such attorney, and told him that he was not an attorney. Told him of the cases, and asked him if there was any objection, and he said, "No." Said he would try the cases, and he gave his information to Mr. Taylor. In this transaction the supreme court was not talked about or discussed, nor were its members. It should be stated here that the cases referred to were advanced on motion of counsel, in accordance with the usual practice of this court,—a practice which had obtained for several years.

Another circumstance is the receiving of the dispatch, which has been mentioned above. It is only necessary to say further in regard to it that this dispatch was sent to Buckley by a deputy in the clerk's office, in accordance with a custom which had for some time existed in that office. It was sent by Deputy Williams in consequence of a request put on a notice board kept in the clerk's office. This request was put on that board by Myers, another deputy in the clerk's office, who was a friend of Buckley's, on a supposition that Buckley had some interest, or felt some interest, in the cases. The dispatch was not sent until the opinions of the court in the cases referred to had been filed in the office of the clerk.

With regard to the first circumstance relating to the advancing of the causes, we cannot perceive how this tends in any way to prove that Buckley is guilty of the contempt charged. It has no relevancy in that regard. Take the evidence of Buckley's connection with the advance of the cases: It appears that that transaction had been entirely concluded before the contempt is charged to have been com-

mitted, and we must say that what the evidence shows Buckley did in regard to such advancement was nothing more than any citizen might have done without impropriety. He did not pretend to act in the matter as an attorney. He went to the office of the city and county attorney and procured some information, and found a case in place of which the cases could be substituted. Really, as it turned out, the cases were advanced on motion of an attorney of this court who appeared in the cases, in place of a case other than that which was found by Buckley. The above is all Buckley did, and in that we see nothing wrong. In this remark we express no opinion as to his receiving \$500 for his services in regard to advancing the cases. If the parties chose to pay him that sum for his services they had a right to do so. In regard to the whole matter of advancing the causes there is no evidence that Buckley ever pretended or gave out that he had any influence with this court, or that he was using such pretended influence in any way.

With regard to the other circumstance, it is said that Buckley testified falsely when he stated that he never received the dispatch sent from Sacramento on the tenth of May. Concede that this is so—that he did swear falsely in this regard—his receipt and knowledge of it would tend to show that his statement in regard to his employment to use his influence with the board of supervisors was true.

It may be asked that if he did not receive this dispatch, and neither he nor Taylor nor Bonnett knew that the cases were decided, why should they make any agreement with regard to the board of supervisors? Why make any such agreement in advance of the decision by this court of the *Bonnet and Parker Causes*? It does appear improbable that any such agreement should be made in advance of the action of this court, but on an improbability of this character this court cannot base a judgment of guilt; nor would it be justified in rendering any such judgment on such improbability, taken in connection with all the other testimony in the case. In our view, the probability is that he received the dispatch and knew of the judgment of this court at the time of the interview of the tenth of May, and, in this view, the improbability urged vanishes.

From a review of the whole evidence we are of opinion that the guilt of the respondent is not made out. The evidence in favor of innocence, in our judgment, predominates. Bonnet's testimony alone tends to prove guilt, and that is contradicted by respondent and Taylor. We are further of opinion that Bonnet is impeached by the testimony of F. A. Hornblower, J. H. Knight, and John Lewis, who testify that they know Bonnet's general reputation for truth and honesty and integrity, and that it is bad.

It should be also observed here that Bonnet is an accomplice with Buckley and Taylor on his own admission. In relation to the testimony of an accomplice, it is provided by the Penal Code, § 1111, that "a conviction cannot be had on the testimony of an accomplice unless

he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." There is no evidence which in itself, without the aid of the testimony of Bonnet, tends to connect Buckley with the commission of the offense charged. In fact Bonnet's testimony is the only evidence of the commission of the offense. The foregoing rule as to accomplices should have its due weight in passing on this cause.

We are of opinion that the guilt of Buckley is not shown, and that the order to show cause should be discharged and the proceedings dismissed. So ordered.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

MYRICK, J., (*concurring*.) 1. As to the law: I have no doubt of the proposition that if a person pretend or give out that he can, by improper means, influence the decisions of this court he is guilty of a contempt, and may be punished. The power to adjudge and punish for a contempt in such case is inherent in the court, and has not been circumscribed by the constitution. It is not necessary to look to the statute to see if such an act has been declared to be a contempt or the punishment therefor has been defined. The judicial department, in this regard, adjudges for itself, being responsible, as in other cases, for the abuse of the power. To illustrate as to the inherent power of the court: Suppose the statutes were silent as to what acts constitute a contempt, and as to the punishment; suppose a person should, in open court, by violent conduct, disturb and interrupt the proceedings: could it be maintained that the court was powerless except to turn the person over to the police? I think not. This inherent power should, however, like all power, be prudently but firmly exercised when necessary. It has been well said by a great writer that "a judge who listens to private solicitations is a disgrace to his post." "If it should prevail, it perverts justice; but if the judge be so just and of such courage, as he ought to be, as not to be inclined thereby, yet it always leaves a taint of suspicion behind it." A person who gives out that he can, by private solicitations or personal influence, procure decisions by a judge, does all he can to bring the office into contempt. The vulgar fellow who misbehaves in open court and interrupts its proceedings commits an offense trifling in character as compared with him who holds himself out as capable of bringing the very office itself into disgrace and of making the administration of justice a mockery. The very existence of a court, *as a court*, needs not only the quiet order of decorum, but it needs the confidence of the community in the impartiality of its decisions.

2. As to the facts: The decisions in the *Bonnet* and *Parker* Cases in this court were filed in the clerk's office at Sacramento about 10

o'clock A. M. of May 10, 1884. On the trial in this proceeding Bonnet testified that during the afternoon of that day Taylor sought him, and said Buckley wished to see him; that in the evening they went to Buckley's place of business, and there Bonnet executed to Buckley his promissory note for \$500, the consideration for which was Buckley's professed influence with this court to obtain decisions in the cases in Bonnet's favor, and on such day as he pleased. The chief circumstance in corroboration of Bonnet's testimony is that a deputy clerk of this court, immediately upon the decisions being filed, sent to Buckley a telegram stating the fact; and this telegram was, in due course, received by Buckley's bar-keeper at 10:48 A. M. On the other hand, Buckley and Taylor testified that at no time was this court, or any member thereof, mentioned; that they expected favorable decisions by reason of a former decision involving the same principle; that the note was given for services to be rendered in urging action on the part of the board of supervisors looking to speedy payment in case of favorable decisions in this court. Taylor and another witness testified that it was Bonnet who sought Taylor for the purpose of being introduced to Buckley, instead of Taylor seeking Bonnet. The deputy clerk swore that the telegram was sent without any request from Buckley, and because he supposed Buckley had some interest in the cases, as he had heard him, some time before, making inquiries about them; and Buckley and his secretary swore that the telegram did not reach them. Buckley, not having the use of visual organs, could know of the telegram only by its being stated or read to him, which, they say, was not done.

It will thus be seen that the testimony as to the substantial point, viz., whether Buckley assumed or gave out that he could influence the action of this court, is in direct conflict, Bonnet swearing upon one side, Buckley and Taylor on the other. It is possible that the explanation given by the deputy-clerk as to the sending of the telegram is correct. If so, it fitted in so closely between the filing of the decisions and the making of the note as to give rise to stringent criticism.

I heard all the testimony in open court, and since the hearing I have twice read it carefully through, and the result is that I have grave doubt as to which side is correct. Bonnett admitted to have said that Buckley had done no wrong, and that there never would have been any trouble about the matter except for a subsequent disagreement between himself and Taylor regarding \$650 of the money received on the judgments. How far was Bonnet's testimony influenced by his annoyance in being, as he supposed, overreached in the settlement? How far was Buckley's and Taylor's testimony influenced by a desire to be relieved from a grave charge? I am unable to arrive at a satisfactory conclusion. I cannot say that I have an abiding conviction, beyond reasonable doubt. I am therefore of opinion that the charges are not proven.

ROSS, J. I dissent. The gist of the charge against the respondent, Buckley, is that in the evening of the tenth day of May, 1884, he undertook, for a money consideration, to be paid to him by one Bonnet, to procure the judgment of this court favorable to the plaintiffs in two certain actions entitled, respectively, *Bonnet v. City and County of San Francisco* and *Parker v. City and County of San Francisco*, at the time representing that he possessed such influence with the justices of the court as would enable him to procure such judgments as he desired. As a matter of fact, the cases referred to were decided at the city of Sacramento, shortly after 10 o'clock A. M. of the tenth day of May, 1884; but of that fact Bonnet was ignorant, and the respondent, Buckley, claims to have been ignorant until some time after the expiration of the day mentioned. In his answer respondent explicitly denies that he ever, at any time or under any circumstances, undertook to procure any decision in the cases referred to, or in any other case or cases, or that he ever represented that he had, or pretended to have, any influence with this court, or with any justice thereof; but that the consideration, and the sole consideration, for the money Bonnet agreed to pay him was certain services that he (respondent) agreed to render Bonnet in expediting the disposition of his claims by the board of supervisors of the city and county of San Francisco.

While strenuously contesting the truth of the charge against him, respondent claims that, even if it should be found to be true, it does not constitute a contempt of court, for which offense the present proceeding is prosecuted. It is contended that the legislature has defined contempts, and the punishment thereof, and that the charge in question does not come within the statute, the provisions of which, it is claimed, are exclusive. I am inclined to think that the charge in question is embraced by the ninth subdivision of section 1209 of the Code of Civil Procedure; but, assuming that it is not, I am of the opinion that this court has the inherent power to punish for contempts. It is true that the power to punish for contempts may be limited and defined by the authority creating the court, (*Ex parte Robinson*, 19 Wall. 510;) but can the power of a court created by the constitution to punish for contempts be limited and controlled by an act of the legislature? I think not. While every court should be very careful not to assume to itself powers it does not possess, it is no less its bounden duty to exercise its powers in all proper cases. The supreme court of this state was created by the constitution and exists by virtue of its provisions. It not only has the right of existence by virtue of the constitution, but it is thereby charged with the performance of important functions. Its jurisdiction cannot be diminished by legislative enactment. Every power necessary to the due and proper performance of the duties with which it is charged is impliedly conferred by the organic act creating it. "Certain implied powers," said the supreme court of the United States in *U. S. v. Hudson*, 7 Cranch. 34, "must necessarily result to our courts of justice,

from the nature of their institutions. * * * To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts, no doubt, possess powers not immediately derived from statute."

In the case of *State v. Morrill*, 16 Ark. 384, where it was contended, as it is here, that the court was controlled by the statute, and could not go beyond its provisions, the supreme court, in holding against the proposition, asked these pertinent questions:

"Had the legislature never passed the act above quoted, or any act at all, on the subject, could it be doubted that this court could possess the constitutional power to preserve order and decorum, enforce obedience to its process, and maintain respect for its judgments, orders, and decrees, and, as a necessary consequence, punish for contempts against its authority and dignity, without which it could never accomplish the useful purposes for which it was established by the framers of the constitution? If the general assembly were to repeal the act, would any lawyer seriously contend that the courts were thereby deprived of the power to punish contempts? One of the counsel of the defendant frankly admitted that they would not, and the admission concedes the position to be true that the power of this court to punish contempts is inherent, springing into life along with, and as an incident to, those great judicial powers carved out for its exercise by the constitution."

My conclusion on this branch of the case is that as this court has the constitutional right of existence it has the constitutional right of self-protection, which cannot be taken away or abridged by legislative enactment.

The next inquiry to be made is whether the act charged against the respondent, if true, constitutes a contempt of court. This question cannot admit of any sort of doubt. No stream can be pure whose source is tainted. There can, therefore, be no greater or fouler blow at the administration of justice than for one to falsely and fraudulently pretend and undertake, for a money consideration, and by means of a pretended influence with the judge, to procure a particular decision. Such a practice, if allowed to prevail, would destroy all confidence in courts and sap the very foundation upon which society rests. It would, therefore, be a most fatal and dangerous interference with the administration of justice, and in every instance where it is shown should be visited with severe and summary punishment, not, as said by an English judge, for the sake of the judges as private individuals, but because they are channels through which justice is conveyed to the people.

It remains to consider whether the evidence establishes the fact charged, that respondent did undertake, for a money consideration to be paid him by Bonnet, to procure the judgment of this court favorable to the plaintiffs in the suits mentioned, at the time representing that he possessed such influence with the justices of the court as would enable him to procure such judgments as he desired. In respect to this question the testimony is very conflicting, but there are

certain facts about which there can be no doubt. One is that the cases referred to were decided by this court, in Sacramento, in favor of the respective plaintiffs therein, shortly after 10 o'clock A. M. of the tenth day of May, 1884. Another is that within a few minutes after the opinions in the cases were filed with the clerk a telegram was sent by a deputy clerk, in the name of his principal, to the respondent, Buckley, advising him of the decisions, and delivered to an employe of respondent at his place of business on Bush street, in the city of San Francisco, before 11 o'clock A. M. of the same day. Another is that about 8 o'clock in the evening of the same day Buckley, Bonnet, and one Taylor met in the private room of Buckley, at his place of business, and there Bonnet promised to pay Buckley a certain sum of money for *some* purpose, and as an evidence of his promise executed to Buckley his promissory note for \$500. The consideration for the note is the subject-matter of the present inquiry, and in respect to that the testimony of Bonnet on the one side, and of Buckley and Taylor on the other, is in direct conflict. According to his own testimony, Bonnet was a party to the offense, and therefore, apart from the further facts that the testimony tends to show that his character for truth, honesty, and integrity is bad, and that a part of his testimony in the case is contradicted by that of other and third parties, we ought not to find against Buckley unless there are other facts and circumstances in the case that satisfy us of the truth of Bonnet's statement of the transaction. Buckley's version of it is here given in his own language:

"My recollection of the affair is that Mr. Taylor called upon me at my place of business that evening, in May, with a gentleman he said was Mr. Bonnet, and asked if he could see me privately for a few moments. I went with him into a room in my saloon. Mr. Taylor introduced me to Mr. Bonnet, and said that he was very anxious to see me in relation to the matter of these claims that were coming up before the board of supervisors,—was very anxious that I should interest myself for him in trying to have these matters brought before the board. Some conversation in relation to the matter took place."

Being asked to state what it was as near as he could recollect, the witness replied:

"As near as my recollection serves me it was this: Mr. Taylor told me that in matters of this kind that before obtaining their money they had to go before the board of supervisors; and recited some cases, and, among others, the name of Phelan, that was adjudicated by the court, and went to the board of supervisors, and there remained some four or five years, going over from one board to the other; and the object of my assistance was to have this matter brought up and acted upon by that board of supervisors, and he asked me if I would not interest myself. I told them I did not know what I could do. I had known Mr. Taylor for a long time, and was willing to do anything I could for him. So Mr. Taylor and this other gentleman had a conversation between themselves, and they afterwards returned to me and said: 'We do not want your services for nothing. We are willing to pay you for it if you will assist us to have this matter brought up. We will pay you \$500, and to secure you payment of it will give you a note;' which they did, and I agreed

to assist them and do what I could in the matter. That is about the conversation, as I recollect it."

Now, in considering this testimony, it must be borne in mind that Taylor denied, on this hearing, that he knew, and Buckley testified that he had no recollection of knowing, at the time of making the agreement, that the cases had, in fact, been decided by the court, although it was shown that Taylor had previously stated before a committee of the bar association that he was, at the time, aware of the fact. There is no pretense that Bonnet knew of the decisions at the time of the arrangement in the room of Buckley's saloon in the evening of the tenth of May, or that Buckley or Taylor informed him of them. If none of these parties knew that the cases had been decided, the inquiry naturally arises: Why should they, at that time, be arranging for a prosecution of the claims before the board of supervisors? Until the plaintiff's judgments should be affirmed by the court there was nothing to be presented to the board. An affirmance of the judgments by this court was a condition precedent, without which there was nothing for the board to act on. From the stand-point of ignorance of the fact that the cases had been decided by the court there was therefore no occasion whatever for any arrangement for the prosecution of the claims before the board of supervisors. But for another reason I cannot accept as true the statement that Buckley and Taylor had no notice of the decisions in the *Cases of Bonnet and Parker* at the time of the arrangement with Bonnet, in the evening of the tenth day of May.

As has been said, it was shown on the hearing of this matter that Taylor admitted before the committee of the bar association that he had such knowledge, but he attempted to explain away that fact in his testimony here by saying that he did not understand the questions asked him on those proceedings. An examination of the reporter's notes, however, shows that he could not have misunderstood the questions in that behalf, for they were perfectly simple and direct, and were several times repeated and answered. Nor is ignorance on Buckley's part of the fact that the cases referred to had been decided by this court at the time of the arrangement in question consistent with Taylor's knowledge, or the still more pregnant fact that a telegram from the clerk's office of this court, advising him of the decisions, was delivered to one of his employes, at his place of business, prior to 11 o'clock A. M. of the tenth day of May. Apart from the presumption that a telegram so delivered reached him, all of the circumstances of the case point to the fact that it did. I must therefore find that both Taylor and Buckley knew of the decisions of this court in the *Cases of Bonnet and Parker* at the time of the interview between Taylor, Bonnet, and Buckley, about 8 o'clock in the evening of the tenth day of May. Knowledge of that fact on the part of Taylor and Buckley, and ignorance of it on the part of Bonnet, is consistent with the statement of Bonnet as to what the agreement between the parties really

was, while it is inconsistent with Buckley's and Taylor's statement of it. Then, again, the acceptance of Bonnet's promissory note by Buckley is consistent with Buckley's and Taylor's knowledge of the decisions; for Taylor held an assignment of Bonnet's interest in the actions to secure the payment of certain advances he had made him. In case of the affirmance of the judgments in the *Cases of Bonnet and Parker*, Bonnet would have money and the note would be good. But except his interest in these actions, the testimony shows Bonnet to have been wholly impecunious,—so much so, indeed, that about the time of the transaction in question he borrowed \$50 of Taylor, for which he gave him his (Bonnet's) note for *one hundred and fifty dollars*, and which was subsequently, and within a short time, paid out of the amounts collected upon the judgments in the actions of Bonnet and Parker; and for the sum of \$45, borrowed of one Long, he executed to the latter his promissory note for *three hundred dollars*, which was also paid out of the proceeds of the same judgments. Still another consideration points to the same conclusion, and it is this: Buckley testified that shortly after Bonnet gave him the \$500 note, he (Buckley) left California for the east, but before doing so he turned the note over to his friend, M. J. Kelley, who he said could do as much with the supervisors as himself. But it is not pretended that either Buckley or Kelley ever did, or attempted to do, anything in the matter before the board of supervisors, but it does appear that, after the money had been collected from the city upon the settlement between Taylor and Bonnet, Taylor deducted from Bonnet's portion \$250, which he paid to Kelley on the note. The fact that Taylor, who had in his hands all of the money collected on the judgments, only paid *one-half* of the \$500 note given by Bonnet to Buckley, strongly corroborates Bonnet's statement that at the time the note was given the agreement was that Taylor should pay one-half of it and he (Bonnet) the other half.

I cannot at all agree to what is said in the prevailing opinion with respect to the \$500 paid to Buckley by Taylor in the matter of procuring the advancement of the *Cases of Bonnet and Parker* on the calendar of the court. In so far as that matter has any bearing upon the charge in question, it strengthens the conclusion to which I have come. To believe that Taylor paid Buckley \$500 simply to go to some attorneys and ask if they had a case they did not wish to try, and in lieu of which they would agree that the *Bonnet and Parker Cases* might be placed, requires more credulity than I possess. As a matter of fact, the *Bonnet and Parker Cases* were advanced on the calendar by stipulation of the attorneys in the respective cases. Taylor, who was a real party in interest in the *Bonnet and Parker Cases*, and who, as appears, had frequent interviews with the attorney in them, either communicated the proposed arrangement with Buckley to the attorney, or he did not. If he did not, that circumstance of itself would strongly strengthen the suspicion that the ar-

rangement was not of the peculiar character stated by Buckley and Taylor; if he did communicate the proposed arrangement to the attorney, can it be believed the latter would have advised or permitted his client to pay \$500 to effectuate an advancement of the cases on the calendar,—an advancement which, if practicable at all, could have been legitimately secured by the attorney. While, as has been said, the testimony is very conflicting, the circumstances corroborate the statement of Bonnet as to what the agreement was, and satisfies me that he told the truth about it. I therefore think the respondent should be adjudged guilty of the contempt charged, and should be punished accordingly.

I concur: MCKINSTRY, J.

MCKEE, J., (*dissenting*.) This is a proceeding to punish Christopher A. Buckley and J. W. Taylor for contempt. The charge is that on the tenth of May, 1884, Buckley represented to one B. Bonnet, a party to a cause then pending in this court, that he could influence the court and the members thereof to give a favorable decision in the cause; and that he undertook and agreed, for a large sum of money to be paid to him by Taylor and Bonnet, to influence the judges of the court to render a decision in the cause in favor of Bonnet.

The charge rests upon the testimony of Bonnet, Taylor, and Buckley, who were the principal parties to the transaction, which gave occasion for the charge. The testimony is very conflicting, but, after a careful sifting of the testimony, I find that the following constitute the facts and circumstances of the transaction:

In the year 1884 two cases were pending in this court, viz.: *Bonnet v. City and County of San Francisco* and *Parker v. City and County of San Francisco*, in which appeals had been taken from judgments rendered in the superior court of said city and county. On the morning of Saturday, the tenth of May, 1884, opinions in both cases, affirmatory of the judgments, were sent down by the court, then in session at Sacramento. Immediately after the opinions were filed in the clerk's office a telegraphic dispatch, in the name of the clerk of the court, was sent to the respondent, Buckley, as follows

"SACRAMENTO, 10th.

"To Chris Buckley, Bush Street, San Francisco: *Parker and Bonnet v. San Francisco*, judgments affirmed."

At 10:48 o'clock of the same day the dispatch was delivered at respondent's (Buckley's) saloon.

The only unusual thing in connection with the transmission of such a dispatch from the clerk's office of this court is that neither of the respondents was an attorney or counselor or party in either of the two cases, but both had connections with them. Taylor was assignee of the judgment appealed from in the *Bonnet Case* as security for the payment of a large sum of money, bearing interest at a high rate,

which he had advanced to Bonnet; and Buckley, in his testimony, states:

"About a year before * * * I was asked by Taylor to do something about the cases. * * * Taylor called upon me at my place of business and stated that he had an assignment,—I think *Bonnet* against *The City*,—and wanted me to procure some information for him from the city and county attorney's office in relation to the trial of this case; and also to see if I would go among my friends here—attorneys—and see if we could get a place on the calendar; get them substituted for the case that they might have on the calendar. * * * *Question.* Did you get any money for that service? *Answer.* I did, sir. *Q.* How much money? *A.* Five hundred dollars. *Q.* Who paid it to you? *A.* Taylor. * * * *Q.* Did you say that you went to the office of the supreme court for a calendar? *A.* Yes, sir. *Q.* Did you tell the clerk for what you wanted it? *A.* I might have told him so; I might have mentioned the circumstances to him. *Q.* You cannot tell whether you mentioned these two cases? *A.* I presume I did. I do not know."

Both Buckley and Taylor were therefore financially connected with the cases, and from that connection, and the testimony of Buckley, I think it fairly deducible that Buckley arranged in the clerk's office to receive immediate information of the filings of opinions in the cases when the court decided them; and that pursuant to such an understanding the dispatch of Saturday, the tenth of May, 1884, was promptly sent to him from the clerk's office. In this condition, being blind, he did not see or read the dispatch, but it was received and read; and I have no doubt that the person who received it informed Buckley of the fact of the affirmance of the judgments in the cases. Both Buckley and Taylor, therefore, knew, on Saturday morning, that the judgments of the supreme court in the cases had been affirmed. In fact, Taylor admits that on his examination before the bar association he confessed that on Saturday he "knew all about the affirmance of the judgments." Subsequently, it is true, on his examination before the court, he tried to break the force of his confession by saying that he was confused by the questions which were asked him. But it is also a fact that on Saturday, about 12 o'clock, M. Taylor met Bonnet on Montgomery street, and conveniently arranged with him for a secret interview with Buckley about the cases. For what purpose? Bonnet testifies that on Saturday he was utterly ignorant of the fact that the cases were decided, and intensely anxious to have them immediately decided; for, as Taylor testifies, Bonnet was complaining that the interest which he had to pay on the claims was "eating him up." In his necessity, and believing that Buckley had succeeded in getting the cases advanced on the calendar, although Buckley confesses "that the cases were in fact advanced without his aid or assistance," Bonnet corruptly conceived the idea that Buckley had personal and political influence enough to secure a speedy decision of the cases in his favor. This he believed until it became in his mind a fixed idea; and when he met Taylor, on Saturday at noon, he readily proposed or consented to an arrangement for an interview with Buckley for the purpose of putting that idea into opera-

tion. Upon the subject and object of the interview both Taylor and Bonnet were of one mind, for it is a fact that Taylor, before starting, prepared himself with the printed form of a promissory note, and in going to the interview encouraged Bonnet by telling him as they went: "Buckley can get a judgment for you right away." They got to Buckley's place of business about 8 or half-past 8 o'clock at night. Bonnet testifies:

"When we got there Buckley invited us inside his private place, and there he said to me: 'You got a case in the supreme court?' I told him: 'Yes.' He then said: 'I can get judgment for or against you in the cases.' * * * Then Taylor said: 'I suppose the judges will be down here to-night or to-morrow;' and Buckley said: 'Oh, yes; there is two already here.'"

At this point in the conversation Bonnet and Taylor retired to a corner of the room, where Taylor drew from his pocket the promissory note for \$500, which Bonnet had signed, or then signed, with the understanding that Taylor was to pay half of it; and they then returned and delivered it to Buckley, saying: "We do not want your services for nothing. We are willing to agree to pay you for it if you will assist us to have this matter brought up. We will pay you \$500, and to secure your payment of it will give you a note," which, says Buckley, they did, "and I agreed to assist them, and do what I could in the matter."

The fact is, then, fairly established that on Saturday, that day the telegraphic dispatch from the then clerk of the court was delivered at Buckley's place of business, the secret interview took place at the room and place testified; and that the result of the interview was the execution and delivery to Buckley of a note for \$500 for personal or political services to be rendered by him in the cases. So far not the slightest conflict exists in the testimony. The three men agree that a night conference was held, and that a corrupt arrangement was made for securing Buckley's services for some purpose in connection with the cases. But Buckley testifies that the statements of Bonnet as to the services to be rendered are wholly false, and so Taylor testifies. Both tell the same story, namely, that the note was given to secure the personal services of Buckley for the purpose of influencing members of the board of supervisors to pay the claims. Is that true?

I find the story improbable because there is one thing beyond controversy, and that is that Buckley and Taylor, on Saturday, knew, or did not know, of the decision of the cases. If they did *not* know, then they did know, or had every reason to believe, that the cases were still pending and undetermined, and that the claims involved in them were not collectible from the city or enforceable against it. Bonnet did *not* know that the cases were decided. That is manifest from the circumstance that the fact of filing the opinions in the cases on Saturday was not publicly announced until the following Monday, when it was published, for the first time, in the San Fran-

cisco *Evening Bulletin*. Being alike ignorant that any decisions had been rendered in the cases, it follows that none of these parties could have been actuated by any motive to meet together to make a corrupt arrangement for the collection of claims which the city was contesting in the courts, and there was no reason why either Bonnet or Taylor should attempt to bring personal or political influences to bear upon members of the board of supervisors to pay claims upon which they could not then act.

On the other hand, if Buckley and Taylor knew that the cases were decided, then they used their knowledge as a veil to cover the pretense held out to Bonnet that Buckley could get a decision of the court in his favor "right away;" and, in either case, I think the truth of Bonnet's testimony as to what transpired at the private interview on Saturday night is substantially proved,—proved not only by all the circumstances of the interview itself, but by the subsequent conduct of the parties to it. Taylor admits that, upon a division of the spoil among the persons who had become, one way and another, interested in the case, he applied \$250 of Bonnet's portion to the payment of the note, and that he himself refused to pay any part of it; and although Buckley testifies: "I was to receive \$500 to aid these gentlemen in bringing these matters up before the board of supervisors; that is my understanding of it,"—yet he virtually admits no such understanding, expressed or implied, existed at the interview, by confessing that he neither took action, nor thought of acting, upon such an understanding. On his examination upon that subject he answered as follows:

"*Question*. You were to go to them—the members of the board of supervisors—privately? *Answer*. I presume so. *Q*. To speak to each member? *A*. I should judge so. *Q*. And ask them to pay these claims? *A*. No, sir; to ask them to bring bills up and act upon them. *Q*. Did you make any request of any supervisor? *A*. No, sir; I did not. *Q*. Did you go before any committee of the board or to any member on this subject? *A*. I did not. *Q*. Did you go to the board in session? *A*. No, sir. *Q*. Did you go to any member of the board? *A*. No, sir. *Q*. What did you do for this \$500. *A*. Nothing."

From the conduct and acts of the men I therefore deduce the fact that the note was not given to pay Buckley for influencing the members of the board of supervisors, but that it was given for the purpose testified by Bonnet.

I do not overlook the fact that Bonnet is an accomplice to a corrupt transaction, and that his testimony is tainted, and needs corroboration, but I find it corroborated, not by words, but by the acts and deeds of Buckley and Taylor, as they themselves have testified.

The question then remains: Is one who falsely holds himself out as a court broker to a suitor in a cause pending in the court, and agrees for a large sum of money to procure for him a favorable decision in the cause, by his professed personal or political influence with the members of the court, guilty of contempt of court? I think

it needs neither argument nor authority to show that such an act is a contempt of court. The thing is evil, immoral, invalid, and criminal. Any contract founded upon such a transaction would be illegal and void, and unenforceable in the courts; and, under the code law of this state, it is in itself, and independent of any attempt at fulfillment, a contempt of court. The law declares: "Any interference with the * * * proceedings of a court is a contempt of court." Subdivision 9, § 1209, Code Civil Proc. To dissuade a witness in a cause from attending court to testify in the case is an unlawful interference with the proceedings of the court; to threaten, by letter or otherwise, a suitor in a cause pending in court, against prosecuting it, is an unlawful interference with the proceedings of the court; to falsely pretend to a suitor in a cause that jurors trying it can be corruptly influenced with money to return a favorable verdict for him is an unlawful interference with the proceedings of the court; and *a fortiori* is it, when such corrupt pretense is held out to a suitor about the judges of the court, for the purpose of extorting money from the suitor for such a purpose.

In support of these propositions numerous cases might be cited. All the authorities, indeed, tend to the same point; they show that it is immaterial what measures are adopted. If the object is to taint the source of justice, and to obtain, or profess to be able to obtain, a result of legal proceedings different from that which would follow in the ordinary course of proceedings, it is a contempt of the highest order. "One," say the supreme court of Indiana, "who does a wrongful act for the purpose of bringing unmerited disgrace upon the officers of the court, or the members of the jury, is guilty of a contempt. One who, for the purpose of securing money for himself, falsely pretends to another, interested in the result of the cause, that he can corruptly influence with money the jurors trying the cause to return such a verdict as he desires, is guilty of a contempt. Such an act tends to disgrace and degrade the jury in the mind of the person to whom the corrupt proposition is submitted. No man has a right to falsely insinuate that he can, by corrupt means, influence jurors in the performance of their duty. It would be a reproach to the law, if shameless men were permitted to slander honest officers and jurors by vile insinuations." *Little v. State*, 90 Ind. 338.

2 Cal. Unrep. 648

In re TAYLOR. (No. 20,135.)

Filed February 27, 1886.

ORDER TO SHOW CAUSE DISCHARGED, AND PROCEEDINGS DISMISSED.

In bank. Proceedings against respondent for alleged contempt of court.

The Attorney General, for the prosecution.

Preston & McPike and *D. H. Regensburger*, for the defense.

BY THE COURT. This cause is ruled by the decision in the case entitled "*In re Buckley*, charged with contempt," *ante*, 69, (No. 20,-136,) and therefore it is ordered that the order to show cause herein be discharged, and the proceedings dismissed.

We dissent: ROSS, J.; MCKINSTRY, J.; MCKEE, J.

SUPREME COURT OF CALIFORNIA.

68 Cal. 635

Ex parte LE PROTTI. (No. 20,125.)

Filed February 26, 1886.

MUNICIPAL CORPORATIONS—UNIFORMITY OF LICENSES.

A municipal corporation having by its charter power to license occupations, and that "licenses shall be discriminating and proportionate to the amount of business done." may, in pursuance of such power, provide that laundries shall be licensed according to the number of persons employed in them, this being one way of ascertaining how much business is done. THORNTON, J., dissents.

In bank. Application for discharge on writ of *habeas corpus*.

Jas. A. Johnson, for petitioner.

C. T. Johns, for respondent.

Ross, J. The sole point presented by the petitioner is that he is illegally restrained of his liberty because he is held for a violation of a certain ordinance of the city of Oakland, which, it is claimed, violates that provision of the charter of the city which declares that "licenses shall be discriminating and proportionate to the amount of business." St. 1862, p. 353. The portion of the ordinance which it is claimed violates this provision of the charter is section 14 of an ordinance entitled "An ordinance establishing and regulating municipal licenses," and which reads as follows:

"For owners or keepers of laundries who employ or use two or less than four persons in transacting the business of said laundry, \$7 per quarter; for those who employ not less than four and less than eight persons, \$12 per quarter; for those who employ not less than eight and less than twenty persons, \$20 per quarter; for those who employ twenty or more persons, \$40 per quarter."

As has been seen, licenses by the charter are required to be made proportionate to the amount of business done. Whether the number of persons employed in the various laundries of the city is the basis by which can best be gauged the amount of business done therein or not, it is *one* way of doing so, and, for aught we know, the safest way. The city council cannot count the various articles of wearing apparel laundered by the various laundries; but it is fair to presume that no more persons are employed in such establishments than are necessary to the performance of the work, and, as a consequence, that the amount of business done by such establishments is in proportion to the number of persons employed therein. The nature of the business in question is quite different from that of a merchant who, with one employe or none at all, may do more business than other merchants with a hundred employes. We think there is no analogy between the two cases, and that it was permissible for the council to take a practical view of the question, and legislate accordingly.

Writ dismissed, and prisoner remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; MORRISON, C. J.

THORNTON, J. I dissent. I do not think the ordinance accords with the charter. How does the employment of a certain number of men indicate the amount of business done by a laundryman? It might be that a man who employs eight men does less business than one who employs four men. The custom of the latter may be greater than that of the former. If a merchant employs eight clerks it does not follow that he does a greater amount of business than one who employs four. Again, it is not said in the ordinance when and for how long the persons referred to must be employed. Must they be employed at the date the license is issued or during the period granted? How if four of the eight are dismissed the day after the license is granted, or four employed during the previous quarter and eight when the license is granted? How, then, can such a test furnish a means of estimating the amount of business? In my view it may furnish modes of conjecture or guess, but nothing more. There is a means of determining the amount of business. That is by the receipts in money for the previous quarter. Surely there must be some mode of determining this. If the ordinance supplies no mode, it should be amended in that regard. Surely a municipal corporation like the city of Oakland, whose powers are derived from its charter, and which do not go beyond the grant in the charter, fairly and reasonably construed, cannot adopt such a conjectural mode as the one above stated for determining the amount of business done by a laundryman, in proportion to which amount the license to be paid is to be fixed. A construction which allows a mode so uncertain in its data, so incompetent to determine the amount of business done, the city should have no power to adopt. The powers of such a corporation are limited by its charter, the meaning of which must be arrived at by a reasonable construction, and, when there is any ambiguity, the ambiguous language must be resolved against the city.

In my judgment the prisoner is illegally held, and should be discharged.

KETCHUM v. COUNTY OF PLUMAS. (No. 11,006.)

Filed February 25, 1886.

1. COUNTIES—CLAIM AGAINST COUNTY—AFFIDAVIT OF CLAIMANT.

If the affidavit attached to a claim to be presented to the board of supervisors of a county is substantially as required by law, it will be sufficient.

2. SAME—JUDGMENT REVERSED.

On authority of *Whiting v. Plumas Co.*, 64 Cal. 65, judgment reversed.

In bank. Appeal from superior court, county of Plumas.

Goodwin & Jenks, for appellant.

R. H. F. Variel, for respondent.

BY THE COURT. Action to recover moneys received by plaintiff as county recorder, and paid to the treasurer of the county. The affi-

—FROM—

davits of the claimant, attached to the claim presented to the board of supervisors, were in substance as required by law, and are sufficient. The facts as found are sufficient to present the case as it really exists. On the authority of *Whiting v. Plumas Co.*, 64 Cal. 65, the judgment and order are reversed, and the cause is remanded with instructions to the court below to render judgment in favor of plaintiff for the sum of \$2,209.92 and costs.

68 Cal. 509

BARNES v. MARSHALL. (No. 9,001.)

Filed February 25, 1886.

WATERS AND WATER-COURSES—RIPARIAN OWNER—RIGHT TO PREVENT CHANGE IN CHANNEL OF STREAM.

A riparian owner may protect his land from a threatened change in the channel of the stream liable to occur by reason of the washing away of his bank, and in pursuance thereof may build a bulk-head as high as was his original bank before it was washed away. And this will not deprive the opposite owner of any right, nor give him legal ground for complaint.

Commissioners' decision.

Department 2. Appeal from superior court, county of Sonoma.

Henley & Oates, for appellant.*Rutledge & McConnell*, for respondent.

FOOTE, C. An action for the removal of a nuisance, and for a perpetual injunction against the erecting or maintaining thereof. The defendant had judgment in his favor, and for costs, and the plaintiff appeals upon the judgment roll alone. All the issues raised by the pleadings were passed upon by the findings, although in some respects the latter might have been expressed with more perspicuity. By them it becomes apparent that the plaintiff and defendant own separate parcels of land, lying opposite to each other, on the banks of the Russian river, in Sonoma county, the river being the common boundary between the two. For some years prior to 1879 the river had been washing off portions of its bank lying upon the defendant's land. At a certain point on said land the stream having, as it were, slowly eaten into and carried off a portion of its bank on defendant's front, was threatening to cut a new channel through his land, which would have eventuated in the carrying off of some acres thereof. To prevent this the defendant built a bulk-head on his own land, which was carried away, in the main, by a flood. He then, in October, 1880, constructed another slightly nearer the river, and again this was partially destroyed by the floods of the succeeding winter; and in the washing out caused thereby quite a pool of water was formed in and upon the defendant's land, almost as deep as the bottom of the river, which at low stages thereof remains full of still water. Upon the subsidence of the floods, the river returned to its former channel, a pool of water remaining at the place where the bank and the spiling of the bulk-head had been washed away. In October, 1881, the defendant again built a bulk-head of the same character as the one pre-

viously erected, commencing it with the upper end of the part of the old one still remaining, and running it in such a way as to carry it through the pond above mentioned, and some 15 or 20 feet back of the former bulk-head, and continued by running it through an excavation of his high bank. The last bulk-head is not quite so high as the former, and is somewhat lower than his original bank, (now washed off,) as it stood in 1879.

The plaintiff's bank does not appear to have been lowered in any way, and a sand-bank on his side has risen higher than the bulk-head on the defendant's side. At high water the defendant's bulk-head does not prevent the water from overflowing it, and has no more injurious effect on the plaintiff's land than had the bank of the river as it stood in 1880; and the land of defendant, notwithstanding the bulk-head, is overflowed at high water, as it was before its construction. By removing the bulk-head the stream would probably cut a channel through defendant's land, and thereby, perhaps, relieve the plaintiff of apprehended danger. He, however, had suffered no damage up to the institution of this action. It therefore appears that the contention of plaintiff is that the defendant cannot reconstruct his bank, washed off by the river, to such a height as the bank formerly stood, and thereby prevent the river from running through his land; which last, if permitted, would, by shortening the stream, take the water off of plaintiff's bank, and render his land less liable to overflow. And he claims that the river must be permitted, without obstruction, to change its current, even if thereby it cut a new channel through and over the defendant's land.

This position is not tenable. The defendant had a right to protect his land from the threatened change of the river's channel by building a bulk-head as high as was his original bank before it washed off. He thereby took no right from the plaintiff,—he simply attempted to maintain his own. Ang. Water-courses, § 333. "A riparian proprietor may in fact legally erect any work to prevent his lands from being overflowed by any change in the natural state of the river, and to prevent the old course of the river from being altered." *Farquharson v. Farquharson*, 3 Bligh, Pr. (N. S.) 421, 422. According to the findings, the pond left from the high water on defendant's land was not a channel of the river, but only threatened to become so, which the defendant was seeking to prevent; and this he had a right to do, if he did not thereby interfere with the ancient channel of the stream. Ang. Water-courses, § 108.

There is no error in the record, and the judgment should be affirmed.

• We concur: BELCHER, C. C.; SEARLES, C.

• BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

68 Cal. 572

PFISTER v. DASCEY and others. (No. 8,871.)

Filed February 25, 1886

1. HOMESTEAD—RESIDENCE ON PREMISES.

To constitute a valid homestead under the California law existing in 1869, as well as under the present existing law, claimant must actually reside on the premises at the time of filing the declaration.

2. SAME—RESIDENCE, EVIDENCE OF.

Residence of a person at a particular time is a fact to be determined by testimony, in the same manner provided for the establishment of other facts; and not being a fact of general interest, cannot be proved by evidence of common report.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

J. J. Burt, for appellant.

Laine & Johnston, for respondent.

SEARLS, C. This is an action of ejectment to recover some 45 acres of land in Santa Clara county. Defendants had judgment, from which, and from an order refusing a new trial, plaintiff appeals. Plaintiff's title is based upon a constable's deed of the premises, executed pursuant to a sale under execution levied thereon February 19, 1879. Defendants (husband and wife) claim that the premises at the date of levy of the execution were, and ever since have been, their homestead, by virtue of a declaration of homestead executed, acknowledged, and duly filed for record on the tenth day of April, 1869. The statute in force when defendant's declaration of homestead was filed, like the present Civil Code, required that the person making the declaration should reside upon the premises at the date of making and filing such declaration. To constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed. *Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, Id. 630; *Prescott v. Prescott*, 45 Cal. 58; *Gregg v. Bostwick*, 33 Cal. 220.

The finding of the court is that "on the tenth day of April, 1869, and while said John Dascey and his family were occupying said premises described in the complaint, and residing thereon with the intention of making said residence their permanent home, said John made, executed, acknowledged, and filed for record, in the recorder's office in and for Santa Clara county, his declaration of homestead upon the premises described in the complaint, which said declaration was in the due and usual form provided by law," etc. There was testimony sufficient, if credited, to warrant the findings; and being conflicting, we are not, under the well-established rules of this court, authorized to interfere with the result reached by the court below.

2. At the trial plaintiff introduced evidence showing that an indictment was found against John Dascey, the defendant, in the county of Santa Clara, on the twenty-eighth day of May, 1869, charging him with the commission of a crime in that county on the

third of May, 1869. Plaintiff then offered to prove by several witnesses that at the time of defendant's arrest on said charge "it was generally reported and understood among them at that time, and on April 10, 1869, that he [defendant] and his family were not living in Santa Clara county, but were living in San Francisco." To the introduction of this testimony defendants objected "upon the ground that it was immaterial, irrelevant, and incompetent." The objection was sustained by the court, and the ruling is assigned as error.

By subdivision 11 of section 1870 of the Code of Civil Procedure evidence may be given of "common reputation existing previous to the controversy respecting facts of a public or general interest more than 30 years old, and in cases of pedigree and boundary." The residence of defendant in 1869 was a fact to be determined by testimony as other facts are required to be established. It was not a fact of any general or public interest, and not a fact to be proven by the general understanding and report. Hearsay evidence is not, as a rule, competent to establish any *specific fact* which in its nature is susceptible of being proven by witnesses who can speak from their own knowledge. 1 Greenl. Ev. § 99. There is a class of cases in which the very fact in controversy is whether certain things were said or done, and not whether they were true or false; in which cases the words or acts are admissible, not as hearsay, but as original, evidence. The testimony proffered did not come under this last or any other head with which we are familiar entitling it to be introduced, and it was properly excluded. There were no errors of law committed at the trial prejudicial to the plaintiff, and we are of opinion the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

GURNEN v. GARRITY. (No. 11,453.)

Filed February 25, 1886.

APPEAL—MOTION TO DISMISS APPEAL DENIED.

In bank. Motion to dismiss appeal.

E. F. Fitzpatrick, for the motion.

J. B. Hart, contra.

By THE COURT. Motion to dismiss appeal on clerk's certificate. No service of notice of appeal was made on adverse party. See *Frederick v. Tierney*, 54 Cal. 583. Motion denied.

68 Cal. 604

KIRBY and others v. SUPERIOR COURT OF NEVADA Co. and others.
(No. 9,869.)

Filed February 25, 1886.

1. PLEADINGS—DEMURRER—AMENDMENT AFTER FINAL JUDGMENT.

Where a complaint is demurred to, and the demurrer sustained, and on plaintiff's refusal to amend judgment is entered for defendant, and on appeal such judgment is affirmed, the superior court cannot, on plaintiff's motion, then allow him to amend his complaint, and thereupon proceed with the trial of the cause; and such threatened action may be prevented by writ of prohibition, notwithstanding the fact that the order allowing the amendment is appealable, as the remedy by appeal, though adequate, would not be speedy.

2. SAME—AMENDMENT PENDING APPEAL.

During the pendency of an appeal, a trial court has no jurisdiction to order or allow an amendment to any pleading.

In bank. Application for writ of prohibition.

Lloyd & Wood, for petitioners.

THORNTON, J. Application for a writ of prohibition. In the action *Johnson and others v. Kirby and others*, in the superior court of Nevada county, the plaintiffs filed an amended complaint, to which defendants demurred. The demurrer was sustained, and plaintiffs herein refused to answer. Thereupon judgment was entered for the defendants. From this judgment plaintiffs appealed to this court, where the judgment was affirmed. *Johnson v. Kirby*, 65 Cal. 482; S. C. 4 Pac. Rep. 458. After the affirmance of the judgment, and more than one year after the entry of the final judgment, the superior court above named, on motion of plaintiff Johnson, made an order vacating the judgment and allowing plaintiffs to file another amended complaint, and now threatens to proceed to try said cause notwithstanding the final judgment affirmed as aforesaid. To prevent this a writ of prohibition is asked for.

We are of opinion the writ should be allowed. The plaintiffs had an opportunity to amend prior to the appeal. This they declined to do, preferring to stand on the complaint as they had shaped it and resort to the remedy of appeal from the judgment. This they tried, and the appeal was determined against them. It would be the height of injustice now to allow the plaintiffs, after trying the remedy by appeal, and having been cast on it, to do that which they had refused to do when it was submitted to their option. The judgment which they appealed from having been affirmed, there is an end of the litigation. The defendants having gained the suit in the course adopted by plaintiffs, the plaintiffs should not be allowed to turn round and say, they should be allowed to try the course which they refused to adopt when it was in their power to adopt it. Such inconsistent action is likened to *blowing hot and cold* with the same breath, which a court of justice always discountenances and disallows. Broom, Leg. Max. *allegans contraria*, etc., *169.

It is said the order allowing the amendment is an appealable order. Conceding it is, we do not think the defendants should be put

to the delay and expense of an appeal. This remedy, while it would be adequate, would not be *speedy*. *Merced M. Co. v. Fremont*, 7 Cal. 130. The plaintiffs, under the state of facts above presented, should not be put to the delay of an appeal. The cause is a plain one, and we are convinced the court has no power or discretion after final judgment affirmed to vacate the judgment and allow an amendment to a complaint under the circumstances presented here. The judgment of this court on appeal has determined that there was no error in the record, and the parties and court *a qua* are alike concluded by it from vacating it and making another case for trial. The plaintiffs should not be thus allowed to speculate or gamble on remedies.

There is here a final judgment, and certainly the court could not allow an amendment to a complaint when more than a year had elapsed since the final judgment was rendered and entered. Under such circumstances an amendment is only allowed for clerical misprisions, when the means for making the amendment and the right to make it are furnished by the record itself of the case. *De Castro v. Richardson*, 25 Cal. 49; *Estate of Schroeder*, 46 Cal. 316. In other regards the court has no power to alter the record in any respect. It has then passed beyond the power of the court, or there could not be an end of the litigation.

There is no answer to the petition, therefore we have taken the facts as stated in the petition as admitted; and on these we are of opinion the writ should issue. It would be a hard case on defendants that a court should allow the affirmed judgment in an action to be vacated, and a new case made by plaintiffs, after defendants, on the elected showing of plaintiffs, had won the suit. An amendment of the complaint would not then be in furtherance of justice, and amendments are only allowed in furtherance of justice. Code Civil Proc. § 473.

It does not appear from the petition that a *remittitur* was ever sent down from this court to the court below on the affirmation of the judgment. But this does not help the case of the respondents. While the appeal is pending the court below certainly could not have jurisdiction to order an amendment to any pleading.

The writ must be allowed. So ordered.

We concur: ROSS, J.; SHARPSTEIN, J.

I concur in the judgment: MYRICK, J.

2 Cal. Unrep. 647

ROSS v. BRUSIE. (No. 9,965.)

Filed February 26, 1886.

MORTGAGE—DEED ABSOLUTE AS MORTGAGE—EVIDENCE—BOOK ACCOUNTS.

In proceedings for redemption from a mortgage, where the question at issue is whether a deed absolute in form with an agreement for reconveyance was intended as a mortgage or not, a book of account cannot be introduced in evidence to show that defendant credited plaintiff with the alleged purchase price of the lot in controversy.

Commissioners' decision.

In bank. Appeal from superior court, county of Stanislaus.

L. J. Maddux and *Wright & Hazen*, for appellant.

W. E. Turner, for respondent.

SEARLS, C. This is an action to redeem a lot of land in the town of Modesto. A deed, absolute in form and purporting to be in consideration of \$250, was executed and delivered by plaintiff to the defendant. The latter at the same time delivered to the former a bond, by which he bound himself to convey to the former, at any time within two years, the same property upon the payment to him of \$250. Plaintiff failed within the two years to tender the sum mentioned in the bond, but subsequently did make such tender, and demanded a deed from defendant, which was refused. The question for determination in the court below was whether the transactions, taken together, constituted a mortgage. It was held that they did not. The finding is that the deed was not given as security, but was executed and delivered by plaintiff to defendant in pursuance of a sale of the property in question. There is testimony in support of the facts as found by the court, and the conclusions of law and judgment are in consonance with the facts. At the trial, defendant was permitted to introduce in evidence, against the objection of plaintiff, his book of account for the purpose of showing that he credited plaintiff with \$250, the alleged purchase price of the lot of land concerning which the controversy arose. The entries made by a party in his books of account are admissible in his own favor under certain limitations and for certain specific purposes. 1 Greenl. Ev. § 118. This, however, is an exception to a general rule which holds that a party cannot make evidence in his own favor. The proffered evidence was not properly within any exception to be found in the reported cases, and should have been excluded. For this error the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

GROSS v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO and others. (No. 11,437.)

Filed March 9, 1886.

CERTIORARI—APPLICATION FOR CERTIORARI GRANTED.

Department 2. Application for writ of *certiorari*.

J. M. Huster, for petition.

BY THE COURT. In this cause it is ordered that a writ of review issue as prayed for, and that all proceedings in the cause of *Gross v. Cleland*, in the superior court above named, be staid until further order. On the hearing the question of the constitutionality of the provision in section 980, Code Civil Proc., authorizing the superior court to grant a change of the place of trial in cases appealed from justices' courts will be argued by counsel.

68 Cal. 607

BISHOP v. FULKERTH. (No. 8,794.)

Filed February 25, 1886.

WAREHOUSE RECEIPTS—NEGOTIABILITY OF—PASSING TITLE BY INDORSEMENT.

A warehouse receipt is negotiable unless marked non-negotiable, under the California Act of 1858, and an indorsement and delivery thereof by the party for whose account it was issued passes the absolute title to the property mentioned in it to the transferee, without any attornment of the warehouseman to the holder; and the legislature has power to make such receipts negotiable. THORNTON, J., dissents.

Commissioners' decision.

In bank. Appeal from superior court, county of Stanislaus.

Wright & Hazen, for appellant.

Schell & Bond, for respondent.

FOOTE, C. Action of claim and delivery. The defendant appeals from that part of the judgment awarding 10 bags of wool to the plaintiff. The latter appeals from that part which adjudges 20 bags of wool to the defendant. The case comes here on the judgment roll alone, there being no motion for a new trial. The defendant contends that upon the findings he should have had judgment for the 30 bags of wool; the plaintiff that judgment for him should have been had in like manner for the same amount. This state of facts appears by the record. The bank of Sonoma on the twenty-first day of April, 1882, instituted an action against one Linville upon two promissory notes. Upon the next day an attachment was issued ancillary to that action, and a seizure was made by the sheriff of Stanislaus county, the defendant in this case, of 30 bags of wool, then in a warehouse, where it had been left on storage by Linville. One warehouse receipt issued was as follows:

"THE FARMERS' WAREHOUSE COMPANY OF OAKDALE, STANISLAUS COUNTY, CAL.

"No. 5.

OAKDALE, CAL., April 22, 1882.

"Received on storage from J. A. Linville, for account of self, in good order, in the Farmers' Warehouse Company's warehouse, at Oakdale, Stanislaus

county, Cal., 10 bags of wool, weighing 2,961 pounds, pile No. —, —pounds, marked 'O,' which we agree to deliver in like order, (dangers from fire or sweating excepted,) on return of this receipt properly indorsed and payment of storage, as follows: Storage, fifteen cents per bale, first month; after that five cents per month additional. Number of bags ten. Number of pounds, 2,961.

A. S. EMERY, Superintendent."

The other receipt was in the same words and figures, except that it was numbered "4" and called for "20 bags of wool" "weighing 5,326 pounds, marked J. A. L." At the time of the issuance of these receipts the wool was accredited to Linville's account, on said company's books, and no further entry thereof was made before the attachment herein was levied, and until after the warehouse receipts were surrendered by the plaintiff in this action. Receipt "No. 4," about three hours and a half before the levy of the attachment, was indorsed as follows: "Deliver to F. Weyer. J. A. LINVILLE;" and immediately delivered to Weyer. At the same time receipt No. 5 was indorsed in the same language to S. Bishop, to whom, also, immediate delivery of it was made. Bishop at that time notified Mr. Martin, its secretary, and person in charge of the company's warehouse, of the indorsement and delivery of receipt No. 5 to him, and showed the receipt so indorsed, but no other notice concerning the delivery or indorsement of that, or receipt No. 4, was ever given the company, and no change made in the marking or situation of the wool mentioned in the receipt, or upon the books of the company, until after the attachment was levied and until the surrender of said receipts to said company. Weyer retained his receipt until the sixteenth of May, 1882, when, for a valuable consideration, he indorsed it as follows:

"OAKDALE, CAL., May 16, '82.

"For value received, I hereby assign, transfer, and deliver to S. Bishop the within receipt, and the wool represented thereby, and all rights thereto;"

and then and there delivered it to Bishop. Bishop retained both the receipts until long after the commencement of this action, when he surrendered them to the said company, and took said wool, and J. A. Linville's account was by them debited therewith. All the wool was seized under the attachment by the defendant at about half past 6 o'clock P. M. on the twenty-second day of April, 1882, as Linville's property, in the action before mentioned, and judgment on the notes was afterwards, on the fifteenth day of May, 1882, obtained against Linville, and an execution issued thereon, and levied upon the property which had been, and was then held, by the defendant under attachment.

The law under which these receipts were issued is entitled "An act in relation to warehouse and wharfinger receipts," etc., and is found on page 950 of the acts of 1878. Section 5 thereof is as follows:

"Warehouse receipts for property stored shall be of two classes: *first*, transferable or negotiable, and, *second*, non-transferable or non-negotiable. Under the first of these classes *all property shall be transferable* by the indorsement of the party to whose order such receipt may be issued, and such indorsement of the party shall be a *valid transfer of the property* represented by such receipt, and may be in blank or to the order of another."

Section 8 provides:

"All receipts issued by any warehouseman or other person under this act, other than negotiable, shall have printed across their face, in bold distinct letters, in red ink, the words 'non-negotiable.'"

The receipts under consideration were without those words in red ink. Upon their face it was agreed that the goods which they called for should be delivered to whomsoever returned them, properly indorsed, on payment of storage. A proper indorsement could only mean that of Linville, the party for whose account they were issued. The receipts, therefore, were negotiable, and by the terms of the act above mentioned they carried with them, by mere indorsement of the proper party, viz., Linville, the title to the wool against all the world. It was perfectly competent for the legislature in its wisdom, for the convenience of commerce, to declare such instruments negotiable, and to make their proper transfer by indorsement carry with it the absolute, free, and unconditional title to the property specified in them, while remaining in the hands of the warehouseman. The object and intent of the law seems to be that the warehouseman holds property embraced in such an instrument, as the property of any individual, who, after its issuance, returns it to him, indorsed by the person for and on account of whom it was originally stored. It was intended to do away with the necessity of any attornment of the warehouseman to the holder, by the indorsement of such a receipt, as a condition precedent to the transfer of the title and possession of the property. By proper indorsement such a receipt carries with it the absolute title to the property mentioned therein, as much so as the transfer by indorsement of a certificate of deposit of a bank, which states that the money it calls for is deposited to the credit of an individual, and that it will be paid on the return of the certificate properly indorsed invests the title to and right of possession of such money in the indorsee.

It follows that the plaintiff should have had judgment for the 30 bags of wool, or the value thereof, in case a delivery could not be had, and damages for the detention thereof. And the judgment should be reversed, and cause remanded.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded with directions to render judgment for plaintiff for 30 bags of wool, or the value thereof,

in case a delivery cannot be had, and damages for the detention thereof.

THORNTON, J. I dissent. I find no error in the record, and think the judgment should be affirmed.

69 Cal. 75

BAGGETT v. DUNN. (No. 11,337.)

Filed March 2, 1886.

DEPUTY SUPREME COURT REPORTER—PAYMENT OF SALARY OF.

If the appropriation for the purpose of paying the salary of the deputy supreme court reporter has been exhausted, and there is no money in the general fund in the state treasury which has not been appropriated to some other purpose, the state comptroller cannot be compelled to draw his warrant in payment of such salary, under the California act of February 26, 1881.

In bank. Application for writ of mandate.

William T. Baggett, for petitioner.

R. T. Devlin and *R. M. Clarken*, for respondent.

THORNTON, J. Application for a writ of mandate compelling the respondent, as comptroller of state, to draw his warrant on the state treasury in favor of petitioner, Baggett, payable out of the general fund, for the sum of \$200, as salary of petitioner, as deputy supreme court reporter, for the month of July, 1885. The act authorizing the appointment of deputy supreme court reporter was passed February 26, 1881, (St. 1881, p. 9,) and is entitled "An act to provide for the appointment of a deputy supreme court reporter, and to regulate his compensation." The act is in these words:

"Section 1. The reporter of the decisions of the supreme court is hereby authorized to appoint a deputy, and such deputy shall hold his office at the will of the reporter.

"Sec. 2. The salary of such deputy shall be \$2,400 per annum, payable monthly, out of any money in the general fund not otherwise appropriated, and the comptroller of state is hereby authorized and directed to draw his warrants monthly for such purpose, and the state treasurer is hereby authorized and directed to pay the same.

"Sec. 3. This act shall take effect from and after its passage."

The answer of respondent denies that it is his duty to draw a warrant in favor of the petitioner for the amount stated in his application or for any amount whatever.

It avers that, as provided by section 433, sub. 17 of the Political Code, one of the conditions the existence of which is necessary to enable the respondent to draw a warrant is that there must be an unexhausted specific appropriation provided by law to meet the same; that there is no unexhausted specific appropriation to meet the claim of petitioner; that the legislature, at its last session, wholly failed to make any appropriation whatever to meet or pay his claim. It is further averred that the legislature of the state of California by the appropriation act of 1883, entitled "An act making appropriations

for the support of the government of the state for the thirty-fifth and thirtieth fiscal years," approved March 9, 1883, (see St. 1883, p. 78,) made the following appropriation: "For salary of deputy reporter of the decisions of the supreme court, four thousand eight hundred dollars;" that all of this appropriation has by warrant thereon been exhausted, and that there is now no money appropriated to pay petitioner's claim. It is also averred that there is not now, nor at any times mentioned in the application of petitioner has there been, any money in the general fund not appropriated to some purpose, and that there are no moneys in such fund, nor have there been any to its credit since July 1, 1885, which are not covered by and subject to specific appropriations.

We have stated in full the answer of the respondent, perhaps more so than necessary. The question which is determinative of the case is this: Has any appropriation been made to pay the demand of the petitioner? If no such appropriation has been made by the legislature, this court cannot order a mandate to the comptroller to issue a warrant for its payment, for it is the clear command of the constitution, which cannot be disregarded, that no money shall be drawn from the treasury, but in consequence of appropriations made by law. Const. art. 4, § 22. That is made either by the constitution or by an act of the legislature. *McCauley v. Brooks*, 16 Cal. 29.

The respondent contends that the appropriation is made by the second section of the act of 1881 above quoted. That section provides that the salary mentioned in it shall be \$2,400, "*payable monthly out of any money in the general fund not otherwise appropriated.*" Not otherwise appropriated when? Clearly and manifestly either at the date of the act, (twenty-sixth of February, 1881,) or at the date of the last appropriation act passed by the legislature then in session. We cannot construe this language as applying to any subsequent legislature, and directing an appropriation for the payment of the salary referred to out of a general fund not otherwise appropriated, which may afterwards be paid into the treasury to be appropriated by a subsequent legislature to the purposes for which such fund is designed. If the act of 1881 referred to such fund, which would subsequently come into the treasury, it would be an appropriation in advance of any appropriation which would be made by the legislature which was to deal with it, and there would then be no necessity for using the words "not otherwise appropriated," for, the subsequent legislature not having convened, there would then have been none of the general fund appropriated, and the prior act of 1881 would then be referred to a fund from which no appropriation had been made, and the use of the words "*not otherwise appropriated*" would be totally unnecessary. If the words of appropriation used in the act of 1881 had reference to such subsequent general fund, it would be the first appropriation from the fund, and the words "not otherwise appropriated" would be useless and superfluous.

It follows from the foregoing that the appropriation made by the act of 1881, conceding, but not deciding, that such an appropriation is there made, terminated with the fiscal year ending thirtieth of June, 1883. This seems to have been the view of the legislature which passed the act of 1883, making appropriations for the support of the state government for the thirty-fifth and thirty-sixth fiscal years. In that act a distinct and definite appropriation was made for the fiscal years mentioned, succeeding the period for which the appropriation was made by the act of 1881, for the payment of the salary in question. It is reasonable to conclude that the legislature in 1883 considered the appropriation made by the act of 1881 at an end, and therefore made an appropriation for the fiscal years above mentioned. In our judgment this view of the legislature of 1883 was correct. The appropriation so made by the act of 1883 had been exhausted by payments when the demand of the petitioner was preferred. This is not denied, but conceded. Nothing is claimed from the appropriation of 1883. We can find no other appropriations made than those above mentioned. These appropriations have been exhausted by payments, and, no other appropriation having been made, this court has no authority to order the issuance of the writ asked for, and it must therefore be denied.

The application herein is denied and the proceeding dismissed. So ordered.

We concur: MYRICK, J.; McKEE, J.; SHARPSTEIN, J.; McKINSTRY, J.

ELLIS v. JUDSON. (No. 11,474.)

Filed March 9, 1886.

MOTION TO DISMISS APPEAL DENIED.

In bank. Appeal from superior court, city and county of San Francisco. Motion to dismiss appeal.

M. G. Cobb, for appellant.

P. G. Galpin, for respondent.

By THE COURT. Motion to dismiss appeal on clerk's certificate. A notice of appeal was filed without admission of service thereof. The motion must be denied. So ordered. See *Frederick v. Tierney*, 54 Cal. 583; *Gurnen v. Garrity*, (11,453,) ante, 118, decided February 25, 1886.

68 Cal. 638

MATTHEWS v. SUPERIOR COURT OF MARIN COUNTY and others. (No. 11,292.)

Filed February 27, 1886.

NEW TRIAL—POWER OF JUDGE TO MAKE ORDER OUT OF COUNTY OF TRIAL.

The judge who presided in court at the trial of a cause in another county in place of the judge thereof, who was disqualified, has authority to grant an order extending the time to prepare and serve a statement, on motion for a new trial, although such order be made in a county other than that in which the cause was tried.

Department 2. Application for writ of review.

James F. Smith, for petitioner.

Hepburn Wilkins, for respondent.

BY THE COURT. Application for a writ of review. The cause of *Coughran v. Matthews*, the applicant for the writ here, was appealed by Matthews to the superior court of the county of Marin, from a judgment rendered in a justice's court; and the Hon. E. B. MAHON, the judge of the superior court above named, being disqualified to try the cause on appeal, the Hon. J. F. SULLIVAN, a judge of the superior court for the city and county of San Francisco, at the request of Judge MAHON, presided at the trial of the appeal above stated. On this trial a verdict was returned, and judgment was rendered for the plaintiff. Matthews, within the proper time, regularly gave notice of his intention to move for a new trial on various grounds, among which were insufficiency of the evidence to justify the verdict, and errors of law occurring at the trial and excepted to by the defendant. The time for defendant to prepare and serve a statement on motion for new trial was extended, by agreement, until the fourteenth day of May, 1885, after which, by order of Judge SULLIVAN, the time was further extended to the twenty-ninth of the same month, and by another order of the same judge the time was again extended to the thirteenth of June, 1885. It does not appear when the first of these orders was made by Judge SULLIVAN, but the second order shows on its face that it was made at San Francisco. The statement was prepared and served within the time thus extended. To this statement the attorney for plaintiff proposed amendments, reserving at the same time an objection that the statement was not served in time as required by law; and that no extension of the time allowed by law to serve the statement was ever made by the superior court of Marin county, or any judge thereof, and that the extensions granted by order of Judge SULLIVAN were made by him in the city and county of San Francisco, within which city and county Judge SULLIVAN had no power to grant such orders; and that the said judge had no power to make such orders except while he was holding court in Marin county. On motion of plaintiff's attorney the motion for a new trial was, on the twenty-sixth of September, 1885, dismissed. This dismissal was ordered by the court, Judge SULLIVAN presiding.

It is argued here that the defendant's motion for a new trial was

dismissed on the ground that the orders of Judge SULLIVAN, made in the city and county of San Francisco, extending the time to prepare and serve the statement were without authority; that, therefore, there was no extension of such time made, and the statement was not filed in time.

The order dismissing the motion is as follows:

"Plaintiff's motion to dismiss defendant's motion for a new trial having been fully considered, and now on this day the court being fully advised, it is ordered that the same be and is hereby granted, and that said motion for a new trial be dismissed."

It does not appear, *in terms, in the order*, on what ground the motion was dismissed, and it is argued from this that we must presume that the motion was granted on some proper ground. But the order refers to "*plaintiff's motion*," and the only notice of such motion was the one given in his objection and grounds above stated to the statement as not in time, and it is fair and just to presume that the court dismissed it on such grounds.

The question then arises, is such an order, made by a judge of another court, who presided at the trial in place of the judge of the court in which the cause is tried, who was disqualified, made without authority, when granted in a county other than that in which the cause is tried? It would be strange if the law did not give power to the judge who tried the cause to make such orders. It would be hard on litigants if when such orders, which are usually made when applied for, are needed, the judge who had tried the cause should be without authority of law to make them unless in the county where the cause had been tried. If such is the law, the judge must leave his own county and visit the county of trial to make the simplest order applied for in the cause. Such order, too, having no relation to the merits, but relating to a *mere matter of procedure* to put a phase of the cause in a condition to be heard.

The judge who tried the cause is the proper judge to settle the statement. Section 659, sub. 3, Code Civil Proc. He can, therefore, take all necessary steps to have it properly settled. For this purpose he can extend the time for its proper preparation for settlement. This power to extend need not be exercised by the judge in court. Sections 166, 176, Code Civil Proc. Such extensions may be made by a judge at chambers. Section 166, Code Civil Proc. Orders made out of court may be made by the judge of the court in any part of the state. Section 1004, Code Civil Proc. The motions referred to in section 1004, just cited, which by it are required to be made in the county or city and county in which the action is pending, in our opinion refer to such motions as must be made and heard in court, and not to *ex parte* motions which may be made and passed on at chambers.

Judge SULLIVAN, as to this power to extend time to prepare and serve a statement, was, in our judgment, invested with the same

powers as the judge of the court where the cause was pending would have had if not disqualified. He was, as regards the cause he had tried, the judge of the superior court of Marin county, and could make the extension orders granted by him in any part of the state. Under these circumstances the learned judge had no power or jurisdiction to dismiss the motion for a new trial. He was vested with jurisdiction to settle the statement and hear the motion, and he was without jurisdiction to decline to do so.

The order dismissing the motion for a new trial must be quashed and annulled, and it is so ordered.

2 Cal. Unrep. 649

CHILDS v. EDMUNDS, Judge, etc. (No. 11,498.)

Filed March 9, 1886.

PROHIBITION—WRIT OF ASSISTANCE.

The enforcement of a writ of assistance, as against one not a party to the action, cannot be restrained by a writ of prohibition, as there is in such case an adequate remedy at law by appeal from the order granting the writ.

In bank. Application for writ of prohibition to restrain the enforcement of a writ of assistance, obtained against petitioner for the purpose of dispossessing him, in a foreclosure suit to which he was not a party.

E. A. & G. E. Lawrence, for petitioner.

J. R. Brandon, for respondent.

BY THE COURT. The application for a writ of prohibition in this case is denied for the reason that petitioner has an adequate remedy by appeal from the order complained of.

69 Cal. 80

RANDALL v. HUNTER. (No. 11,237.)

Filed March 12, 1886.

1. APPEAL—NOTICE TO ADVERSE PARTY.

Under the California Code of Civil Procedure, which required that a notice of appeal must be served on the adverse party, if the reversal or modification of the judgment or order appealed from will affect the interest of a co-defendant in the subject-matter of the appeal, he is an adverse party, upon an appeal by another defendant.

2. SAME—SERVICE—DEFAULT JUDGMENT AGAINST CO-DEFENDANT.

In an action against partners on a partnership demand, on default by one of the defendants, and judgment after trial against the others, the defendant making the default is not an adverse party to an appeal taken by the other defendants, so as to require service of notice of appeal on him.

Department 2. Appeal from superior court, county of Humboldt.

J. D. H. Chamberlain, for appellant.

J. J. De Haven and *S. M. Buck*, for respondent.

THORNTON, J. Motion to dismiss appeals. Randall sued Hunter and Gill, as partners, on a promissory note signed Gill & Hunter. Gill made no defense, and judgment passed against him by default.

Hunter answered, and denied the execution of the note by Gill & Hunter as partners, and further alleged that the note was executed to plaintiff by Gill without the knowledge or consent of Hunter; that it was not executed for the use and benefit of the firm of Gill & Hunter, but for the individual use and benefit of Gill alone; that the whole consideration for the note passed to the sole use of Gill, and none of it to the firm; that when plaintiff received this note on its execution, and paid to Gill the consideration therefor, he knew all the foregoing facts, and further knew that the firm was not to receive, and did not receive, any portion of the consideration for said note.

On this answer, trial was had, which resulted in a verdict against Hunter, and judgment was entered against both defendants,—against Gill on his default, and against Hunter on the verdict. Hunter moved for a new trial, which was denied. He then appealed from the judgment, and from the order denying his motion for a new trial. The notice of appeal was not served on Gill, but on plaintiff only. Plaintiff now moves to dismiss the appeals on the ground of the failure of Hunter to serve the notice of appeal on his co-defendant, Gill.

By the provisions of the statute, the notice required to take an appeal must be served on the “adverse party.” Code Civil Proc. § 940. If the reversal or modification of the judgment or order appealed from will affect the interest of Gill in the subject-matter of the appeal, he would be an adverse party within the meaning of the section above cited. *Senter v. Bernal*, 38 Cal. 637; *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Williams v. Santa Clara M. Co.*, 5 Pac. Rep. 85.

Now, it appears here that Gill has not appealed, and the judgment appealed from was rendered against him by default. If the judgment as to Hunter is reversed, it would still stand unreversed as to Gill, and therefore he would not be affected by a reversal. If the judgment is affirmed, the judgment appealed from would remain unchanged, and manifestly Gill’s interest would not be affected by the judgment of affirmance. Whatever modification might be made of the judgment rendered by the court below, or whatever judgment might be here rendered, the judgment by default would still remain against Gill.

It is said that if the judgment is reversed another trial might result in a several judgment against Gill, whereas the judgment against him is now a joint judgment,—one against him and Hunter; and that he is interested in preserving the joint judgment against him, and preventing a several judgment as to him. But his default admits that he is bound severally as well as jointly. If on the trial which has taken place a verdict had passed in Hunter’s favor, a judgment by default might have been entered against him (Gill) severally. A reversal of the judgment appealed from would not do away with this default. It would only affect the judgment as to Hunter. As long as the default stands, whatever judgment is rendered here would not affect the judgment against Gill. In this view we do not think Gill was an adverse party upon whom the notice of appeal should have been served.

What is said above applies to the appeal from the order as well as from the judgment.

It follows from what has been said herein that the motion must be denied, and it is so ordered.

We concur: McKee, J., Sharpstein, J.

SUPREME COURT OF CALIFORNIA.

68 Cal. 623

PEOPLE v. BUSH. (No. 20,084.)

Filed February 26, 1886.

1. HOMICIDE—MURDER—MODIFICATION OF ORDER FOR VIEW OF LOCUS IN QUO.

In a prosecution for murder a modification by a judge out of court, and without the defendant's knowledge, of an order duly made for the jury to view the *locus in quo* of the offense, is not prejudicial error, if the modification of such order was favorable to defendant.

2. SAME—VIEW BY JURY OF LOCUS IN QUO—KEEPING JURY TOGETHER.

The requirement that a jury shall be kept in a body is sufficiently complied with if, where the jury are transported to the *locus in quo* in several wagons, such wagons are at all times in sight of each other, and if, during an intervening night, the jury occupied rooms at a hotel to which access by others was impossible.

3. CRIMINAL LAW—TRIAL—ABSENCE OF DEFENDANT FROM COURT-ROOM.

In a criminal trial, mere absence of the defendant from the court-room for an inappreciable space of time during the trial will not warrant a reversal.

4. SAME—JURY—CONSULTATION WHILE VIEWING LOCUS IN QUO.

The fact that the jury whispered among themselves while viewing the place of a homicide is not such misconduct as will warrant a reversal.

5. SAME—ARGUMENT—OBJECTIONABLE REMARKS BY COUNSEL.

On a prosecution for homicide, the fact that counsel for the prosecution stated to the jury in his address his own impression on hearing of the homicide, while objectionable conduct, if made in reply to similar remarks by the defendant's counsel will not warrant a reversal.¹

6. WITNESSES—EVIDENCE OF CHARACTER.—OBJECTIONS TO, HOW TAKEN.

Where questions by the prosecution in a criminal trial, concerning defendant's character for truth, honesty, and integrity, are objected to on the ground that they are incompetent and irrelevant, but no objection is made to the form of the questions, the defendant cannot, on appeal, complain that such questions should have been directed to the general character of the defendant for truth, honesty, and integrity.

7. HOMICIDE—VIEW OF LOCUS IN QUO—PRESENCE OF DEFENDANT NECESSARY.

A view of the *locus in quo*, pending a trial for murder, must be had in the presence of defendant, and if such view is had in his absence, this will be ground for reversal, as it is in violation of defendant's rights under the California constitution to appear and defend in person, and with counsel, and to be confronted with the witnesses against him on his trial.

MYRICK and McKEE, JJ., dissent.

Commissioners' decision.

In bank. Appeal from superior court, county of San Diego.

Z. Montgomery, Levi Chase, and W. J. Hunsaker, for appellant.

Wallace Leach, J. L. Copeland, and E. W. Hendricks, for respondent.

FOOTE, C. The defendant was tried upon an information for murder. He was found guilty by the jury of that crime in the first de-

¹See note at end of case.

gree. From the judgment of conviction, and an order denying him a new trial, he appeals.

There were numerous matters occurring during the trial upon which the defendant bases his contention that the judgment and order should be reversed and a new trial awarded him. It appears from the record that upon the trial there was evidence given, both by witnesses for the prosecution and the defense, in relation to the place where the homicide occurred, and of the relative positions then and there occupied by the defendant, the person killed, and the witnesses, and of certain natural objects there existent. From the nature of that testimony it appeared proper to the trial judge that the jury should view the place in which the offense was charged to have been committed, and the places at which certain other material facts occurred, and upon motion duly made by counsel for the people under section 1119, Pen. Code, the court made the following order:

"Whereas, it appears to the court that it is proper and necessary that the jury should view certain places represented on the diagram used in this case marked 'Map of Road from Julian to House of J. J. Bush, San Diego County, by C. J. Fox, 1884,' hereinafter specified, it is ordered that the jury be conducted in a body, in custody of the sheriff, to such places and that the witness Valentine show to said jury the following places, viz.: *First*, the hotel in Julian; *second*, the blacksmith's shop; *third*, the stable near said blacksmith's shop; *fourth*, the road traveled by the witness and John Ivey the day of the killing of John Ivey, when they left Julian; *fifth*, the place where he (Valentine) was when he first saw the defendant, J. J. Bush, after leaving Julian on the day of the killing; *sixth*, the place where he (Valentine) was when he next saw the defendant, J. J. Bush; *seventh*, the places on the road where the said Bush was when he (Valentine) saw him at the two times before mentioned; *eighth*, the place where the killing of John Ivey took place; *ninth*, the rock near by, marked on said map; *tenth*, the trail going to the house of J. J. Bush from the Julian road. And that said sheriff return said jury into court without unnecessary delay.

"It is ordered that the interpreter, William Lyons, heretofore sworn as such in this case, accompany the witness Valentine, and that a copy of this order be furnished said sheriff, and be interpreted to said witness Valentine, so that he may be enabled to point out the said places."

The sheriff and Charles T. Murphy, his deputy, were then sworn in open court in accordance with the terms of section 1119, *supra*. On the next morning, which was Sunday, the twenty-sixth of September, 1884, at an early hour, the judge of said court called upon the said sheriff at the hotel, where he and the jury were making preparations to start on the journey that had been specified in the said order, and obtaining from him the certified copy of said order in the sheriff's possession, but without the hearing of the jury, made certain changes in the same, viz.: By striking out the parts thereof embraced under the fifth, sixth, and seventh heads, by drawing a line with a pen and ink through the writing of them all, and then and there placed the following indorsement thereon: "The foregoing order is modified so as to strike out and omit the fifth, sixth, and seventh places mentioned therein.—W. T. McNEALY, Judge." And af-

forwards, on the convening of the court, an order was made in open court modifying the said original order in the manner above specified. The defendant claims that this modification was made out of court, without his knowledge, and that he did not know of it until the jury had gone on their way to the scene of the killing, and that no offer was made after the modification to allow him to accompany the jury.

The jury journeyed to the place of the alleged homicide in two wagons, one containing seven of them and the sheriff, and the other five of them and the deputy-sheriff. During the trip the wagons were always in sight of each other. Julian was reached by the whole party that night, and the sheriff engaged for their occupancy at the hotel rooms on the second floor thereof, and at the rear of the building. There was a hallway between those rooms, and the sheriff and his deputy occupied a room at the head of the stairway. The jury occupied several rooms, but there does not appear to have been any way of access by stairs, or otherwise, to their apartments from the outside or inside of the hotel, save by the stairway where the sheriff and his deputy were stationed, and which station must be passed before any one could reach the jury. There is no evidence whatever that the jury had, or could have had, any communication with any one but with each other and the officers under whose charge they were. A man rode up to them in the road at one time, and asked if that "was the jury in the Bush case," but he was immediately ordered off by the sheriff, and left at once. On the morning after the night of their arrival at Julian, the jury, in a body, in charge of the said sheriff and his deputy, were conducted to the places mentioned in the order of the court, and the various points and objects therein specified pointed out and named to them by the witness Valentine, except those which had been stricken out by the court. No other communication was made to the jury by Valentine, except that at one time he pointed with his hand towards a certain place, and commenced a sentence by saying "the horse—" but he was immediately stopped by the sheriff. The striking out by the judge of the fifth, sixth, and seventh clauses of the original order was done out of abundant caution, and with the intention of preventing any possible wrong being done to the defendant, and of that action merely he cannot be heard to complain. The jury were transported upon their journey in a mode which, under the circumstances of this case, did not in any manner conflict with the rule that they should always, during such a trial, be kept in a body; and so it was as to the manner in which they slept. And it does not appear anywhere in the record, during this journey, or at any time in the progress of the trial, that any sort of effort was made to tamper with the jury.

The point is made that error prejudicial to the defendant occurred by his being absent from the court-room during a part of the trial. This appears to have been for an inappreciable space of time, if at all, while his counsel was preparing to begin an address to the jury; and

the refusal of the court to correct its minutes so as to show that any such absence had in reality occurred, upon the evidence produced before it, was justifiable.

The fact that the jury whispered among themselves while viewing the locality where John Ivey was killed is not, of itself, sufficient error to warrant a reversal of the judgment in this cause.

Granting that the evidence given on the trial of this case was conflicting, nevertheless it was the province of the jury who heard it, and whose verdict as found was based upon it, to determine what evidence was entitled to credence; and that they did so is no error prejudicial to the defendant.

The arguments made by counsel on both sides to the jury, wherein they stated their several impressions on hearing of the killing of Ivey by the defendant, were commenced, it seems, by the attorney for the defendant, and his example was followed in turn by counsel for the people. The former asked that the latter be restrained by the court; but this that tribunal declined to do because what was being said was in reply to a similar argument to the jury that had been made just before by the objector. That proceeding upon the part of the gentlemen of the bar was objectionable, but under the circumstances, the court having fully instructed the jury upon the law as applicable to the matter, we perceive no just cause of complaint against that tribunal.

The defendant also assigns as error the ruling of the court, on the objection made by his counsel, to questions put to witnesses for the prosecution as to his character for truth, honesty, and integrity. The objection as made was for incompetency and irrelevancy; but no specific objection was made that the witnesses were not asked what the *general* character of the defendant was for truth, honesty, and integrity; and while it is true that in putting such a question the word "general" ought always to be employed, yet it appearing that on the occasions here complained of neither the court nor the attorneys for the prosecution were advised by the objector that the form of the questions asked was what was aimed at, nor what particular form thereof was claimed to be indispensable, the defendant cannot be heard to complain for the omission of his counsel to put the court in possession of the exact point of his objection.

There remains for discussion but one other point made by the defendant for the reversal of the judgment; but it is one of grave importance and of far-reaching character. He claims that section 1119, which authorizes a jury to be taken from the court-room, where a trial for murder is being had, to view a place or places elsewhere, does not in its terms authorize such action to be taken unless the defendant be present during the whole time of such view, and that, if such view is in fact had in his absence, it is in violation of his constitutional right "to appear and defend in person and with counsel," (article 1, § 13, Const. Cal.); and that by the same section of that

constitution, being secured in his right to be confronted with the witnesses against him on his trial, such right is violated unless he be present at such a view.

For wise and proper reasons, and in pursuance of a good purpose, in certain instances, the trial court is authorized to send a jury trying a criminal cause to "view the place in which the offense is charged to have been committed, or in which any other material fact occurred;" but the law which confers this authority does not declare that this may be done without the presence of the defendant and his counsel. It is impossible that a jury could go and view such a place without receiving some evidence through one of their senses, viz., that of sight.

In the case at bar there was a conflict in the evidence which had been submitted to the jury, between that given by witnesses for the defendant and that by Valentine, the principal witness for the people. There is little doubt that the order made for the view was for the reason that the court thought it necessary for the jury to determine, by looking at various physical objects, extending along a road for some distance, which was the true and reliable testimony as to the matters where this conflict existed. They went to the places designated in the order, and Valentine, the witness, pointed out and named to them the objects therein embraced. The jury viewed them all as they lay along the road, and therefrom must have determined which evidence, upon certain points, they deemed most worthy of belief. They thus received evidence in the absence of the judge, the defendant, and his counsel.

The order made by the court did not require the defendant to go and be present with his counsel at such view. Suppose that upon the trial, after the witnesses had testified as to the occurrences which transpired at the places named in the order, instead of making the order a photograph of all such places had been offered and allowed by the court to go in evidence to the jury, in the absence of the defendant and his counsel, can it be successfully contended that the defendant could be debarred from claiming and having awarded him a new trial for manifest error? It is often most important for the defendant and his counsel to be able to perceive exactly what impression is being made upon the jury by any portion of the evidence given in on his trial; and it may frequently happen that it is within their power then to introduce other evidence which might tend to disabuse that body of a wrong impression, or the counsel might, by fair and legitimate argument, be able to convince them of the right view to be taken of such evidence. It is to insure to the defendant in all cases of such a nature a fair and impartial trial by a jury of his countrymen that the constitutional enactment was made the supreme law of the land.

The defendant objected to the order of view as made originally and as modified. He was not present when the jury inspected

the various places named in that order, and it is fair to presume that what they then and there saw tended to or did influence their verdict. This court, in the case of the *People v. Green*, 53 Cal. 60, where a similar order was made and action taken with the jury, used this language: "The action of the court was opposed * * * to the principle which gives to a defendant the privilege of being confronted by the witnesses against him." Judge Cooley, in his work on Constitutional Limitations, (5th Ed.) § 319, says: "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment." And in note 1 of the section, *supra*, this is said: "In capital cases the accused stands upon all his rights, and waives nothing." *Dempsey v. People*, 47 Ill. 325; *People v. McKay*, 18 Johns. 217; *Burley v. State*, 1 Neb. 385. And further, as to the inability of a defendant to waive a constitutional right, see *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Wilson v. State*, 16 Ark. 601; *Bond v. State*, 17 Ark. 290; *Brown v. State*, 16 Ind. 496.

In the case of *State v. Bertin*, 24 La. Ann. 47, similar to the one in hand, (except that there was no statute of the state of Louisiana authorizing a view of places,) this language occurs:

"Concede that in the absence both of the accused and the judge (for the judge did not accompany the expedition) the witness obeyed these instructions to the letter, which were as follows: 'To make no explanations, but to confine himself to pointing out appearances as described in said diagram,'—it would result merely that the witness gave testimony on the premises, out of court and in the absence of the accused; gives testimony, namely, by signs, and it needs no argument to prove that the effect of such pointing out in dumb show is as potent with the jury as if the verification of the diagram had been enforced with a multitude of words. The object of law is the doing of real justice; it is but natural and proper, therefore, that criminal jurisprudence should protect the accused person by numerous safeguards, and among these is the rule that in general every proceeding of his trial shall take place in his presence; for, peradventure, if he be present he may, at any moment, by a question, a suggestion, an argument, or even a glance, confound his accusers, vindicate his innocence, or at least mitigate his punishment. Especially is this proper at the taking of testimony against him, and therefore in this state as in many others of this Union, it is provided by the constitution that the accused shall have the right to meet the witnesses against him face to face."

In Gaunt, Ark. Dig. §§ 1927, 1928, the statute authorizing a view in such a case as the one we are now discussing is almost *in totidem verbis* as our own section 1119 of the Penal Code. And in the case of *Benton v. State*, 30 Ark. 350, it is said:

"The view of the place where the crime is alleged to have been committed, by the jury, is part of the trial, and may be an important step in the trial, and the presence of the prisoner at the view, in a case involving life or liberty, that he may have an opportunity to observe the conduct of the jury, and whatever occurs there, might be of the utmost consequence to him. The judge who presides at the trial and hears the evidence must determine

whether or not a view is necessary; and if, in his discretion, he deems it necessary to order a view to be made, it would be better and safer for him to accompany the jury, if convenient, to see that nothing improper occurs at the view. If not convenient, he may appoint a person to show the jury the place to be viewed, sworn as directed by statute. If the jurors are familiar with the place, they may be conducted to it by a sworn bailiff in charge of them, and there could be no necessity for the appointment of another person to show them the place."

At page 349, same case, this is said:

"But though no witnesses are examined at the view, yet the jurors, from their observation of the place and its surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused, and are in their nature incapable of cross-examination."

By section 1043 of our Penal Code it is provided that the defendant must be present in person when on trial for a felony. In Arkansas a statute of the same kind was in force, and the supreme court of that state said of it that it was "declaratory and affirmatory of the common law, which would not allow any proceeding affecting life or liberty to be had in the absence of the prisoner, and when any step was to be taken in the cause the prisoner was to be present personally, lest in so important a matter he should be prejudiced. This care of the law for his safety was extended through the whole trial, from his arraignment to his final conviction or acquittal." *Sneed v. State*, 5 Ark. 432; *Cole v. State*, 10 Ark. 318; *Sweeden v. State*, 19 Ark. 209.

We are of the opinion that it is not intended by section 1119, Pen. Code, that a view to be taken by the jury of any place or places contemplated by that statute should ever be ordered by the court, or take place, unless in the presence of the defendant; and, in addition to the authorities above cited, the following bear out the correctness of that rule. Whart. Crim. Pr. & Pl. (8th Ed.) § 707; *State v. Sanders*, 68 Mo. 202; *Smith v. State*, 42 Tex. 444; *Carroll v. State*, 5 Neb. 31; *Eastwood v. People*, 3 Parker, Crim. R. 25.

The judgment and order should be reversed, and cause remanded for a new trial.

I concur: BELCHER, C. C.

SEARLS, C. I concur in the conclusion reached in the foregoing opinion, and hold that a defendant in a criminal case amounting to felony has a right to be tried in the presence of the court, of which the judge is an integral part; to be represented in every step of the case by counsel; to be personally present and be confronted by the witnesses against him; and section 1119 of the Penal Code, so far as it is in conflict with, or in any manner abridges, these rights or any of them, is unconstitutional and void.

THE COURT. For reasons contained in the foregoing opinions the judgment and order are reversed, and the cause is remanded for a new trial.

ROSS and SHARPSTEIN, JJ., agree with the views presented in the opinion of Commissioner FOOTE.

THORNTON and MCKINSTRY, JJ., concur *also* in the opinion of Commissioner SEARLS.

MYRICK, J. I do not concur in the judgment, or in the reasons therefor.

MCKEE, J. I dissent. Section 1119 Pen. Code; *People v. Bonney*, 19 Cal. 427.

NOTE.

For a full discussion of the question of abuse by and misconduct of counsel in the argument of a case to the jury, see *Petite v. People*, (Colo.) 9 Pac. Rep. 622, and note, 627, 628, and *State v. McCool*, (Kan.) 9 Pac. Rep. 745.

A judgment will not be reversed for misconduct of counsel in argument, unless it was such as to prejudice the substantial rights of the accused. *Shular v. State*, (Ind.) 4 N. E. Rep. 870.

It is only where the misconduct of counsel is of such a material character as to make it probable that the jury were misled that there can be a reversal therefor. *Boyle v. State*, (Ind.) 5 N. E. Rep. 203.

It is improper for a prosecuting attorney to make a statement to the jury of a fact as of his own knowledge, which has not been introduced in evidence under the sanction of an oath, relating to a material issue in the case, and if the accused is prejudiced thereby, the conviction may be set aside. *People v. Dane*, (Mich.) 26 N. W. Rep. 781.

(68 Cal. 561)

DILLON, Adm'r, etc., v. CENTER and others. (No. 8,696.)

Filed February 25, 1886.

1. EJECTMENT—DEFENDANT'S POSSESSION TO BE SHOWN.

In an action of ejectment it is indispensable to a recovery by the plaintiff that it should appear that the defendant was, at the commencement of the action, in the possession of some part of the land sued for.

2. SAME—GENERAL DENIAL—ADVERSE POSSESSION.

In an action of ejectment, an answer containing a general denial puts in issue the alleged possession of the defendant, and if, in addition, the defendant sets up title by adverse possession, the admission of possession contained in such special defense must be confined to that defense.

3. SAME—NONSUIT AS TO PORTION OF DEMANDED PREMISES.

In an action of ejectment for the possession of several distinct pieces of land, the defendant may have a nonsuit as to such portions of the demanded premises as the plaintiff's evidence shows were in his own possession at the time of the commencement of the action.

4. SAME—ADVERSE POSSESSION—LANDLORD'S DISCLAIMER AS EVIDENCE AGAINST TENANT.

Where, in ejectment, the defendant sets up title in his landlord acquired by adverse possession, the evidence of a disclaimer by the landlord in a prior ejectment suit for the same premises against the then possessor is admissible in such action.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

S. O. Houghton, for appellant.

T. H. Laine, for respondents.

BELCHER, C. C. This is an action of ejectment to recover possession of lot 1 of the N. W. $\frac{1}{4}$, and lots 2 and 3 of the N. E. $\frac{1}{4}$, of a cer-

tain section of land in Santa Clara county. In the complaint it is alleged that W. H. Dillon, plaintiff's intestate, died in April, 1877, and at the time of his death was the owner in fee and entitled to the possession of the premises described; that the plaintiff, as administratrix of his estate, took possession of the said premises in January, 1879, and continued to occupy the same until the seventh day of January, 1880, when she was ousted and ejected therefrom by the defendants. The defendant Alexander Center alone appeared. By his answer he denied all the allegations of the complaint, and then alleged that he, and those through and under whom he claimed, had had and held the actual possession of the lands and premises described in the complaint, and every part and parcel thereof, continuously, exclusively, and adversely to all the world for the five years next preceding the commencement of the action; and he further alleged that the plaintiff's cause of action was barred by the provisions of section 318 of the Code of Civil Procedure.

The case was tried by the court and judgment rendered in favor of the plaintiff, for the possession of the three lots described in the complaint, and for damages and costs. The appeal is from the judgment and an order denying a new trial.

When the plaintiff rested her case the defendant moved for a nonsuit as to lots 1 and 2 upon the ground that it appeared from the plaintiff's testimony that she was in possession of those lots when the action was commenced, and it did not appear that defendant ever had possession of any part of them. The motion was denied upon the ground that a nonsuit could not be granted as to a part of the demanded premises. We think the motion might and should have been granted. It is indispensable to a recovery in ejectment that it should appear that the defendant was, at the commencement of the action, in the possession of some part of the land sued for. The general denial contained in the answer put in issue the alleged possession of defendant, and the admission of possession contained in the special defense must be confined to that defense. *Miller v. Chandler*, 59 Cal. 540. The lots were severable and the only contest was as to a part of lot 3. It was unnecessary, therefore, to include in the action lots 1 and 2, and a judgment that the plaintiff recover the possession of those lots might be harmful to the defendant if an action should be commenced to recover rents and profits for them. 2 Greenl. Ev. § 333.

As above stated, the only real contest was in reference to about 16 acres of lot 3, and as to this piece it was claimed that the plaintiff's right of action was barred by the statute of limitations. It appeared from the evidence that W. H. Dillon became the owner of the three lots described in the complaint, in December, 1875. To sustain his claim under the statute of limitations the defendant then proved that in November, 1871, one John Center received a deed for a tract of about 300 acres of land known as the "Scott Place," and embracing the 16-acre parcel of lot 3; that the whole tract was then inclosed;

that shortly after receiving his deed John Center leased the whole tract to the defendant Alexander Center, and that he, as such lessee, had ever since occupied and used the premises, kept up the fences, and paid all the taxes on the land; and that John Center had always claimed to own all the land conveyed to him by his deed since he received it in 1871.

The plaintiff then proved that, in 1872, George Center, the father of Alexander Center, resided on the Scott place, and that in May of that year the said owner of the said lots 1, 2, and 3, commenced an action against him in the district court of the Fourth judicial district to recover their possession; that the papers in the case were served on George Center, and he immediately sent them to John Center, whom he considered "the responsible party;" that an answer was filed in the case by some one, but by whom George Center did not know; that between 1872 and 1879 the attorney for the plaintiff had a conversation with John Center about the land described in the complaint, and was told by him that he did not claim it; that again, in 1879, the attorney had another conversation with John Center about the land, and he, John Center, then asked that no judgment for costs should be taken against George Center in the case, as he did not claim the land, and the plaintiff might go and take possession without further trouble; that the case was tried in January, 1879, and judgment rendered in favor of the plaintiff for the possession of the premises described in the complaint; that an execution was issued on this judgment, and under it, on the sixteenth day of January, 1879, the sheriff of the county of Santa Clara placed the agent of the plaintiff in the quiet and peaceable possession of the land therein described; that in 1879 the plaintiff cut hay on the 16-acre parcel, and erected a barn and stored the hay in it, and also commenced to construct a fence to separate that parcel from the other land occupied by the defendant; that the defendant stopped the work of building the fence, tore down what had been built and excluded the plaintiff from the land. The plaintiff offered in evidence the judgment roll in the case against George Center, and the execution issued on the judgment with the sheriff's return thereon. The defendant objected to the offered evidence upon the ground that it was irrelevant and immaterial. The court overruled the objection, and this ruling is assigned as error.

We think the ruling correct. The evidence became admissible in connection with the uncontradicted statement of John Center, and the whole testimony in the case very clearly justified the court in finding that the action was not barred.

The case should be remanded, with directions to the court below to amend the judgment by striking therefrom lots 1 and 2, and as so amended the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the cause is remanded to the court below, with direction to amend the judgment by striking therefrom lots 1 and 2, and as so amended the judgment will stand affirmed.

68 Cal. 611

PEASLEY v. McFADDEN and others. (No. 11,014.)

Filed February 25, 1886.

1. VENDOR AND VENDEE—POSSESSION OF LAND—EFFECT AS NOTICE.

Possession of land is notice to subsequent purchasers of all equities of the possessor of such land.¹

2. PLEADINGS—LIBERAL CONSTRUCTION TO BE GIVEN.

The allegations of a pleading must be liberally construed, with a view to substantial justice, for the purpose of determining its effect; and in every stage of the action errors or defects in the pleadings which do not affect the substantial rights of the parties must be disregarded.

3. MISTAKE—REFORMATION OF WRITTEN CONTRACTS—PLEADING.

A complaint in an action to reform a written contract for the sale of land on the ground of mistake, sufficiently alleges such mistake if it states, in effect, that at the time the contract was executed both parties intended that it should, and understood that it did, include certain land, and that such land was omitted from the agreement by reason of an unconscious ignorance or forgetfulness of the fact that it was not included, or a belief that it was then included, therein. And in order to entitle such a contract to be reformed or enforced, it is not necessary that the agreement should show an adequate consideration; and therefore, in an action on the contract, no consideration for its execution need be alleged.

McKINSTRY, J., dissents.

Commissioners' decision. In bank. Appeal from superior court, county of El Dorado.

George C. Blanchard and *C. A. Swisler*, for appellants.

M. P. Bennett, for respondent.

BELCHER, C. C. This is an action of ejectment to recover the possession of a small lot of land in El Dorado county. The lot is a parcel of about 14 acres of land, known as the "Nashville Placer Claim," which one John C. Ensey sold and conveyed to the plaintiff on the twenty-fifth day of October, 1882. At that time the lot was covered by a building known as the "Gem Saloon," which had been erected thereon by the defendant Duncan, and was occupied by the defendants McFadden and Heald, as his tenants. The Nashville placer claim was patented to Ensey by the government of the United States on the fifteenth day of September, 1882, under an application made therefor by him at some time prior to the eighteenth day of March, 1878. When the application was made, and for several years before that, Duncan had been in possession of and had claimed to own a part of the land embraced in the application, including the lot in question. As early as 1866 he erected a building on the land adjoining this lot on the north, in which he carried on the business of merchandising until 1874. He also erected a barn and other buildings,

¹ See note at end of case.

which he used in connection with his store. The store, barn, and other buildings were inclosed by a fence. The lot in question was not within the inclosure, but he used it to pile wood upon and boxes from his store, and also kept there some barrels of water for use in case of fire. In 1874 he leased the store and other buildings to defendant Heald, who has continued ever since to occupy them as his tenant. Up to the time the Gem saloon was built Heald used the land on which it stands for the same purposes that Duncan had used it for.

On the eighteenth day of March, 1878, Duncan wrote and read to Ensey, and Ensey then signed, a contract by which, after reciting that he had made application for a patent for the Nashville mine, he agreed and bound himself, "for and in consideration of the sum of \$1 to me in hand paid, that as soon as I obtain a patent of said described land I will make out a good and sufficient deed to R. H. Duncan of said land he, said Duncan, has inclosed, and upon which his store, barn, dwelling, and warehouse stand." As soon as the contract was signed it was placed in Heald's safe, and was kept there, and not seen by Duncan until some time in 1882, after Ensey sold to plaintiff, when, hearing that Ensey had received his patent, he got it out and read it. Then, for the first time, he discovered that in writing the agreement he had omitted from the description of the land he had intended to describe the land and premises sued for in this action.

When the contract was made, and for a long time prior thereto, Duncan claimed to own the premises in dispute here, and he intended to have included the same in the written agreement, but unintentionally and by mistake omitted to do so. Ensey knew of the claim made to the said premises by Duncan, and knew from what had been said between them prior to the date of the agreement that Duncan intended to require of him a conveyance of the same as a part of the premises which he, Duncan, claimed within the lines of the Nashville placer claim. Ensey also had reason to know and suspect, at the time he signed the agreement, that Duncan had made a mistake in drawing it, and through such mistake had omitted the premises in dispute.

The complaint is an ordinary complaint in ejectment. The defendants answered, denying the plaintiff's ownership of the premises sued for; and the defendant Duncan, by way of cross-complaint, set out the contract for a deed, herein before referred to, and then alleged "that by mistake said agreement does not correctly describe the premises so to be conveyed; * * * that at the time said agreement was executed the said parties thereto intended, and it was by them understood, that the premises therein described and agreed to be conveyed as above set forth should include the whole of the land and premises described in plaintiff's complaint, but that the same was omitted by mistake, and in order that the said agreement may conform to the intention of the said parties thereto at the time

of its execution, it is necessary that the same be reformed and made to read as follows: * * *

The plaintiff answered the cross-complaint by denying fully that there was any mistake made in the drawing or execution of the agreement referred to, or that it was understood or agreed by the parties thereto that it should or did include the whole or any part of the premises described in plaintiff's complaint.

The case was then tried, and the facts found substantially as above stated.

As conclusions of law the court found:

"(1) The answer and cross-complaint does not show a mistake, within the meaning of section 3399 of the Civil Code. (2) That the agreement does not show an adequate consideration. (3) That the plaintiff is entitled to judgment for the possession of the premises sued for."

Judgment was entered in favor of the plaintiff, and from that judgment the appeal is taken and rests upon the judgment roll.

Two questions are presented for consideration in the case: (1) Was the mistake in the written agreement so pleaded that the equity powers of the court could be called into exercise to reform it? (2) The agreement being reformed so as to include the premises in controversy, did it furnish any defense against the plaintiff's claim to possession?

There can be no doubt that when the plaintiff bought the property from Ensey he took with notice of Duncan's claim to it. The lot was then entirely covered by the Gem saloon, which Duncan had built and was occupying by his tenants. This was full notice to the plaintiff of Duncan's equities. *Lestrade v. Barth*, 19 Cal. 660; *Dutton v. Warschauer*, 21 Cal. 609; *Pell v. McElroy*, 36 Cal. 271; *Talbert v. Singleton*, 42 Cal. 390. Duncan was entitled, therefore, to have the agreement reformed and enforced as against the plaintiff if he would have been as against Ensey, provided Ensey had not sold, but had commenced the action.

It is urged on the part of the respondent that the cross-complaint is insufficient to justify a reformation of the written agreement because it does not show that there was any mutual mistake of the parties in making it, or a mistake of one party which the other at the time knew or suspected, and because the allegation that at the time the agreement was executed it was intended and understood by the parties thereto that the premises therein described and agreed to be conveyed should include the land sued for is contradictory and unintelligible. It is clear that the cross-complaint was not artistically drawn, and if it had been tested by a demurrer, on the ground that it was ambiguous, uncertain, and unintelligible, it would probably have been held bad. It was not, however, demurred to, but its averments were denied, and upon the issues thus tendered the case was submitted. When thus tested, was it fatally defective?

A written contract may be reformed when, through a mutual mis-

take of the parties thereto, or a mistake of one party, which the other at the time knew or suspected, it does not truly express the intentions of the parties. Section 3399, Civil Code.

A mistake, as defined by the Code, is:

"(1) An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing, material to the contract, which does not exist, or in the past existence of such a thing which has not existed." Section 1577, Civil Code.

In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties, and in every stage of an action the court must disregard any error or defect in the pleadings which does not affect the substantial rights of the parties. Sections 472, 475, Code Civil Proc. As we read it, then, the cross-complaint, in effect, alleges that at the time the agreement was executed both parties intended that it should, and understood that it did, include the land sued for here, and that this land was omitted from the agreement by reason of an unconscious ignorance or forgetfulness of the fact that it was not included, or a belief that it was then included therein. This, we think, must be held sufficient as the case was presented.

The point that the agreement does not show an adequate consideration, and therefore cannot be reformed and enforced, is not well taken. At common law an adequate consideration was absolutely necessary to give validity to contracts not under seal, and in case of suits upon them the consideration was required to be alleged and proved. It was not so with sealed instruments; they imported a consideration which was presumed to be adequate. We have changed the rule of the common law in this state with reference to unsealed instruments. Our Civil Code provides:

"Sec. 1614. A written instrument is presumptive evidence of a consideration.

"Sec. 1615. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

It was not necessary, therefore, that the agreement set forth in the cross-complaint should show an adequate consideration, or that the defendant in pleading it should set forth any consideration for its execution. If it was not based upon a sufficient consideration, the burden was upon the plaintiff to plead and show that fact. Failing to do that, his contention here cannot be supported.

The judgment should be reversed and the cause remanded.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded.

McKINSTRY, J. I dissent.

NOTE.

Implied or constructive notice may be as effectual as actual notice, and such constructive notice may arise from possession alone; but such possession must be open, notorious, exclusive, and unequivocal, and while actual residence is not necessary when there is no actual *pedis possessio*, dominion must be manifested by such open and notorious acts of ownership as will naturally be observed by others, and the acts must be of a character so certain and definite in denoting ownership as not to be liable to be misunderstood or misconstrued. *Hodge's Ex'rs v. Amerman*, (N. J.) 2 Atl. Rep. 257.

Possession of land by parties at the time of the levy of an attachment is notice of their rights and equities in the premises to a purchaser at a sale under such levy, and he takes the property subject to the rights and equities which are capable of being enforced by the party in possession against the judgment creditor. *Story v. Black*, (Mont.) 1 Pac. Rep. 1. To the same effect are *Ray v. Birdseye*, 5 Denio, 626; *Jones v. Marks*, 47 Cal. 242; *McKinzie v. Perrill*, 15 Ohio St. 168; *Hughes v. U. S.*, 4 Wall. 232; *Landes v. Brant*, 10 How. 348. See, also, *In re Howe*, 1 Paige, 128; *Ells v. Tousley*, 1 Paige, 283; *White v. Carpenter*, 2 Paige, 219; *Buchan v. Sumner*, 2 Barb. Ch. 181, *Lounsbury v. Purdy*, 11 Barb. 494; *Kiersted v. Avery*, 4 Paige, 15; *Averill v. Loucks*, 6 Barb. 27; *Mason v. Wallace*, 3 McLean, 148; *Strong v. Smith*, Id. 362; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21; *Lake v. Doud*, 10 Ohio, 515.

68 Cal. 618

LUCAS v. RICHARDSON. (No. 9,656.)

Filed February 25, 1886.

1. APPEAL—REJECTION OF EVIDENCE, WHEN REVIEWABLE.

Unless an exception was reserved to the ruling of a trial court in rejecting evidence, the action will not be reviewable on appeal.

2. DEPOSITIONS—TIME AND PLACE OF TAKING—NOTICE.

The statutory requisites concerning the taking of depositions must be strictly followed; and the requirement of notice of time and place of taking is insufficient if it fails to inform the adverse party of the place of business or office of the notary before whom the deposition is to be taken, if the same is to be taken in a city having a population of 50,000 inhabitants or over, and in which the streets are named and numbered.

3. EJECTMENT—STATUTE OF LIMITATIONS.

In ejectment, if the defendant sets up the statute of limitations, evidence that he leased the land to a tenant, and instructed him to keep stock of other people off the land, is admissible as tending to sustain his allegation of possession.¹

4. APPEAL—FINDINGS AS TO ULTIMATE AND PROBATIVE FACTS—FINDINGS—EVIDENCE.

Findings held supported by the evidence. Where an ultimate fact in favor of an appellant has been found, an erroneous finding on the probative facts covering the same issue is not prejudicial to him, so as to warrant reversal.

Commissioners' decision.

In bank. Appeal from the superior court, county of Stanislaus.

G. A. Whitby and *Wright & Hazen*, for appellant.

J. B. Hall, for respondent.

SEARLS, C. This is an action of ejectment by plaintiff, as the heir and devisee of George C. Lucas, to recover 160 acres of land situate in the county of Stanislaus. Defendant denies plaintiff's title, avers title in himself, interposes the plea of the statute of limitations, and as a further and equitable defense sets out, in apt language, a verbal contract made in 1870 between himself and plaintiff's predecessor,

¹ For a general discussion of the statute of limitations, and when the statute begins to run, see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-641, and *Glenn v. Saxton*, (Cal.) 9 Pac. Rep. 420, and note, 423.

George C. Lucas, by the terms of which defendant agreed to purchase upon certain terms—since that date fully complied with by him—the demanded premises. The cause was tried by the court, and defendant had judgment. The findings were against defendant upon the plea of the statute of limitations. The only additional facts necessary to be stated are that the legal title to the *locus in quo* vested in plaintiff as the heir and devisee of George C. Lucas, and that, under his contract of sale with said Lucas, defendant acquired an equitable title which, for the purpose of this decision, we shall assume was, if it still remains in him, or may be set up in this action, sufficient to bar plaintiff's right of recovery.

At the trial plaintiff offered to prove that subsequent to the acquisition by defendant of the equitable title he instituted proceedings in bankruptcy, in the district court of the United States for the district of California, in which proceedings an assignment in due form and sufficient in law to pass all the estate of said defendant to A. W. Moulton, the assignee therein named, was duly executed; also a final discharge in bankruptcy of said defendant in said cause, duly made and entered therein. The papers in bankruptcy were, and each of them was, duly certified and authenticated, so as to entitle them to be admitted in evidence, if they were material and proper testimony in the cause. To the introduction of this documentary evidence, counsel for defendant objected upon the ground "that it is irrelevant and immaterial." The objection was sustained by the court. We find no exception to this ruling, and are not, therefore, called upon to consider the question presented. The evidence was sufficient to warrant the findings of the court, and we are of opinion they cover all the material issues, and show such an equitable title in the defendant under an executed verbal contract for the purchase of the premises, accompanied by possession, as warranted the judgment in his favor.

The deposition of B. F. Marekley, offered by plaintiff, was properly excluded. The method of taking testimony by deposition is statutory, and all the essential requirements of the statute must be complied with. Among these requirements is a notice of the *time and place* of taking the deposition. *Williams v. Chadbourne*, 6 Cal. 559. It appears that the action was pending at Modesto, in Stanislaus county, and was set for trial on the twenty-second day of May; that defendant's attorney resided in Stockton; that on the fourteenth of May defendant's attorney received a written notice that the deposition in question would be taken on the twenty-first day of May, between the hours of 10 o'clock A. M. and 5 o'clock P. M., before Lee D. Craig, a notary public, in San Francisco, but the office or place of business of the said notary was not given; that to have reached Modesto at 10 A. M. of the 22d a passenger would have been compelled to leave San Francisco by train as early as 4 P. M. of the 21st. Defendant was not represented at the taking of the deposition, the time for giving notice of the taking of which had been shortened by an order of the

judge. In view of the fact that the notice of taking the deposition was short, and that it was to be taken in a city like San Francisco, the notice should have apprised the attorney for defendant of the office or place of business of the notary, and, not having done so, and no one having been present on behalf of defendant, the court was authorized, under section 2033 of the Code of Civil Procedure, to exclude the deposition. It may be difficult to formulate a general rule in reference to the particularity as to *place* required in notices of this character. Under section 2033, *supra*, something is left to the discretion of the court in excluding depositions, upon proof that sufficient notice was not given, or that "the taking was not in all respects fair." It would seem, however, that where depositions are to be taken in incorporated cities having a population of 50,000 inhabitants or over, in which the streets are named and numbered, the office or place of business of an officer before whom a deposition is to be taken should be specified by reference to the street and number, or by such other designation as will make the place easy of ascertainment.

The exceptions taken to the rulings of the court in permitting plaintiff's counsel to ask the witness John Richardson, on cross-examination, what use the defendant made of the land in dispute, and in permitting him to testify that he was instructed by defendant to keep stock of other people off the land, and that he did so, cannot be sustained. The testimony was proper in support of the possession which defendant had set up in himself, and tended to support his plea of the statute of limitations. The same considerations apply to the objection made and exception taken to the testimony showing a lease of the premises by defendant to Robert Young. If Young took a lease of the land in question from the defendant, and entered and held under such lease, his possession was that of his landlord, and was proper to be shown. So, too, the judgment roll in *Lucas v. Young* was admissible to show that the latter was in possession of the land, not as the tenant of the plaintiff, but under and by virtue of a lease from the defendant, Richardson, thus going to sustain the allegation of the defendant's answer as to his possession of the premises.

We think the evidence was sufficient to sustain the eighth finding of the court, which was to the effect that defendant paid all the taxes levied and assessed upon the land in suit from and including the year 1874-75 to the present time, except for the fiscal year 1880-81, the taxes for which year were paid by plaintiff. The contention of appellant is that for two years Moulton paid the taxes, and that for a third year the property was assessed to unknown owners, and it cannot be determined who paid the tax. The whole evidence in relation to the payment of taxes was introduced in support of the plea of the statute of limitations. By section 325 of the Code of Civil Procedure payment of all taxes levied upon the premises is an essential requisite in support of the bar of the statute of limitations. In the present case the court found that defendant did not pay the

taxes for the year 1880-81, and found against defendant upon his plea of the statute. The ultimate fact being found in plaintiff's favor, it cannot matter to him whether certain probative facts bearing upon the same issue were found for or against him.

We have said the findings are supported by the evidence, and it seems hardly necessary to quote from the testimony to show that the second, fourth, sixth, seventh, and eleventh findings are so supported. A perusal of the testimony convinces us, not only that there was evidence to warrant the findings, but that as to most of them there was little or no conflict.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

68 Cal. 642

HORTON *v.* DOMINGUEZ and others. (No. 11,178.)

Filed February 27, 1886.

1. APPEAL—FINDINGS—PRESUMPTION IN FAVOR OF.

Where nothing appears in the record to the contrary, it will be presumed that there was evidence introduced at the trial to sustain the findings.

2. SAME—FINDING WITHOUT ISSUES, EFFECT OF.

Where the record shows that the cause was tried as if certain facts found were put in issue, if no objection was made in the court below to the admissibility of the evidence supporting the findings, an objection that the findings were without issues will not be considered on appeal.

Department 2. Appeal from superior court, county of Ventura.

Hall & Hamer, for appellant.

Blackstock & Shepherd, for respondent.

THORNTON, J. The motion to dismiss the appeal is denied. Conceding that the contract made before the patent was issued was void, as against the states of the United States, it appears from the findings that after the patent was issued in November, 1879, another agreement was entered into between the parties, which is not void. This last agreement is as follows:

"That afterwards, to-wit, on or about the twenty-fifth day of December, 1882, in said Ventura county, defendants again demanded that said deed of conveyance should be executed to said lands to said Mercedes D. Dominguez, and that plaintiff then and there agreed he would execute and deliver said deed to said lands so described in his complaint when he, the said defendant, would execute and deliver to him, the said plaintiff, a deed of conveyance to a one-half interest in *his*, the said Prudencia Dominguez's, water-right, known as the 'Pires Ditch,' the said interest being the one-third, and said water-right so demanded by said plaintiff to be conveyed being described as follows: that certain ditch and water formerly owned jointly by Jose Ygna-

cio del Valle, Alfredo Salazar, and Prudencia Dominguez, which said ditch is taken out of the Pires creek at the mouth of the canon, and which passes through the lands of Esteban Dominguez, A. Salazar, R. Strathern, and J. M. Horton; that defendants, in consideration that said plaintiff would then or soon thereafter execute and deliver to said Mercedes A. Dominguez the deed of conveyance to lands so described in his complaint, did execute and deliver to said plaintiff a deed to said water-right as above set forth in this finding, (No. 9;) and that at said time plaintiff accepted said deed in full compensation for said agreement to so convey said land, and caused the same to be recorded in Book 12 of Deeds, of Ventura county records, pp. 121, 122."

It is objected that the finding is not within the issues. As the record shows nothing to the contrary, we must presume that testimony was introduced to establish the facts found by this finding. It does not appear that any objection was made by the plaintiff to the evidence that it was inadmissible under the pleadings, as not being within the issues joined. As the record stands, it appears that the cause was tried as if the agreement found was put in issue. Under such circumstances, we cannot permit the objection to be now made that this finding is of matters outside of the issues joined in the cause. It should not be permitted that the plaintiff should allow the cause to be tried as if issues are regularly joined, and, when the result is a judgment adverse to his claims, urge in this court that no such issue was made in the court below.

The judgment must be affirmed. So ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

68 Cal. 644

HOYT v. NEVADA CO. NARROW-GAUGE R. CO. (No. 9,971.)

Filed February 27, 1886.

WAREHOUSEMAN—LIABILITY OF RAILROADS FOR NEGLIGENCE.

Where a judgment is rendered in favor of plaintiff in an action against a railroad company to recover for loss of goods occasioned by its negligence in the course of its duty in its capacity as warehouseman, such judgment, if supported by the evidence, will not be reversed merely because the complaint avers that defendant is liable in its capacity of "common carrier." MYRICK, J., dissenting.

In bank. Appeal from superior court, county of Nevada.

Searls & Searls and *A. B. Dibble*, for appellant.

Cross & Simonds, for respondent.

BY THE COURT. The complaint herein does not entirely fail to aver such negligence or want of ordinary care as would make the defendant liable in its capacity of warehouseman. It contains an averment of negligence of the defendant in storing the goods,—an averment not necessary to an action for failure to perform a carrying contract. The defendant, after alleging that it had possession of the property as warehouseman, averred due care, etc. Here was a

direct issue as to whether the goods were destroyed by reason of the neglect of defendant in storing them, and upon that issue the jury found in favor of plaintiff. No objection was made by defendant at the trial below to evidence tending to show negligence as averred, and the charge of the court was apparently given on the theory that the liability of defendant as warehouseman was the question before the jury. There was no error in the instructions of the court, except in particulars too favorable to the defendant, nor was there any error in refusing the instructions requested by defendant. Under these circumstances we would not be justified in reversing the judgment and order merely because the complaint avers defendant is liable in the capacity of "common carrier."

Judgment and order affirmed.

MYRICK, J. I dissent.

69 Cal. 69

PEOPLE v. SCOTT. (No. 20,121.)

Filed March 8, 1886.

HOMICIDE—MURDER—SELF DEFENSE—HOSTILE DEMONSTRATIONS BY DECEASED.

Where, on a trial for murder, it appeared that the parties were engaged in gambling, and that defendant bet, and put his money on the table, but subsequently, claiming that he did not have money enough to make good his bet, withdrew the money, upon which deceased, with a knife in his hand, demanded that the money be replaced, and that defendant then drew his pistol, which deceased seized, and in the struggle over it deceased was shot, it was held that instructions of the court to the effect that if defendant could have avoided the necessity of killing the deceased by replacing the money, it was his duty to have done so, are erroneous; and the defendant's withdrawal of the money did not justify any act or demonstration of hostility on the part of deceased, or modify the right of defendant to meet and repel such act or demonstration by adequate and proper means.

In bank. Appeal from superior court, county of Fresno.

S. J. Hinds and *J. H. Daley*, for appellant.

E. C. Marshall, Atty. Gen., for respondent.

MYRICK, J. The defendant was charged with the crime of murder in killing one Feliz. He was convicted of murder in the second degree, and sentenced to imprisonment for ten years. The homicide occurred at a gambling table, in reference to money being bet at a game of poker. One Higgins sat at the right of Scott, and dealt the cards; Feliz sat at Scott's left. After the dealing Scott bet \$4 on the game, and put the money in the "pot." Feliz, the next in order, bet \$2.50. Scott, remarking to Feliz that he had not money enough, withdrew the \$4 he had bet. Feliz demanded that it be replaced, Feliz having at the time a knife in his hand. Scott drew a pistol. Feliz seized the pistol and in the struggle was shot, whether by design or by an accident, in consequence of the struggle, was for the jury to determine.

At the trial the court below instructed the jury that if the defendant "had agreed to return the money claimed to have been removed by him from the gambling pot, and could have avoided any necessity for killing the deceased by doing so; and that by so doing he would have been in no danger to either life or bodily harm from the deceased; and yet, with full knowledge of this situation, and after he had agreed to return the money, by doing which all danger to him would have been avoided with safety to himself, he shot and killed the deceased in a cool and deliberate manner,—then such killing will be murder;" and the court also instructed the jury that if the defendant prior to the fatal shot, if he fired it, "had agreed to return the money alleged to have been removed by him from the gambling pot, and could have avoided the necessity of killing the deceased by replacing the money back after agreeing to do so, the court instructs the jury that it was his duty to do so; and as between complying with such promise and slaying the deceased, it was his duty to adopt that course which would have prevented and avoided any occasion for the shooting, if that course could have been pursued with safety to the defendant." We are not aware of any rule of law by which the withdrawing of his money by the defendant, or his refusing to replace it, even after a promise so to do, would have justified any act or demonstration of hostility on the part of Feliz, or have at all changed or modified the right of defendant to meet and repel such act or demonstration by adequate and proper means. These instructions implicitly carried the doctrine of "retreating to the wall" to an extent hitherto unknown. The giving of these instructions is manifest error, and for such error the judgment and order are reversed, and the cause is remanded for a new trial.

We concur: SHARPSTEIN, J.; McKEE, J.

ROSS, MCKINSTRY, and THORNTON, JJ. We think the last instruction quoted in the opinion erroneous, and therefore concur in the judgment.

69 Cal. 71

KIMPLE v. CONWAY and others. (No. 9,700.)

Filed March 9, 1886.

1. APPEAL FROM ORDER OF NONSUIT.
An order of nonsuit is not an appealable order.
2. SAME—FINAL JUDGMENT—ENTRY PREREQUISITE TO APPEAL.
An appeal cannot be taken from a final judgment until the judgment has been entered.
3. SAME—NOTICE OF APPEAL—CONSTRUCTION OF.
Where the language of a notice of appeal is that the appeal will be taken "from the order denying plaintiff's motion for a rehearing," the word "rehearing" will be construed as intended for "new trial," if it appears that the court below so understood it.

Cal.Rep. 9-11 P.—24

4. SAME—JUDGMENT ROLL IN TRANSCRIPT.

On an appeal from an order denying a motion for a new trial, the judgment roll must be in the transcript.

Department 2. Appeal from superior court, county of San Francisco. Motion to dismiss appeal.

A. M. Heslip and D. L. Smoot, for appellant.

W. R. Daingerfield, for respondents.

THORNTON, J. Motion to dismiss appeals taken by the plaintiff. The notice of appeal is as follows:

"You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the state of California from the judgment or order of nonsuit in the above-entitled cause; also order dissolving preliminary injunction in said cause therein entered in the said superior court on the eighth day of February, 1884, in favor of the defendants in said action, and against said plaintiff, and from the whole thereof; also overruling and denying plaintiff's motion to set aside said judgment or order of nonsuit, and dissolving plaintiff's preliminary injunction, and for granting a rehearing therein, entered in said superior court on the twenty-first of May, A. D. 1884, in favor of said defendants in said action and against said plaintiff."

1. There is no appeal allowed by law from an order of nonsuit, nor does the law allow an appeal from a judgment of nonsuit. If it should be urged that the judgment of nonsuit is the final judgment from which an appeal is allowed, the plain reply is that the transcript does not show that a final judgment has ever been entered. No appeal can be taken from a final judgment until it has been entered. *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43.

2. The transcript contains no order dissolving an injunction. On appeal from that order the order must be furnished in the transcript. Code Civil Proc. § 951.

3. The third appeal mentioned in the notice of appeal, we are of opinion, is an appeal from an order denying a new trial. The notice of appeal states it as an appeal from overruling and denying plaintiff's motion for granting a rehearing. Such a rehearing can signify nothing else than a new trial, for the only mode of rehearing the cause is by a new trial. That the word "rehearing" is used here in the sense "new trial" is borne out by the use of the words in the notice of intention to move for "a rehearing or new trial." These words "rehearing" and "new trial" are there used as synonymous. It further appears that the court below so understood these words, treated this notice as a notice of motion for a new trial, and denied it.

The only remaining objections to the appeals is that the transcript does not contain the complete judgment roll. Of this judgment roll a copy of the final judgment is wanting. On appeal from an order denying a motion for a new trial the judgment roll must be in the transcript. Code Civil Proc. §§ 952, 661.

The appeal from the order of nonsuit and judgment of nonsuit is dismissed. The other appeal will stand dismissed unless appellant shall furnish at the hearing of this cause copies of the papers above designated as wanting in the transcript, certified and attested in the mode required by law. The other questions made on the argument are reserved until the hearing of the cause. They do not properly come before us until such hearing. Ordered accordingly.

We concur: McKEE, J.; SHARPSTEIN, J.

69 Cal. 73

CITY AND COUNTY OF SAN FRANCISCO v. DUNN, Comptroller, etc.
(No. 11, 362.)

Filed March 9 1886.

STATE AID TO INSTITUTIONS FOR SUPPORT OF AGED INDIGENTS.

Under the provisions of the California constitution for the maintenance of aged indigents, authorizing state aid to private institutions therefor, and providing that when any city and county, county, city, or town, shall provide for the support of aged persons in indigent circumstances, such county, etc., shall be entitled to receive the same *pro rata* appropriation as may be granted to such private institutions, upon appropriations being made to the first mentioned institutions the proviso relative to such other institutions becomes self-executing, and no further legislative action is required to put the same into force.

In bank. Application for writ of mandate.

John L. Love for petitioner.

Langhorne & Miller, for respondent.

MYRICK, J. This is an application for a writ of mandate compelling the respondent to draw his warrant upon the state treasurer for an amount allowed by the board of examiners, on petitioner's behalf, for the support and maintenance of aged persons in indigent circumstances. The first and second provisos of section 22 of article 4 of the constitution, have reference to institutions of a private character, as distinguished from public institutions; and, after authorizing state aid to such institutions, the section proceeds to declare in the third proviso, that whenever any county, city and county, city, or town shall provide for the support of aged persons in indigent circumstances, (and others named,) such county, city and county, city, or town shall be entitled to receive the same *pro rata* appropriation as may be granted to the institutions referred to in the first and second provisos. By the act of March 15, 1883, (St. 1883, p. 380,) the legislature granted aid to the institutions referred to in the first and second provisos, and appropriated \$100 per annum to each person supported and maintained in such institutions. Such appropriation having been made, the third proviso became self-executing as to counties, cities and counties, cities, and towns, and no further legislative action was required. This proviso is a portion of a section

which declares that no money shall be drawn from the treasury but in consequence of appropriations made by law, and qualifies that declaration. It acts of itself as an appropriation upon the other appropriation being made. The evident intent of the constitution is to vest in the legislature the discretion to grant state aid to institutions for support of orphans and indigent aged persons; and, upon the exercise of that discretion, to appropriate to the aid of counties, cities and counties, cities, and towns, for similar purposes, *pro rata* amounts. The demurrer of petitioner to the answer of respondent is sustained. In pursuance of the stipulation of the parties, dependent upon the ruling on demurrer, it is ordered that the writ issue as prayed for.

We concur: ROSS, J.; SHARPSTEIN, J.; THORNTON, J.

68 Cal. 549

PEOPLE v. EDSON. (No. 20,145.)

Filed February 19, 1886.

1. BRIBERY—INFORMATION, SUFFICIENCY OF.

An information for bribery substantially in the language of the statute is sufficient.

2. CRIMINAL LAW—TRIAL—INSTRUCTIONS AS TO CHARACTER OF WITNESSES.

An instruction in a prosecution for bribery that the jury might "take into consideration the character, vocation, and profession of witnesses * * * for two purposes: (1) In the consideration of their credibility as witnesses; and (2) where the witnesses are shown to have been active parties to the transaction that is the subject of inquiry. You can consider their character, profession, and vocation in judging of the probability of their being parties to a transaction as has been detailed; you can judge whether these parties would have been likely to offer a bribe to an officer, and, in determining that as a fact, you can judge of the character of the party who, it is alleged, made that approach,"—is erroneous, because it is susceptible of the interpretation that the jury could infer that the witnesses for the prosecution would be likely to approach an officer with a bribe from the fact that they were persons of bad character; and that from such probability of conduct on the part of those witnesses the jury could draw a further inference of the guilt of the defendant.

Commissioners' decision.

In bank.

J. H. Campbell and *W. G. Lorigan*, for appellant.

Howell C. Moore and *Daniel W. Burchard*, for respondent.

FOOTE, C. Edson, the defendant, appeals from a judgment of conviction of bribery, and from an order denying him a new trial. The objection made to the sufficiency of the information is not tenable. Its allegations were substantially in the language of section 68 of the Penal Code. *People v. Markham*, 64 Cal. 157.

Inter alia, the court charged the jury as follows:

"It is proper for the jury to take into consideration the character, the vocation, and the profession of witnesses, as well as their appearance upon the stand, for two purposes: One is in the consideration of their credibility as wit-

nesses; and, *secondly*, where the witnesses are shown to have been active parties to the transaction that is the subject of the inquiry, you can consider their character, their profession, and vocation in judging of the probability of their being parties to such a transaction as has been detailed; you can judge whether these parties would have been likely to offer a bribe to an officer, and, in determining that as a fact, you can judge of the character of the party who, it is alleged, made that approach."

It is claimed for the appellant that the foregoing part of the court's charge to the jury was contrary to law, and that they were thereby misled, to the prejudice of the defendant, in this: that the language thus used by the court was susceptible of the interpretation by that body that they could infer that the witnesses for the people, Scossa and Feliz, would be likely to approach an officer with a bribe from the fact that they were persons of bad character; and that from such probability of conduct on the part of those witnesses the jury could draw the further inference of the defendant's guilt as charged. It appeared by abundant evidence that those witnesses were persons of bad character,—the one a prostitute, the other a man who lived with her in a most disreputable relation. The jury may have been misled, as defendant contends, to his injury, by the portion of the charge to which he makes objection, as it is susceptible of the construction he places upon it. We perceive in the record no further prejudicial error. The judgment and order should be reversed, and cause remanded for a new trial.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

68 Cal. 539

GIBSON v. ROBINSON and others. (No. 8,268.)

Filed February 19, 1886.

1. PUBLIC LANDS—RIGHT TO PURCHASE STATE LANDS—REFERENCE OF CONTEST.

On a contest of the right to purchase state lands, an order of the surveyor general reciting what had been done by and for each of the parties to give him a right to purchase the land, and that the plaintiff had filed a demand that the contest be referred to the proper court, and then reading as follows: "It is therefore ordered and directed that the said parties be, and they are hereby, referred to the district court of the Twentieth district, in and for Monterey county, for a final determination of said conflicting claims,"—is sufficient as an order of reference of the contest, and gives to the court jurisdiction.

2. SAME—CONTEST OF RIGHT TO PURCHASE STATE LANDS—PLEADINGS IN.

In a contest to determine the right to purchase state lands, each party is an actor, and must set forth in his pleadings, and show by his proof, that he has strictly complied with the law, and by such compliance has become entitled to become the purchaser of such land.

3. SAME—RIGHT TO PURCHASE STATE LANDS—REFERENCE OF CONTEST.

A contest to determine the right to purchase state lands may be referred, although a certificate of purchase has been issued to one of the parties, as the title of the state is not divested by such certificate.

4. SAME—AFFIDAVIT FOR PURCHASE OF UNSURVEYED TOWNSHIP LAND.

An applicant for the purchase of land in a township the exterior lands of which have been surveyed, but which has not been subdivided, (under the California act of 1869, section 12,) must, in his affidavit for purchase, state that there is no legal claim to the premises other than his own, and that the same are not occupied by any *bona fide* settler, and if he fails to do so he is not entitled to relief in the court; and his application, if defective in such particulars, though made after the passage of the act of March 27, 1872, is not cured by such act, nor by the amendment thereto of April 1, 1878.

Commissioners' decision.

In bank. Appeal from superior court, county of Monterey.

William H. Webb, for appellants.

T. Beeman and *S. O. Houghton*, for respondent.

BELCHER, C. C. This is an action to determine a contest as to which of the parties has the better right to purchase from the state the S. E. $\frac{1}{4}$ of a certain thirty-sixth section of land in Monterey county. In the court below judgment was entered in favor of the plaintiff, and the defendant has appealed. The case comes here on the judgment roll.

The findings show the facts to be as follows: In the year 1854, the north and south exterior lines, and in 1855 the east and west exterior lines, of the township in which the land in controversy is situated were run by the United States surveyor general, but no other steps were taken relative to the survey of the township until the fall of 1874. In the fall of 1874 the township was surveyed and subdivided into sections and quarter sections, as directed by section 2395 of the Revised Statutes of the United States, and on the twenty-seventh day of November of that year the map or plat of the survey was duly approved by the surveyor general and filed in the proper United States land-office. In 1869 one Kellogg settled upon the quarter section in controversy, and placed thereon valuable improvements, consisting of a dwelling-house, barn, corrals, fences, etc. He inclosed and cultivated a part of the land, and resided in the dwelling-house with his family until June, 1871, when he sold and conveyed his improvements and possession to the mother of plaintiff. She at once took possession of the premises, and remained in possession until March, 1873, when she died, leaving the plaintiff her sole heir. From the time of her purchase till her death the plaintiff resided with her on the land, cultivating a part of it and using the balance as a dairy pasture, and ever since her death he has continued in the exclusive possession and occupation of it, claiming ownership as the heir of his mother. On the twenty-first of October, 1870, the defendant filed in the office of the state surveyor general an application to purchase the quarter section, and his application was approved on the twenty-ninth of December, 1873. On the third of March, 1874, he made the first payment, as required by the statute under which the application was made, and the register of the land-office issued to him a certificate of purchase. When he made his application the defendant was not, nor has he ever at any time been, in the possession or

occupation of any part of the land which he sought to purchase. On the thirteenth of January, 1875, the plaintiff filed in the surveyor general's office an application to purchase from the state the south half of the quarter section upon which his buildings and improvements were located, and afterwards, on the fifth of April, 1876, before any action was taken upon his application, and before any intervening adverse rights had accrued or attached, he amended his application so as to include the entire quarter section, of which he was then in the actual possession. All the land in the township was agricultural land, and fit for cultivation, and each of the applicants was qualified and competent to purchase school land from the state.

1. It is claimed for the appellant that the court below had no jurisdiction to hear and determine the case, because no proper and sufficient order was made by the surveyor general referring the contest between the parties to the court for trial. In the complaint it is alleged that the plaintiff demanded of the surveyor general that the contest between the plaintiff and defendant be referred to the proper court for determination, and thereupon that officer did refer said contest to the district court, etc., for adjudication. These averments are not denied by the answer. Attached to the complaint is a copy of the order made by the surveyor general, which, after reciting what had been done by and for each of the parties to give him a right to purchase the land, and that the plaintiff had filed a demand that the contest be referred to the proper court, reads as follows: "It is therefore ordered and directed that the said parties be, and they are hereby, referred to the district court of the Twentieth judicial district in and for Monterey county for a final determination of said conflicting claims." This order was sufficient, we think, to refer the *contest*, and to give the court jurisdiction of the case.

It is further claimed that there was no contest to be referred, because a certificate of purchase had been issued to appellant, and nothing was left for the surveyor general or register to do, except, when final payment should be made, to prepare and issue to him a patent. In support of this view *Somo v. Oliver*, 52 Cal. 378, is cited. In that case it was held that a contest cannot be made before the surveyor general in respect to the right to purchase land for which a patent has been issued to one of the parties; but that is not in point here. A patent divests the state of its title, but a certificate of purchase has no such effect. It has been held in many cases in this state that a contest may be made where only a certificate of purchase has been issued. *Woods v. Sawtelle*, 46 Cal. 389; *Cunningham v. Crowley*, 51 Cal. 128; *Christman v. Brainard*, Id. 534.

2. When the defendant made his application the land was in the occupation of Kellogg, to whose possession the plaintiff afterwards succeeded. The application was made under the act of March 28, 1868. St. 1867-68, p. 507. Section 52 of that act provides that whenever any resident of this state desires to purchase any portion, not

less than the smallest legal subdivision of a sixteenth or thirty-sixth section of any township in the state, which has been surveyed by authority of the United States, he shall make an affidavit stating, among other things, "that there is no occupation of said lands adverse to any that he or she may have; or, if there shall be adverse occupation, then he or she shall state that the township has been sectionized and subject to pre-emption three months or over; and that said adverse occupant (giving his or her name) has been in such occupation for more than sixty days." Section 12 of the act, as amended in 1870, (St. 1869-70, p. 875,) provides "that in cases where the townships have not been subdivided, but township and other lines have been established so as to clearly show that a tract of land is included in any thirty-sixth section, and the parties applying for the same make affidavit that there is no legal claim to the same other than his or their own, and that the same is not occupied by any *bona fide* settler, the surveyor general may approve such locations without the acceptance of the register of the United States land-office, and the register of the state land-office may issue certificate of purchase for the same."

As the township was not surveyed and sectionized until 1874, it is apparent that defendant's application was not, and could not have been, made under section 52. *Medley v. Robertson*, 55 Cal. 396. Was it made under section 12? If it was, his affidavit must have stated that there was no legal claim to the premises other than his own, and that the same were not occupied by any *bona fide* settler. But there is nothing in the complaint, answer, or findings to show that the affidavit contained such statement, and no presumption can be indulged in that it did. In cases of this kind each party is an actor, and must set forth in his pleadings and show by his proofs that he has strictly complied with the law, and by such compliance has become entitled to purchase the land. If he fails to do this, he can obtain no assistance from the courts. *Woods v. Sawtelle*, 46 Cal. 392; *Cadierque v. Duran*, 49 Cal. 356; *Christman v. Brainard*, 51 Cal. 536; *Lane v. Pierdner*, 56 Cal. 122.

But it is said that defendant's application, however defective it may have been, was made good by the act for the relief of purchasers of state lands, which was passed March 27, 1872. St. 1871-72, p. 587. The first section of that act provides:

"When application has been made to purchase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant, or his assigns, upon his making full payment therefor: provided no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase."

Obviously this had reference to cases where not only the application, but part or full payment, had been made, and the certificate of

purchase issued prior to the time of its passage. *Rowell v. Perkins*, 56 Cal. 226. It was a curative act, and not prospective in its operation; and as the defendant did not make any payment, or receive his certificate till March, 1874, he can claim nothing under it.

Our attention is also called to the act of April 1, 1878, amending the last-named act. St. 1877-78, p. 914. This act cannot affect the case for the reason that it was passed after the plaintiff made his application, and after this action was commenced, and by its terms is not to be "construed to remedy any defect in any application, or the issuing of any certificate, other than that of payments in the wrong county."

When the plaintiff made his application to purchase the land he was in possession, and had a right to purchase it, unless the defendant had acquired a prior and better right to do so. As no such prior and better right was shown, the court properly entered judgment in favor of the plaintiff, and that judgment should be affirmed.

We concur: SEARLES, C., FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

69 Cal. 559

KLUMPKE v. BAKER and others. (No. 9,098.)

Filed February 25, 1886.

1. HUSBAND AND WIFE—GRANT TO WIFE BY HUSBAND—SUBSEQUENT TITLE VESTS IN WIFE.

A conveyance of land by a husband to his wife by deed, containing the word "grant" in the proper clause thereof, and containing no other words in any part of the deed indicating a less estate, raises the presumption that a fee-simple title was intended to pass, and a subsequent reconveyance to him of a naked legal title from those to whom he had previously executed a deed of trust to secure the payment of a debt does not inure to the benefit of the community, but passes, by operation of law, to the wife by virtue of such former conveyance by the husband to her by grant.

2. TAXATION—ASSESSMENT TO ONE NOT OWNER—VALIDITY OF TAX DEED.

A tax deed to land owned by a married woman will pass no title if it be based upon an assessment to her husband, who does not own the land, nor any interest therein.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

E. W. Ashby, for appellant.

W. C. & Isaac Burnett, for respondents.

FOOTE, C. The appellant, Klumpke, instituted this action to quiet the title to land which he had bought at tax sale. The court below (the trial being had without a jury) gave judgment for him, but afterwards, on motion of defendants, made and entered an order granting them a new trial, and from that this appeal is prosecuted. That tribunal assigned as a reason for making the order that, as appeared

from the record, the title to the land at the time of its assessment for taxes was in one of the defendants, Mrs. Mary A. Baker, and it had been assessed to George H. Baker. The appellant denies that such was the fact and alleges that the owner of the land was George H. Baker. It appears that the latter obtained title to the land, by deed from the Central San Francisco Homestead Association, in August 3, 1869; that on November 1, 1875, he made a conveyance of it to his wife, Mary A. Baker, who entered into possession thereof, and has so remained ever since, claiming it as her separate property under that deed. That on the second day of May, 1870, he executed a deed of trust conveying the same property to E. W. Burr and B. D. Dean, as trustees for the Savings & Loan Society, the object thereof being to secure the payment to said society of a loan of money made to him; that said money was paid on the seventeenth of August, 1876, and reconveyance under the terms of the trust deed made by said trustees to George H. Baker; that the land was sold for the taxes of the year ending June 30, 1881, and a deed thereof made to the plaintiff by the tax collector on the eleventh of August, 1882. The grounds of the plaintiff's claim to the land under his tax deed were—*First*, that the deed which George H. Baker made to his wife had no greater effect than an instrument of quitclaim, and that therefore no title afterwards acquired by him would inure to her benefit, *second*, that even conceding the deed to be in fact one "granting" the land, the husband's after-acquired title inured to the benefit of the community, and as such was properly assessed to the husband.

It is plain from an examination of the conveyance from the husband to his wife of November 1, 1875, that, containing as it did the word "grant" in the proper clause thereof, without other words in any other part of the deed indicating a less estate, that a fee-simple title must be presumed to have been intended to pass. Civil Code, § 1105; *Mabury v. Ruiz*, 58 Cal. 11-15. And the title which the husband afterwards acquired, coming by a reconveyance to him of a naked legal title from those to whom he had executed the deed of trust to secure the payment of a debt, did not inure to the community, but passed by operation of the law to his wife by virtue of his former conveyance to her by grant. Civil Code, §§ 1072, 1106; *Montgomery v. Sturdivant*, 41 Cal. 290. The land in controversy not having been assessed to its true owner, she being known, but to her husband, who had no title thereto, the tax deed to the plaintiff gave him none. Section 3628, Pol. Code; *Hearst v. Egglestone*, 55 Cal. 365.

The order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

68 Cal. 593

THOMPSON v. DOAKSUM, Sr., and others. (No. 9,546.)

Filed February 25, 1886.

1. PUBLIC LANDS—POWER OF CONGRESS OVER INDIAN LANDS.
The exclusive right of pre-emption to all Indian lands lying within the territories of the United States is vested in congress.
2. PROPERTY—TITLE TO LAND—LAW OF NATIONS AFFECTING.
Title to land is dependent on the law of the nation in the territory of which the land lies.
3. PUBLIC LANDS—LAND TITLES IN CALIFORNIA—TREATY OF GUADALUPE HIDALGO.
All lands not held in private ownership by a legal or equitable title, in California, became vested in the United States under the treaty of Guadalupe Hidalgo. In the case of inchoate titles the legal title passed to the United States, which held it subject to the trust imposed by the treaty and equities of the grantee, and the execution of this trust was a political power, to be exercised in such manner as the government might deem expedient.
4. SAME—INDIAN LANDS IN CALIFORNIA—PRE-EMPTION.
Where lands in California were held by Indians under title by occupying at the time of the treaty of Guadalupe Hidalgo, unless a claim therefor was presented to the commissioners appointed under the act of the United States of March 3, 1851, within the time limited by such act, the land became a part of the public domain, and as such became open to pre-emption.
5. SAME—UNITED STATES PATENT TO LAND—CONCLUSIVENESS OF.
A United States patent to public lands is conclusive evidence of title in the grantee, in any collateral attack thereon, as against those not connecting themselves with the government title.
6. SAME—AGREEMENT BY PRE-EMPTOR TO SELL.
An agreement by a pre-emptor of public land to convey to another when he shall receive his patent is void, and not enforceable.
7. ESTOPPEL IN PAYS—CONTRACT—OPERATION OF.
An estoppel *in pays* can have no greater force or effect in binding parties than would a contract including the very subject-matter urged by way of estoppel.
McKEE, J., dissenting.

Commissioners' decision.

In bank. Appeal from superior court, county of Plumas.

J. D. Goodwin and *D. W. Jenks*, for appellants.*R. H. F. Variel*, for respondent.

SEARLS, C. Action to quiet title to a tract of land in Plumas county. Plaintiff had judgment, and defendants appeal. On the thirtieth day of July, 1878, one D. D. Blunt received from the government of the United States a patent for the land in question, under a homestead filing made in 1873, and the title thus acquired is vested in the plaintiff. The bill of exceptions shows that at the trial defendants offered evidence tending to prove the allegations of their answer numbered fourth, fifth, sixth, and seventh, to which plaintiff objected, which objection was sustained by the court upon the ground that said allegations were, and any evidence tending to prove them was, immaterial, and this ruling is assigned as error.

Defendants are Indians, belonging to a tribe generally known as the "Big Meadows" tribe, and called in their own language the "Nahkomas." The allegations of the answer sought to be sustained

by the testimony offered are, in substance and effect, that at a time unknown to defendants, but which they are informed and believe, and therefore allege, was prior to October 1, A. D. 1492, said lands being vacant, unoccupied, and unclaimed, the ancestors and predecessors of defendants discovered, entered upon, claimed, and occupied said tract of land, and built their dwellings thereon, and that ever since said date defendants and their said ancestors and predecessors have continuously owned, claimed, and occupied said land, and used the same for a village-site and burial-place, and for supplies of water, fuel, etc., according to the customs and necessities of their people; that the right thus acquired has never been ceded, sold, granted, transferred, or relinquished to any nation, government, state, or individual, but remains to them by right of discovery and occupation; that no treaty has ever been made by them with any state or government for their support, maintenance, or education, and no proceedings have ever been had by which their title to said land has been extinguished.

The right or title attempted to be set up by appellants has the merit of age, if no other. The relation of the Indians to the lands they occupied, their title thereto, their power of alienation and the mode of its accomplishment, were questions much discussed in the earlier days of our government. On the discovery of America the leading nations of Europe eagerly sought a foothold upon its soil, and each sought to appropriate all it could discover and occupy. Its great extent afforded an ample field to the ambition and enterprise of all. To avoid conflicting settlements and consequent war with each other, the principle was established that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The relations between the discoverer and the natives were to be regulated by themselves. These relations were to be settled upon the basis of ownership of the soil by the discoverer, with the right of occupancy in the original inhabitants. So long as they remained at peace with the superior race they were entitled to be protected in their occupancy, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country.

Congress has the exclusive right of pre-emption to all Indian lands lying within the territories of the United States. *Johnson v. McIntosh*, 8 Wheat. 543; *Fletcher v. Peck*, 6 Cranch, 142. The United States own the soil, as well as the jurisdiction, of the immense tracts of unpatented lands included within their territories, and of all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual states; and the Indians have only a right of occupancy, and the United States possess the legal title subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title

of occupancy either by conquest or purchase. Kent, Comm. 257. The *status* of the Indian, and his relation to the land by him occupied, have received careful consideration at the hands of Chancellor KENT, and his views, as expressed in the third volume of his Commentaries, pages 379 to 400, throw much light upon the question under discussion.

It seems, however, unnecessary to discuss the several propositions involved in the foregoing authorities. The subject in the present case is confined to a narrower limit. The title to land is dependent entirely upon the law of the nation in which it lies. Under the English law the king was the original proprietor or lord paramount of all the land within the kingdom, and the sole source of title. We have adopted the same principle, and applied it to our republican government, and the doctrine with us is settled beyond a peradventure that valid individual title to land within the United States is derived from the grant of our own local governments, or from that of the United States, or from the predecessors of our government.

The lands within the territorial limits of the state of California were ceded to our general government by the republic of Mexico under the treaty of Guadalupe Hidalgo, of February 2, 1848. By that treaty the United States became vested with the title to all the lands in California not held in private ownership by a legal or equitable title. By the law of nations private rights were sacred and inviolable, and the obligation passed to the new government to protect and maintain them. The term "property," as applied to lands, embraces all titles, legal or equitable, perfect or imperfect. *Teschemacher v. Thompson*, 18 Cal. 12. The treaty operated as a confirmation *in presenti* of all perfect titles to lands in California held under Spanish or Mexican grants. *Minturn v. Brower*, 24 Cal. 644. In the cases of inchoate title—cases where an equity only vested in the claimant—the legal title passed to the United States, which held it subject to the trust imposed by the treaty and equities of the grantee. The execution of this trust was a political power, to be exercised in such manner as the government might deem expedient. *Leese v. Clark*, 18 Cal. 535.

The United States, for the purpose of discharging the obligation resting upon it under the treaty with Mexico, through congress, the repository of its political power, at the second session of the Thirty-first congress, passed an act to ascertain and settle the private land claims in the state of California. Under that act a commission was created for the purpose of hearing and determining the validity of claims to land within the state. The thirteenth section of the act provided "that all land the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and *all lands* the claims to which shall not have been presented to the commissioners within two years after the date of this act, (March 3, 1851,)

shall be deemed held, and considered as a part of the public domain of the United States." There is no pretense that the claim set up by defendants in their answer was ever presented to the commissioners under this act of congress, and when the time for such presentation expired the land in question must be deemed and taken as having become a part of the public domain.

Again, the patent to plaintiff's grantor is to be taken as conclusive evidence of title in the grantee, as against those not connecting themselves with the government title, in any collateral attack thereon. If defendants had any right to the land, it should have been asserted in the land department pending the application for patent, or by direct proceeding on the part of the government to set aside the patent. There was no error in the refusal of the court to admit the testimony offered.

The second point made by defendants is that plaintiff is estopped by the agreement of his grantor set out in the findings, and of which he had notice at the date of his purchase. It appears that Blunt, the grantor of plaintiff, had filed in the proper United States land-office, in the spring of 1870, his declaratory statement claiming the land in question under the pre-emption laws of the United States, and had received a certificate of pre-emption therefor. That in September, 1870, the agreement set out in the findings was entered into; that thereafter, and some time in 1873, said Blunt changed his pre-emption filing in the Marysville land-office to a homestead filing upon the same premises made in the Susanville land-office, in which district the lands were then situate; and that afterwards, in due time and in 1878, he made the requisite proof, and on the thirtieth day of July, 1878, received a United States patent under his homestead application. If we accord to the novel proceeding had before the justice all that can possibly be claimed for it, viz., that it amounted to a contract on the part of Blunt to convey to defendants when he should thereafter procure a patent, it can avail nothing, as such an agreement by a pre-emptor is void and cannot be enforced at law or in equity. *Huston v. Walker*, 47 Cal. 484; *Damrell v. Meyer*, 40 Cal. 166. An estoppel *in pais* can have no more force or effect in binding the parties than would a contract including the very subject-matter urged by way of estoppel. The findings support the conclusion reached by the court below, and the judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

McKEE, J., dissenting.

ROSS, J. I concur in the judgment, on the ground that whatever right, if any, the defendants have to the land in question should have been asserted in the land department of the government pending the application for patent, or by direct proceedings on the part of the government to vacate the patent. So long as the patent exists it is conclusive evidence of title in the grantee and his successors in interest, as against those not in privity with the government.

68 Cal. 590

WILSON v. ATKINSON. (No. 9,970.)

Filed February 25, 1886.

1. TAXATION—TAX DEED—EFFECT TO STRENGTHEN TITLE.

Void tax deed is inadmissible to strengthen title by adverse possession, if there is no evidence, or offer of evidence, to show that the person in possession, or his grantor, entered under the deed, or continued to hold adverse possession thereunder.

2. SAME—VOID TAX DEED AND ASSESSMENT, EFFECT AS EVIDENCE OF TITLE.

Where a tax deed is void, the assessment on which it is based cannot be relied on as the basis of any title.

3. APPEAL—BILL OF EXCEPTIONS—PRESUMPTION CONCERNING EVIDENCE.

The presumption is that all evidence tending to explain an objection taken has been inserted in a bill of exceptions, and if, from such evidence, it appears that the trial court erred in ruling against the appellant as to material matter, such error will be ground for reversal.

MCKEE, J., dissents.

In bank. Appeal from superior court, county of Placer.

C. A. & F. P. Tuttle, for appellant.

Hale & Craig, for respondent.

BY THE COURT. The deed of the tax collector conveyed no title. Inasmuch as the bill of exceptions shows no evidence, or offer of evidence, tending to prove that defendant or her grantor entered under the deed, or continued to hold adverse possession thereunder, the deed cannot be claimed to have been admitted to extend the limits of an adverse possession. The tax deed being void, the defendant could not rely on the *assessment* as translativ^e of title. *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 367. But as the court below directed a judgment for the defendant, it is suggested that the judgment may have been based on evidence proving an adverse possession. This is true, but it is also true that the court may have ordered the judgment upon the assumption that the defendant had acquired *the title* by virtue of her deraignment from the purchaser at the tax collector's sale. The Code of Civil Procedure provides that, in a bill of exceptions, "the objection must be stated with so much of the evidence of other matter as is necessary to explain it, and no more." Section 648. When the bill of exceptions reaches us, we must presume that all the evidence tending to explain the objection taken is inserted in the bill. If from such evidence it appears that the court below erred in ruling against the appellant as to a

material matter, this is ground for reversal. We must take it for granted that the judge of the trial court, in settling a bill of exceptions, will see to it that such of the testimony as will sustain his ruling, if any such was given, is incorporated in the bill of exceptions.

Judgment reversed, and cause remanded for a new trial, with leave to the parties to amend their pleadings as they may be advised.

McKEE, J. I dissent. The question arising out of the record on appeal in this cause is whether the court below erred in overruling objections made at the trial of the cause to the admissibility in evidence of a tax deed offered by defendant. Defendant's answer contained a special defense of the statute of limitations. On the trial of the issues raised by the answer the tax deed was admissible in evidence for the purpose of showing adverse entry and occupation by the defendant under it for the statutory period, and thus proving title under sections 322, 323, Code Civil Proc. No doubt the deed itself would not be sufficient evidence of an adverse possession. But that is not the question. The question is, was it admissible in connection with other evidence of such a possession? for, as the ruling of the court upon the admissibility of the deed is the only ruling challenged and sought to be reviewed, and as the defendant had judgment, this court is bound to presume that there was sufficient evidence to sustain the judgment.

I think there was no error in admitting the deed in evidence.

68 Cal. 554

BROOK v. HORTON and others. (No. 8,768.)

Filed February 25, 1886.

1. MUNICIPAL CORPORATIONS—VACATING STREET IN CITY—POWER OF LEGISLATURE.

The state legislature has power to vacate a street in a city, and may therefore properly delegate such power to the city authorities.

2. SAME—ALTERATION OF STREET—EFFECT OF.

The alteration of a street or way, by the proper authorities, operates as a discontinuance of those portions of the way which do not come within the newly-assigned limits, and, to have such effect, no special order of discontinuance is essential.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

William Levison, for appellant.

J. F. Cowdery, for respondents.

BELCHER, C. C. In 1855 an ordinance was passed by the common council of the city of San Francisco, which made it the duty of the city surveyor, acting in conjunction with three commissioners, to be appointed for the purpose, "to furnish, by way of recommendation to the common council, within one month from the date of their ap-

pointment, a plan for the location and dimensions of the streets to be laid out within the city limits west of Larkin and south-west of Johnston streets." Commissioners were appointed, and they and the surveyor agreed upon and reported a plan or map as required. This plan or map was approved and adopted by the board of supervisors of the city and county in October, 1856, and "declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes" in that part of the city named in the ordinance. Subsequently the order and ordinances under which the commissioners were appointed, and the plan or map was prepared, reported, and approved, were ratified and confirmed by the legislature. St. 1858, p. 52. Upon the plan or map so made, which has since been known as the "Van Ness Ordinance Map," was a street running north and south, called Channel street, and having a width of 200 feet. East of Channel street, and running parallel with it at a distance of 132 feet, was a street called Alabama street, and having a width of 80 feet. On the west side of Channel street were three streets, since known as Seventeenth, Eighteenth, and Nineteenth streets, which met it at right angles and terminated at its western margin. On the east side of Channel street were four streets, called Santa Clara, Mariposa, Solano, and Butte streets, which met it at right angles, and terminated at its eastern margin.

In April, 1862, an act was passed by the legislature entitled "An act to establish the lines and grades of streets in the city and county of San Francisco," (St. 1862, p. 407;) and in April, 1864, another act was passed having the same title, and amendatory of the former act, (St. 1863-64, p. 460.) By both acts the city and county of San Francisco was authorized to establish the lines and grades of the streets within the limits of the city, as established in 1851, and for that purpose a "board of city engineers" was created, who were to proceed, as soon as practicable, to survey all the streets, and fix the lines thereof, within the limits named, and to make a map or maps showing thereon the width of every street, and to fix monuments for the preservation of the street lines so established. The maps, when completed, were to be delivered to the board of supervisors, and notice thereof given by publication. Objections to them might then be made by any property owner. If no objections were made, or those made were overruled, and the maps were finally approved and adopted by the board, it was provided that "then such maps and profiles shall stand as the legal and valid official plan of said city to determine the lines of the streets and the grades thereof." Under these acts a map was made which, after due notice, was approved and adopted by the board on the thirtieth of January, 1866, and declared to be "the legal and valid official map of the city and county of San Francisco to determine the lines of the streets and the grades thereof." This map, known as the "City Engineer's Map," was the result of actual sur-

veys, and the streets, as represented upon it, were laid out on the ground, and monuments were placed at the crossing of every street. In June, 1869, the board of supervisors ordered a contract to be entered into with the city and county surveyor to prepare a map of the city and county according to official surveys. A map was prepared, known as the "Humphrey's Map," and in October, 1870, was, by an order of the board, "approved, adopted, and declared to be the legal official map of the city and county of San Francisco."

Upon these two maps Channel street, as represented on the Van Ness ordinance map, does not appear, and in place of it is a narrow street called Treat avenue. Alabama street, as represented on that map, has been removed, and adjoining, and along the east side of the place formerly occupied by it, is Harrison street. Seventeenth, Eighteenth, and Nineteenth streets, instead of stopping at Channel street, are extended to Harrison street. Santa Clara, Mariposa, Solano, and Butte streets, instead of going on to Channel street, are made to terminate at Harrison street. The premises in controversy lie between Channel street and Alabama street, and are a part of Mariposa street, as these streets are laid down on the Van Ness ordinance map. The plaintiff purchased the premises in 1869, and has since occupied and improved them. At the time of this purchase there were upon the premises a dwelling-house and some other improvements, which were erected as early as 1861.

The defendants contend, and the court below held, that when Mariposa street was laid out on the Van Ness ordinance map it was dedicated to the public, and that as so laid out it is still a street dedicated to public use. The plaintiff, on the other hand, contends that that part of Mariposa street which lies between Channel street and Alabama street, as represented on the Van Ness map, was discontinued and abandoned as a street when the engineers' map and Humphrey's map were made and approved. There can be no question that the legislature has competent power to vacate a street in a city, and that it may delegate that power to the municipal authorities of the city. *Polack v. S. F. Orphan Asylum*, 48 Cal. 490. Here the legislature appointed a board of engineers, and directed them to survey all the streets of the city within certain limits, and to fix the lines thereof, and to make maps showing such lines, and it declared that when the maps should be made and approved by the municipal authorities they should stand as the legal and valid official plan of the city. This gave the board of city engineers full power to make the map which they presented, and it constituted that map, when approved, the official map or plan of the city. It was direct legislative authority for the changes made from the Van Ness map, and necessarily operated to discontinue such streets, and parts of streets, as appeared on the Van Ness map, and did not appear on the new map. It has been held in Massachusetts, and we think it must be held here, that an alteration by competent authority of an existing road

or way is a discontinuance of those portions of the way which do not come within the newly-assigned limits and no special order of discontinuance is necessary. *Com. v. Westborough*, 3 Mass. 406; *Com. v. Cambridge*, 7 Mass. 158; *Bowley v. Walker*, 8 Allen, 21. If this be not the rule, then Channel street, which was laid out on the Van Ness map 200 feet wide, is still a street of that width, though Treat avenue was made to take its place with a width of only 80 feet, and the balance of Channel street may now be covered with valuable improvements.

In our opinion the premises in controversy are not now a part of Mariposa street, and the judgment and order should therefore be reversed, and cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reason given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

68 Cal. 576

PEOPLE v. McCURDY. (No. 20,065.)

Filed February 25, 1886.

1. CRIMINAL LAW—INFORMATION—COMMITMENT.

Until an examination and commitment by a magistrate, a defendant cannot be presented by information, under the California constitution; but this does not imply that an information will be set aside because of mere irregularities in the preliminary examination and commitment.

2. SAME—ORDER OF COMMITMENT, SUFFICIENCY OF.

A justice's commitment indorsed upon the depositions, and signed by him, and in the language of the statute, as follows: "It appearing to me that the offense in the written depositions mentioned has been committed, and that there is sufficient cause to believe the within-named (giving name) guilty thereof, I order that he be held to answer to the same," etc.,—is sufficient.

3. SAME—PRESUMPTIONS AS TO REGULARITY OF COMMITMENT AND INFORMATION.

On a motion to set aside an information, it is presumed, in the absence of a showing to the contrary, that an order of commitment, providing that the defendant be committed to the custody of the sheriff without bail, was made out and delivered to the proper officer, and that it contained every essential requisite; and if the order committing the defendant to answer was filed on the same day with the filing of the information, the court must also presume in favor of the regularity of the proceedings, in the absence of any showing that the information was not filed subsequent to the commitment.

4. SAME—TRIAL—VERDICT—CONFLICTING EVIDENCE.

Where the evidence is conflicting, a verdict will not be disturbed on the ground that it was contrary to the evidence.

5. SAME—INSPECTION OF ARTICLES BY JURY.

In the absence of objection by either the prosecution or defense, it will be presumed that the consent of the parties was had to an inspection by the jury, in court, after the close of the evidence, and arguments of counsel and instructions by the court, of articles of wearing apparel having a bearing on the case.

6. SAME—CONVERSATION IN PRESENCE OF JUROR.

Where, during the progress of the trial, one of the jurors joined certain persons who were engaged in conversation in reference to the case, whereupon one of the speakers called attention to the fact that a juror was present, and that they must not talk, and the juror replied: "Go ahead; it wouldn't make

any difference,"—it was *held*, on a charge of improper conduct of jurors, that this remark did not evidence on the part of the juror any disposition to act improperly in the case.

7. HOMICIDE.—MURDER.—INSTRUCTIONS.

In a criminal trial instructions must harmonize as a whole; and if they fairly and correctly present the law on the issues tried, it will not be ground for disturbing the judgment that a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.

8. SAME.—EVIDENCE OF FOOT-PRINTS.

Evidence of measurements of foot-prints about the body of the deceased, though made two weeks after the homicide, is not incompetent because not made sooner.

9. CRIMINAL LAW.—NEW TRIAL.—NEWLY-DISCOVERED EVIDENCE.—WHEN GRANTED.

A new trial will not be granted on the ground of newly-discovered evidence if no reasons are given why the witnesses could not have been present and testify at the former trial, nor when such evidence would be cumulative, or would only tend to impeach the witnesses of the prosecution.

Commissioners' decision.

Department 2. Appeal from superior court, county of Lake.

Murat Masterson and Ben. P. Tabor, for appellant.

E. C. Marshall, Atty. Gen., for the People.

SEARLS, C. The defendant was accused by information of the murder of one Charles W. Dreher, in the county of Lake, on the fourteenth day of July, 1884, and as the result of a trial was convicted of murder in the first degree, and sentenced to suffer the extreme penalty of the law. The appeal is from an order denying a motion for a new trial, and from an order denying a motion in arrest of judgment.

The information was filed on the thirteenth day of August, 1884. On the eighteenth day of August, 1884, defendant, by his counsel, moved the court to set aside the information upon the ground "that before the filing thereof the defendant had not been legally committed by a magistrate in this: the commitment endorsed upon the depositions herein does not state the name of the person alleged to have been murdered, nor is it dated." The motion was denied. The order indorsed upon the depositions was almost in the exact language of section 872 of the Penal Code, and was sufficient. As the order of the justice provided that the defendant be committed to the custody of the sheriff of Lake county, without bail, we must presume, in the absence of a showing to the contrary, that a warrant of commitment, as required by section 877 of the Penal Code, was made out and delivered to the proper officer, and that it contained every essential requisite. Whereas, in this case, the order committing the defendant to answer was filed on the same day with the filing of the information, we must presume, in favor of the regularity of the proceedings, there being no showing to the contrary, that the information was filed subsequent to the commitment. If such was not the fact, it devolved upon the defendant to show it affirmatively. Filing the order of commitment sufficiently fixes the date,

and it is to be read in connection with the depositions which show that an examination was had. A defendant cannot be presented by information until after an examination and commitment by a magistrate. Const. Cal. art. 1, § 8; Pen. Code, § 809; *Kalloch v. Superior Court*, 56 Cal. 229. The examination and commitment to answer are a prerequisite to the information, but it does not follow that the information will be set aside for mere irregularities in the examination or commitment. If the commitment is legal, it is sufficient. A commitment endorsed upon the depositions, and signed by the justice in the following form, is in the language of section 872 of the Penal Code, and is sufficient: "It appearing to me that the offense in the written depositions mentioned has been committed, and that there is sufficient cause to believe the within named [giving name] guilty thereof, I order that he be held to answer to the same," etc. The warrant of commitment to be delivered to the officer is a different order, and is provided for by section 877, Penal Code.

2. The testimony as to the guilt of the defendant was conflicting to the last degree. Accepting the statements of Fred Dreher, a brother of deceased, as true, there can be no reasonable doubt of the guilt of defendant. If, on the other hand, the testimony of the defendant is to be credited, a well-grounded apprehension is raised that Fred Dreher himself, and not the defendant, was the guilty party. The situation of the parties, the surrounding circumstances, the incentives to the crime, and all of the probabilities, were questions peculiarly within the province of the jury to determine. There being evidence sufficient to support the verdict, we are not at liberty, under the well-established rules of this court, to interfere with such verdict upon the ground that it is contrary to the evidence.

3. At the trial, and after the testimony was closed, and after argument of the cause by counsel and instruction of the jury by the court, one of the jurors asked for the hat of the defendant, worn on the day of the alleged homicide, and also for that of the prosecuting witness, Fred Dreher, the brother of the deceased, and said hats being produced, were received and examined by the jury. The bill of exceptions states that there had been no testimony in reference to the hats, but this is manifestly a mistake, for when the testimony comes to be stated, it appears that after the deceased was missed from camp, and defendant and Fred Dreher had gone in quest of him, and had had a deadly encounter near where the body of deceased was afterwards found, which encounter each charges the other with having commenced, and after both parties had fled from the spot, Fred Dreher was found to have defendant's hat, while his own was afterwards found at the scene of the encounter, and defendant next appeared at Stanton's ranch without a hat. Under these circumstances, it is probable, the jurors desired to examine the hats for evidence in corroboration of the witnesses. No objection was taken by the prosecution or defense to this action, and, in the absence of

objection, we must assume it was by consent of all parties that the hats were submitted to the jury. Had it been otherwise, it is not suggested, and we do not see, how defendant was prejudiced by this action of the court.

4. It is objected that J. A. Tennison, one of the jurors, acted in an improper manner. So far as the record shows, the county clerk and one of the counsel for the prosecution, during the progress of the trial, were engaged in conversation in reference to the case when the juror Tennison joined them, whereupon the county clerk very properly called attention to the fact that Tennison was a juror, and said they must not talk, as "Lane is one of the jurors," to which Tennison replied to the effect that "they might go ahead; it wouldn't make any difference to him." The remark seems to have been a correct one, and in it we fail to see any sufficient evidence of a disposition to act improperly in the case.

5. The only error founded upon the instructions is that "the court erred in instructing the jury to the effect that if they agreed upon the grade of the crime, but did not agree upon the punishment therefor, it was no verdict." It appears from the record that after the jury had retired to deliberate upon their verdict they returned into court for further instructions, whereupon the court proceeded, at the request of the jury, to instruct them that it was possible for them to find any one of four verdicts: "That it is possible you can say: 'We, the jury, find the defendant guilty of murder in the first degree,' if you find that degree without any recommendation; or you can say, secondly: 'We, the jury, find the defendant guilty of murder in the first degree, and recommend that the punishment be imprisonment for life.' In order to do that you find him guilty of murder first; then, if you desire to imprison him for life, you agree upon that, and say so in your verdict." *A Juror.* "Suppose we cannot agree upon that?" *The Court.* "Then it is possible for you to find him guilty of murder in the second degree." The court then proceeded to tell the jury it was possible for them to find the defendant guilty of manslaughter or to find him not guilty. The court also proceeded to inform the jury that they had nothing to do with the penalty following a verdict, except in case of verdict of murder in the first degree; and to say that if they found such a verdict they should then proceed to determine the penalty, and, after answering substantially the same question, it was again put by a juror in this wise: "The point we want to know is this: that if we can't agree upon the penalty, does that fail to bring in a verdict?" To which the court answered: "Yes; that is, in this sense: if you agree upon a verdict of murder in the first degree, then you proceed to determine the penalty, whether you want to recommend imprisonment for life. If you do not recommend imprisonment, then it is capital punishment fixed by law." A juror had previously asked this question: "In case we don't agree upon the penalty, then what?" To which the court answered: "Then it is not a verdict. If you

bring in a verdict of murder in the first degree, then the penalty is death."

The court was not correct in his answer that a failure to fix the penalty would result in no verdict, but in each instance he explained the effect by subsequent statements, so that the jury could not have been misled. It was said in *People v. Doyell*, 48 Cal. 85: "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." When thus taken together, it is apparent from the charge that the jury was properly instructed as to the matter of the penalty attaching to a verdict of guilty of murder in the first degree. *People v. Welch*, 49 Cal. 174.

6. There was no error in admitting the evidence of Swinford and Stanton in relation to foot-prints. The defendant, upon reaching the ranch upon the evening of the homicide, described the place in the canon at which he had left his bloody shirt; and some two weeks after the witness Stanton found the shirt at the spot indicated, and measured the foot-prints found at the point, which corresponded with similar marks found in the vicinity of the body of deceased by Swinford five days after the homicide, and by him measured and found to fit the boots of defendant. These last foot-prints were shown the witness by Green,—a witness who on the day of the homicide trailed the course taken by deceased and his companion from the camp to where the body was found, and who identified the foot-prints as those followed by him at that time. Had the measurements of the foot-prints been made at an earlier day, the value of the information acquired as evidence would no doubt have been greater; but it does not follow that the testimony was incompetent.

7. The affidavits on motion for a new trial fall far short of filling the requirements essential to the end in view. They give no reasons why the affiants could not have been present and testified at the former trial. They show that the only tendency of the evidence, if produced, would be to impeach the testimony of Fred Dreher, a witness for the prosecution. They are cumulative to like testimony for a like purpose introduced on the former trial, and one of them is contradicted, while the other does not seem of importance in the case.

We have been prompted by the gravity of the case to search with diligence the record presented for facts bearing upon the objections. This we have been compelled to do without any formal assignment of errors, without an index to the record as full as it should have been, and without any reference in the brief on file to those portions of the transcript supposed to support the several contentions. No blame is attached to the learned counsel who prepared the very forcible brief for appellant, as it is said he resides in New Mexico, had no oppor-

tunity for access to the record, and only undertook the task of advocating the cause of the prisoner from sympathy in his behalf, and not from any hope of remuneration.

Our examination has failed to develop any sufficient cause to warrant a reversal, and we are of opinion the orders overruling the motions for a new trial and in arrest of judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

58 Cal. 584

PEOPLE v. DE WITT. (No. 20,129.)

Filed February 25, 1886.

1. WITNESS—EVIDENCE CONCERNING FORMER TESTIMONY.

If a witness has testified to having been on the witness-stand before, she cannot be compelled to state for what she was called to testify, if such former testimony refers to matter entirely immaterial to the cause.

2. SAME—LEADING QUESTION.

A question put to a witness in the words: "Whom did you see watching around the house?" (the place of the homicide,) is not a leading question.

3. SAME—IMPEACHMENT OF.

Under the California statute the prosecution in a criminal case is allowed to impeach his own witness by proving statements inconsistent with his present testimony given on the trial.

4. HOMICIDE—MURDER—SELF-DEFENSE—INSTRUCTIONS.

An instruction in a prosecution for murder that "the law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of the assailant," is not erroneous as dispensing with the doctrine of apparent necessity, for the reason that a necessity apparently real is real, so far as the conduct in the defendant is concerned.

In bank. Appeal from superior court, county of Colusa.

T. H. Hart and *George L. Cutler*, for appellant.

E. C. Marshall, Atty. Gen., for the People.

THORNTON, J. The defendant was accused of murder, and convicted of it in the first degree. The court committed no error in sustaining the objection to the question of counsel for defense: "How do you know?" In fairness to the witness, the objection should have been and was, properly sustained. There was no error in sustaining the objection to question of counsel for defense: "What for?" The witness had replied to questions of counsel for prosecution that she was never on the stand as a witness but once before, and that then she was very much excited. The question was then asked by the defense: "What for?" that is, for what was she called to testify. The objection to it was sustained. The question referred to a matter entirely immaterial, and the court committed no error in sustain-

ing the objection to it. We perceive no error in the question asked Dr. Tooley as to the range of the ball. It referred to an immaterial matter. The question put to the witness Vincent: "Whom did you see watching around the house?" (referring to the house where deceased was before and when she was killed,) was not leading. To the question by the court: "Did you see anybody there?" (referring to the space around the house where the homicide was committed,) the witness (Vincent) answered: "I saw some person standing at a distance, but I could not recognize him at the time, and I can't make any statement about who the party was." The court committed no error in allowing Matt. Sullivan and Charles Crockett to testify to the statements made to them by the witness Vincent. The foundation was laid for the introduction of such statements as provided by section 2052, Code Civil Proc., and the prosecution, under section 2049, Code Civil Proc., is allowed to impeach his own witness, by proving statements inconsistent with his present testimony given on the trial. The evidence of Vincent's contradictory statements was in regard to a matter material to the issue, and the statements were of the character allowed to be given in evidence. In *People v. Jacobs*, 49 Cal. 384, section 2049, Code Civil Proc., was not referred to, and though decided in 1874, after the Code went into effect, the case must have occurred prior to its adoption and prior to the enactment of section 2049, Code Civil Proc., above referred to. The questions asked by the prosecution of Vincent in his examination of him were admissible under the rule laid down in Greenl. Ev. (Red. Ed.) § 444a, which is quoted in the opinion of this court in *People v. Jacobs*, 49 Cal. 385.

We find no contradiction in the instructions of the court. The defense objects to the following instruction:

"The law of self-defense is founded on necessity, and, in order to justify the taking of life upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension as a reasonable man that, to avoid such danger, it was necessary for him to take the life of the assailant."

It is urged that the instruction is erroneous for the reason that "it does away with the doctrine that the defendant may act upon appearances that are in fact false. It is further said for the defendant as to this direction: "Self-defense is not founded on necessity unqualifiedly; its necessity may be apparent or real." On examination of the instruction we do not perceive that it does away with the doctrine of *apparent necessity*. When it was said in it that the necessity of taking life must appear to the defendant, the meaning is that it must appear from the circumstances of the homicide. The circumstances may show a real necessity, or one which was apparently real. A necessity *apparently real* is *real*, as far as defendant's conduct is regarded. Either is sufficient to protect defendant. The instruction referred to was consistent with either a real or apparently real ne-

cessity. It did not take away either from the consideration of the jurors. If the instruction in this regard was not sufficiently clear, the counsel for defendant should have asked the court to instruct the jury so as to make it clear to their comprehension. The court committed no error in giving it as it was given. There is nothing in *People v. Flahave*, 58 Cal. 249, inconsistent with what is here said.

The judgment and order should be affirmed.

McKINSTRY, ROSS, McKEE, MYRICK, and SHARPSTEIN, JJ., (*concurring*.) The court erred in permitting witnesses to testify to statements made by the witness Vincent, that he saw the defendant near the house where the alleged homicide was committed on the night of the homicide. *People v. Jacobs*, 49 Cal. 384; *Com. v. Welsh*, 4 Gray, 535. The provisions of the Code of Civil Procedure (sections 2049, 2052) do not authorize the admission of the testimony. But the error was immaterial, since the testimony (including that of the defendant) is uncontradicted that the defendant was present at and near the house where the homicide was committed on the night in question. Upon the other points discussed by him we agree with the views of Mr. Justice THORNTON.

The judgment and order are affirmed.

SUPREME COURT OF CALIFORNIA.

69 Cal. 79

HALL v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO. (No. 11,349.)

Filed March 10, 1886.

1. EXECUTORS AND ADMINISTRATORS—VERIFICATION OF CLAIMS AGAINST ESTATE.

Where a claim against the estate of a decedent is verified by an affidavit stating that "the amount thereof, to-wit, the sum of four hundred, is justly due," the word "dollars" being omitted, such omission will not affect the validity of the claim, where the defect is supplied by reference to the body of the claim.

2. SAME—REFERENCE.

A reference of a claim against the estate of a decedent is sufficient, under the California Code of Civil Procedure, section 1507, if made in court on the consent of parties.

In bank. Application for writ of review.

Geo. D. Collins, for petitioner.

MYRICK, J. Application for a writ of review. Two points are made by petitioner:

1. That the claim was not properly verified. The estate of Mary Ann Hall, deceased, was in process of administration, and one Newman presented to the administrator a claim for \$400, for services rendered to deceased in her life-time. It was stated in the claim to be for the sum of \$400. In the affidavit to the claim it was stated "that the amount thereof, to-wit, the sum of four hundred, is justly due," etc., the word "dollars" being omitted. It is claimed that the affidavit was not sufficient in that it did not state that any sum was due the claimant. We think the affidavit sufficient; it referred to the body of the claim, in which the amount was stated, and then said the amount thereof * * * was justly due.

2. That there was no reference, as provided in section 1507, Code Civil Proc. The parties signed a written stipulation, and thereupon the court in which the administration was pending made an order of reference. The point is made that as the approval by the court or judge was not made upon the stipulation, and filed as a distinct act, there was no valid reference. A clause in the section referred to reads: "If the parties consent, a reference may be had in the court." This portion of the section was complied with.

The application is denied, and the order is discharged.

McKINSTRY, ROSS, SHARPSTEIN, and THORNTON, JJ., concurred.

McKAY v. JOY. (No. 9719.)

Filed March 12, 1886.

DISSENTING OPINION OF THORNTON, J.

In bank. Appeal from superior court, county of Amador. The principal opinion of the court in this case is reported in 9 Pac. Rep. 940.

A. C. Brown, for appellant.

Eagon & Armstrong, for respondent.

THORNTON, J. I dissent from the opinion filed in this case, February 19, 1886.

69 Cal. 83

LANDIS v. MORRISSEY. (No. 9,278.)

Filed March 15, 1886.

1. PLEADING—NEW MATTER.

New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it; that is, shows that it has ceased to exist. It is a matter arising subsequently to the origin of the cause of action.

2. SAME—GENERAL ISSUE—NEW MATTER.

Where the complaint in an action averred that the firm, of which the defendant is the surviving partner, promised to pay for goods sold and delivered to it whenever requested, but had failed to do so, and defendant denied this and every count; and, on the issue offered at the trial to prove that the goods alleged to have been sold to such firm were really purchased by it on a credit of 60 days, the period of which had not expired when the action was commenced, *held*, that such evidence should have been admitted under the plea of the general issue, and that it did not constitute new matter which should have been specially pleaded.

Department 2. Appeal from superior court, city and county of San Francisco.

Henry E. Highton, for appellant.

McAllister & Bergin, for respondent.

THORNTON, J. The question in this case arises on an offer to introduce certain testimony. The point presented is to be determined upon the allegations of the complaint and the denials of the answer. There are several counts in the complaint, all of which were answered, but as the counts and the answers to them are the same as to the point to be decided, we shall present here only one of each. The plaintiffs aver:

"First, that during all the several periods of time hereinafter stated said plaintiffs were and still are partners doing business in said city and county of San Francisco, under the firm name of Landis & Jacoby, and during said several periods of time, up to the twentieth of April, 1882, the defendant and one S. Boeh were partners doing business in said city under the firm name of Boeh & Morrissey; that on or about the twentieth of April, 1882, at San Francisco, said S. Boeh died, leaving defendant the sole surviving partner of said firm; second, that, to-wit, at said city and county of San Francisco, state

of California, within a period of six months prior to the commencement of this action, and prior to the death of said S. Boeh, plaintiffs sold and delivered to said partnership of which defendant is sole survivor, as hereinbefore alleged, at their special instance and request, goods, wares, and merchandise at agreed prices, amounting to the sum of two hundred and eighty-eight dollars and seventy-one cents, (\$288.71; that said goods, wares, and merchandise were reasonably worth said sum, which said sum they promised to pay whenever thereunto requested, but, though often thereunto requested, they have not, nor has either of them, paid any part of the same, and the whole amount thereof remains due and unpaid."

The answer of defendant to this count is as follows:

"Denies that plaintiffs sold or delivered to said partnership, of which this defendant is survivor, in manner and form in said second count alleged, the goods, wares, or merchandise therein mentioned, or any part thereof, or for the agreed prices in said second count alleged, or for any agreed price or prices; and denies that said partnership, at the time or place in said second count alleged, or any time or place, agreed to pay the sum in said second count specified, or any sum to said plaintiffs whenever thereunto requested."

On the trial, as stated in the bill of exceptions, to prove their case and each and every count in their complaint contained, the plaintiffs introduced witnesses, and upon the cross-examination of these witnesses, and also as part of his own case, the defendant offered to prove that the goods, wares, and merchandise alleged in each count of the complaint to have been sold to defendant and his deceased partner were purchased by the firm of Boeh & Morrissey from the plaintiffs upon a credit of 60 days, the period of which had not expired when this action was commenced. The plaintiffs objected to the testimony offered on the ground that it was not within the issues raised by the pleadings. The court sustained the objection, and defendant reserved an exception. The complaint averred that the firm of which the defendant is surviving partner promised to pay for the goods sold and delivered to it whenever thereunto requested, but though often requested nothing has been paid. The defendant denied this, as he did every material allegation of the count.

It is contended here that the offer of defendant was new matter, and should have been specially pleaded; and not having been so pleaded, the testimony proposed in the offer was properly excluded. The contention is maintainable if the offer presented new matter. What is new matter? New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it; that is, shows that it has ceased to exist. Of this character are release and accord and satisfaction. *Coles v. Soulsby*, 21 Cal. 50; *Gould, Pl. c. 3*, § 195; *Frisch v. Caler*, 21 Cal. 71; *Hawkins v. Borland*, 14 Cal. 413; *Clafin v. Baere*, 28 Hun, 204; *Wilder v. Colby*, 134 Mass. 377. It is a matter arising subsequently to the origin of the cause of action. A plea of release admits the cause of action, but sets forth a release subsequently executed by the party authorized to release the cause of action. So, also, a plea of accord and satisfaction. Such new matter the defendant must affirm-

atively establish. *Coles v. Soulsby, supra*. See "Plea of Release," 3 Chit. Pl. 930; "Pleas of Accord and Satisfaction," Id. 924, 1002, 1031, 1062.

But the matters here offered to be shown were not of those occurring after the cause of action arose. The defendant's offer was to show that the cause of action did not exist when the action was begun. The answer put in issue all the material allegations of the complaint. The offer was to prove that the cause of action had not accrued when the suit was brought. At common law this was permissible under the general issue, (Gould, Pl. § 44, c. 6,) and new matter was not, according to the strict original principles of the common law, admissible under the general issue any more than under the system established by the Code, (Gould, Pl. § 44, *supra*.) In *Wilder v. Colby, supra*, the action was for goods sold and delivered, and the declaration alleged that the defendant was indebted to plaintiff in a certain sum of money for the goods so sold. The answer was a general denial. The evidence showed that the property had been sold on a credit, which had not expired when the action was brought. It was ruled that the action could not be maintained.

We are of opinion that the court erred in excluding the testimony embraced in defendant's offer, and for that reason the judgment and order must be reversed, and the cause remanded.

Counsel are in error in assuming the offer of defendant could only be presented in a plea in abatement. It goes to the merits of the action, and shows that it never existed when the suit was brought. Gould, Pl. c. 2, §§ 32, 33. It is an answer to the whole action, and perfect defense. Such a defense can be made without any plea in abatement. It does not merely abate the action; it defeats it. *Wilder v. Colby, supra*; *Hanna v. Mills*, 21 Wend. 92; *Manton v. Gammon*, 7 Bradw. (Ill.) 201. Nor is the case here presented one of an immaterial variance. The testimony offered and rejected would have shown a failure of the plaintiffs to prove their cause of action. Code Civil Proc. § 471. We have examined the cases cited by the counsel for plaintiffs, (*Levinson v. Schwartz*, 22 Cal. 229; *Wilkins v. Stidger*, Id. 232, 233; *Nelson v. Murray*, 23 Cal. 338; *Lightner v. Menzel*, 35 Cal. 452,) and find nothing in them inconsistent with what is said herein.

From what has been said above, it becomes unnecessary to pass on the application made by defendant to the court below to be permitted to amend his answer.

Judgment and order reversed, and cause remanded for a new trial in accordance with the views set forth herein.

We concur: MCKEE, J.; SHARPSTEIN, J.

LANDIS v. MORRISSEY. (No. 9,279.)

Filed March 15, 1886.

JUDGMENT REVERSED.

On authority of *Landis v. Morrissey*, (No. 9,278,) *ante*, 258, judgment reversed.

Department 2. Appeal from superior court, city and county of San Francisco.

Henry L. Highton, for appellant.

McAllister & Bergin, for respondent.

BY THE COURT. The same question is presented in this cause as in *Landis v. Morrissey*, (No. 9,278,) *ante*, 258, and in accordance with the ruling therein the judgment and order are reversed, and the cause remanded for a new trial, as in the case above mentioned, No. 9,278.

69 Cal. 88

Ex parte GUERRERO. (No. 20,153.)

Filed March 16, 1886.

1. MUNICIPAL CORPORATIONS—CHARTERS—EFFECT OF CALIFORNIA CONSTITUTION OF 1879.

The effect of the California constitution of 1879 on municipalities of the state is not to abrogate their charters, nor change the powers granted by them, except where they may have been enlarged or contracted by its provisions; but, on the contrary, existing municipalities are made more independent of state control by inhibiting the state legislature from passing special laws for any municipality, and from imposing taxes for any special purpose, and conferring upon them at the same time power to make and administer, within their respective limits, all such local, police, sanitary, and other laws as are not in conflict with general laws.

2. SAME—CHARTER OF LOS ANGELES—POWER TO LICENSE.

Under the charter of 1878 and the California constitution of 1879 the city of Los Angeles had power to pass its ordinance of September 29, 1885, providing for the licensing of business carried on in such city, as, at the time of the passage of such ordinance, no general law has been passed by the legislature which, in its terms or by implication, conflicted with the provisions of such ordinance, or restricted the municipality of Los Angeles in the exercise of its power in that regard.

3. SAME—AUTHENTICATION OF ORDINANCE.

Under a municipal charter providing that "every ordinance and resolution which shall have been passed by the council shall, before it becomes effective, be signed by the clerk of the council," etc., and also authorizing the election of a city auditor, who, it was provided, should be "*ex officio* clerk of the council,"—it is not necessary for such officer, in authenticating an ordinance, to designate himself as "auditor and *ex officio* clerk of the council," but it is sufficient, under the California statute, (Cal. Code, § 1031,) if he designate himself as the "clerk of the council" of said municipality.

4. SAME—CITY ORDINANCE, PUBLICATION OF.

In order to render a city ordinance effectual, its publication is not necessary, and the fact that an ordinance contained an order for its publication, as prescribed by the city charter, does not affect the validity of the order or ordinance.

5. SAME—DISCRETION AS TO LICENSING.

Where a municipality is granted the power to license, the power to consider and determine the nature of the occupations, trades, and business to be licensed is implied; and, in the exercise of such power, the legislative body can discriminate between business which may be useful and beneficial to the

community, and that which may be immoral or disorderly in its nature or tendency, and may fix licenses at such sums as to it shall seem just and equitable, and the courts have no power to control the exercise of such discretion over subjects within the jurisdiction of the corporation.

6. SAME—OPPRESSIVE LICENSE, WHAT CONSTITUTES.

A city ordinance cannot be judicially held unreasonable, oppressive, or in restraint of trade which fixes the amount of the license for carrying on the business of selling liquors, in quantities less than one gallon, at \$50 per month.

7. SAME—CHARTER OF LOS ANGELES—POWER TO PUNISH—VIOLATION OF ORDINANCE.

The city of Los Angeles, under its power to make and enforce all such local, sanitary, and other laws as are not in conflict with general laws, is authorized to punish as a misdemeanor any violation of an ordinance fixing a license for the privilege of carrying on the business of liquor selling, etc.

8. SAME—DELEGATION OF MINISTERIAL POWER TO CLERK.

A city council has power to delegate to the clerk the authority to perform ministerial acts of issuing and collecting the licenses imposed by such ordinance, and also to make the granting of a license conditional upon obtaining a permit from the board of police commissioners of the city.

9. SAME—LOS ANGELES CITY COURT—EFFECT OF CALIFORNIA CONSTITUTION OF 1879.

The Los Angeles city court, created by its charter of 1878, was not abolished by the California constitution of 1879; and the fact that the same person officiated as mayor, and as mayor presided over the council which passed the ordinance in question, did not divest him of his authority under the charter to act as the judicial officer of such court, on the trial of a misdemeanor for violation of the ordinance; nor is he rendered incapable of presiding over such trial by reason of the fact that the charter requires all fines collected in such court to be paid into the salary fund, or because his action in approving the ordinance has been severely criticised by the city press.

Ross, J., dissenting.

In bank. Application for writ of *habeas corpus*.

Bicknell & White and *Howard & Roberts*, for petitioner.

J. W. McKinley, W. T. Williams, and F. P. Kelly, contra.

McKEE, J. The petitioner complains that he is imprisoned under a judgment given against him by the city of Los Angeles for having violated an ordinance of the city by "carrying on, within the corporate limits of the city, in his own name, and for his own profit and benefit, the business of a place where spirituous and vinous, malt, and mixed liquors were sold in quantities less than one gallon, without first procuring a license so to do;" and he asks to be discharged from imprisonment on the ground that the ordinance is void, and the judgment of conviction invalid. The ordinance is entitled "An ordinance to provide for the licensing of business carried on in the city of Los Angeles," approved September 29, 1885; and the contention is that it is void because the municipal legislative body of the city had no power to pass it, and because it was not authenticated and ordered published as required by the city charter.

The charter was granted in the year 1878. Under it the city was administering its local affairs, as an existing municipality of the state, at the time of the adoption of the present constitution, sections 11 and 12 of article 11 of which provide:

"Sec. 11. Any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws.

"Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

And section 5 of article 1 of the charter of the city granted power to "the mayor and council of the city * * * to license the carrying on and conducting of any and all professions, trades, callings, and occupations, or other business, by any person, natural or artificial, within the corporate limits of said city, to fix the amount of license tax thereon, and to be paid by such persons therefor, at such sums, respectively, as the said council shall think equitable and just, and may, in the name and for the benefit of said corporation, enforce, in such manner as it sees proper to prescribe, the payment of such license taxes, by suit, either with or without attachment, in the proper court, under the laws of this state, or by fine and imprisonment, or either, or in such other manner as in said ordinance may be provided." St. 1877-78, p. 655.

The power of the city to pass the ordinance under consideration is therefore derived from the charter of the city and the constitution of the state. Of the power of the state to authorize the license of all classes of trades and employments there is no doubt; and there is just as little doubt that the legislature, at the time it granted to the city of Los Angeles its charter of incorporation, had authority to delegate to the city the power of the state for that purpose. But a legislative grant of power to a municipal corporation, to license business, etc., within its corporate limits, does not necessarily include a power to impose licenses for revenue purposes. The distinction between the two powers is well recognized. Imposing licenses for regulating business, etc., is an exercise of the police power, while imposing them for revenue purposes is an exercise of the taxing power. 2 Dill. Mun. Corp. § 768. It may, therefore, be questionable whether, before the constitution of 1879, the city had, under its charter, power to impose licenses for purposes of revenue; but, under the provisions of the constitution which we have quoted, there is no doubt of the power of municipalities to impose licenses for the purpose of regulation, or revenue, or for both regulation and revenue, and for those purposes the power of the municipality of Los Angeles has been sustained in *City of Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 60.

The present constitution did not abolish the municipalities of the state, nor abrogate their charters, nor change the powers granted by them, except where they may have been enlarged or contracted by its provisions. On the contrary the constitution made existing municipalities more independent of state control by inhibiting the state legislature from passing special laws for any municipality, and from

imposing taxes "for any municipal purposes." At the same time it conferred upon all existing municipalities power to make and administer, within their respective limits, all such local, police, sanitary, and other laws as are not in conflict with Gen. Laws. Art. 11, § 11. There was no general law passed by the legislature which, in its terms or by implication, at the time of the passage of the ordinance in question, conflicted with the provisions of the ordinance, or restricted the municipality of Los Angeles in the exercise of its power to pass the ordinance. *Ex parte Ah Toy*, 57 Cal. 92. The ordinance was therefore in harmony with the constitution of the state, the general laws of the state, and the city charter.

But it is contended that the ordinance did not become a law of the municipality, because, as passed by the "mayor and council," it was not authenticated in the form prescribed by the charter, and was not ordered to be published as the charter required. There is appended to the ordinance a certificate in the following words:

"I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of September 22, 1885.

"W. W. ROBINSON,
"Clerk of the Council of the City of Los Angeles."

This certificate appears to have been made under section 2 of article 12 of the charter, which provides: "Every ordinance and resolution which shall have been passed by the council shall, before it becomes effective, be signed by the clerk of the council, and be presented to the mayor for his approval and signature." It is said there was no such officer as "clerk of the council" elected or appointed by the city. But the charter authorized the election of a city auditor, who, it was provided, "shall also be *ex officio* clerk of the council." There were, therefore, two offices, whose functions were to be performed by one and the same person. In the performance of his official functions, where it became necessary for him to authenticate an official act, done in either office, the law of his position did not require the officer to designate himself as "auditor and *ex officio* clerk of the council." On the contrary, the Code law provides: "When an officer discharges *ex officio* the duties of another office than that to which he is elected or appointed, his official signature and attestation must be in the name of the office the duties of which he discharges." Section 1031, Pol. Code. The signature to the certification of the ordinance was therefore according to law, (*Touchard v. Crow*, 20 Cal. 150;) and there was an order made according to law for the publication of the ordinance. The ordinance itself contained an order for its publication, worded as follows:

"Sec. 5. The clerk of the council shall certify to the passage of this ordinance, and shall cause the same to be published once in the *Los Angeles Daily Herald*, and it shall take effect and be in force from and after November 1, 1885."

We think that was sufficient. The fact that the order was made and included in the ordinance does not affect the validity of the order or ordinance. To render the order effectual its publication was not necessary, and no contention is made that the ordinance was not published under the order. It follows that the ordinance was certified and ordered published as prescribed by the charter.

Another objection is that, conceding that the ordinance was passed according to prescribed forms, it is unreasonable, and in restraint of the business for the regulation of which it purports to have been passed. The amount of the license is \$50 per month, or \$600 per annum. That amount was fixed by a section of the ordinance in the following words:

"Sec. 2. That the monthly rates of license for the pursuits, business, trades, occupations, avocations, and employments hereinafter named be, and the same are hereby, established for and within the city of Los Angeles, and the same shall be paid by the owners or proprietors thereof as follows, that is to say: * * * For every saloon, bar, store, or place, including club-rooms where spirituous, vinous, malt, or mixed liquors are sold or given away in quantities less than one gallon, \$50 per month: Provided, further, that no license to keep a saloon, bar, or other place for the sale of spirituous, vinous, malt, or mixed liquors shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council; and the board of police commissioners shall have power to issue such permit and revoke the same at any time," etc.

It is insisted courts are bound to take judicial notice that such an imposition is *per se* a virtual embargo against the sale of liquors less than a gallon, and, for that reason, *ultra vires*. But the power to impose licenses at all for municipal purposes being granted, it was coupled with the power to consider and determine the nature of the occupations, trades, and business to be licensed; in the exercise of which the legislative body could discriminate between business which may be useful and beneficial to the community, and that which may be immoral or disorderly in its nature and tendency, and fix the licenses at such sums as to it "shall seem equitable and just." The power to fix the amount of licenses for all classes of business was therefore left to the discretion of the municipal legislature; the exercise of such discretion over subjects within the jurisdiction of the corporation cannot be controlled by the courts. Courts are bound to presume the legislature deals with such matters for the public good; and the municipal law, which expresses the will of the municipality upon those matters, will be presumed to be reasonable, unless the contrary appears on the face of the law itself. "It is not to be expected," say the supreme court of Missouri, "that every power will always be exercised with the highest discretion; and when it is plainly granted, a clear case should be made to authorize an interference upon the ground of unreasonableness." *City of St. Louis v. Weber*, 44 Mo. 550.

Applying these principles to the ordinance under consideration we cannot judicially say, as matter of law or fact, that the amount of the license complained of in this proceeding is oppressive, unreasonable, or prohibitory of trade. *Ex parte Benninger*, 64 Cal. 291. In *Ex parte Hurl*, 49 Cal. 558, it was said: "It certainly cannot be assumed that the exaction of \$50 for the privilege of retailing spirituous liquors, * * * for the period of 90 days, will, *per se*, put an end to that business;" and in *Ex parte Wolters*, 65 Cal. 269, S. C. 3 Pac. Rep. 894, the license exacted for carrying on a like business in Butte county was \$50 per month, as in this case, and it was sustained by this court. See *People v. Dwyer*, 4 Pac. Rep. 451.

Another attack upon the ordinance is that it declares that any violations of its provisions "shall be deemed a misdemeanor, and punishable as such." This, it is urged, was in excess of the power of the municipal legislative body, because the state legislature itself could not delegate to a municipal corporation power to determine what shall constitute a criminal offense. But the charter contains the following provisions:

"The mayor and council, or either, when authorized by this act to adopt any ordinance or resolution, or make any rules or regulations, such municipal authority so empowered shall have the further power, and is hereby authorized, to provide that each and every violation of such ordinance, resolution, rules, or regulation shall be and constitute a misdemeanor," etc.

In *State v. Tryon*, 39 Conn. 183, a like contention was urged against an ordinance passed under a charter which provided "that the violation of any ordinance relative to nuisances injurious to health, illegal voting, obstructions to streets, illegal charges of hackmen, weights and measures, or any order or ordinance designed to prevent vice, immorality, or disorder, etc., shall be a misdemeanor, and may be prosecuted as such before the police court of the city like other offenses;" but the supreme court of Connecticut held that the contention was not maintainable. Says the court:

"All the authority that the city council have in the premises is simply to determine whether they will pass ordinances on those subjects or not. If they pass such ordinances, it is the charter, passed by the legislature in the form of a law, and which has all the authority of a statute law, that declares that a violation of such ordinances shall be a misdemeanor. * * * The legislature have declared that the maximum penalty is none too great for a violation of the ordinance, if one should be made."

Besides, as we have seen, the constitution of the state empowered the municipality to make and enforce, within its limits, all such local, sanitary, and other laws as are not in conflict with general laws. The power thus delegated by the constitution itself, for local purposes, included a power to prescribe punishment for disobedience of laws by fine, penalty, or imprisonment. Denominating the act of disobedience a misdemeanor, and making it punishable as such, is within the power granted, and does not affect the validity of the ordinance.

Again, section 4 of the ordinance provides:

"It shall be the duty of the clerk of the council to issue a license under this ordinance to each person so reported to him, and for all other persons known to the clerk, liable to pay a license under this ordinance, duly signed by the mayor of said city and clerk of the council, and to fix and state the amount of license thereon, and on the first Monday of each month deliver such license to the said city tax collector for collection, taking his receipt for the amount thereof, and the said clerk, in fixing the rate of license for the several classes in this ordinance hereinbefore specified, shall grade the same according to his best information and knowledge, and for that purpose may confer with the persons in interest, and may require any person to file his or her affidavit as to which class he or she may belong: provided, that in no case shall any mistake by the clerk in fixing the amount of said license prevent the collection of what shall be actually due, with all costs, against any one selling or carrying on said business without license, or refusing to pay such rate so fixed by the clerk. It shall be the further duty of said clerk, immediately after the delinquent list has been delivered to him, to deliver the licenses uncollected to the chief of police, whose duty it shall be to at once proceed to collect the same, in his discretion, by suit or otherwise."

It is said that the duties which this section of the ordinance directs the clerk to perform were incumbent upon the council, to whom power to perform was delegated; and, being delegated to the council, that body could not delegate its powers to its clerk, or any other officer. The provisions, however, were only regulative of the mode of issuing and collecting the licenses imposed by the ordinance; the acts required of the clerk and tax collector were therefore ministerial; and while it is undoubtedly true that public powers and trusts devolved by law or charter upon the governing body of a municipality, to be exercised by it in such a manner as it shall judge best, cannot be delegated to another, (*Birdsall v. Clark*, 73 N. Y. 73,) yet the power to do acts, which do not involve judgment or discretion, but are merely mechanical or ministerial, may be delegated. "The true distinction," observes the supreme court of Ohio, "is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, W. & Z. R. Co. v. Commissioners Clinton Co.*, 1 Ohio St. 88.

The following proviso in the ordinance is also challenged:

"No license to keep a saloon or bar, or other place, for the sale of spirituous, vinous, malt, or mixed liquors, shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council; and the board of police commissioners shall have power to issue such permit, and revoke the same at any time; and after the filing of such revocation with the clerk of the council the said clerk shall issue no further license to the party whose permit is revoked until a new permit be granted said party."

This condition imposed upon persons entitled to licenses affects only the operation of the ordinance, and not its existence. It is the mode prescribed for issuing licenses to persons who want to engage,

or wish to continue, in a licensed occupation. As mere mode the condition imposed is not more unusual or onerous than statutory law or local ordinance, passed in the exercise of the police power of the state, has frequently prescribed for other occupations or professions. Says the supreme court, in *Ex parte Yale*, 24 Cal. 242: "The manner, terms, and conditions of an attorney's admission to practice, and of his continuing in practice, as well as his powers, duties, and privileges, are subject to legislative control the same as any other profession or business that is created or regulated by statute;" therefore the statute which required, as a condition to admission to practice, or to continue in practice, the taking of the oath prescribed, was constitutional. So in *Ex parte Frazer*, 54 Cal. 94, and *Ex parte Johnson*, 62 Cal. 263, we held that a statute, passed to regulate the practice of medicine, which made it a misdemeanor for a physician to practice medicine without having first procured a certificate from a board of examiners, appointed by certain medical societies, was not subject to constitutional objection.

Lastly, it is contended that the judgment of conviction is void because (1) the city court of Los Angeles was abolished by section 1 of article 6, and section 1 of article 22 of the present constitution; and, (2) if not abolished, the court had no jurisdiction to try the petitioner for the offense with which he was charged.

The constitution of 1879 abolished all courts except "justices' and police courts,"—these it continued in existence. Section 3, art. 22, Const. At the same time it vested the judicial power of the state in certain designated courts, and authorized the legislature to establish inferior courts in any incorporated city or town, or city and county, and fix by law their jurisdiction, and the powers, duties, and responsibilities of the judges thereof. Sections 1, 13, art. 6, Const. But the judicial departments of the municipalities of the state, as created by their respective charters, were not affected by these provisions. The constitution left all municipal bodies free to administer their local affairs under their forms of municipal government, with the powers conferred upon them by their charters, and such additional powers as were thought adequate to the purposes of their creation. This was the *status* of the municipal corporations of the state at the time of the adoption of the present constitution. As such they have since continued to exist before and after the first day of July, 1880, the day fixed by section 1, art. 22, of the constitution, for the cessation of all laws inconsistent with its provisions, working under charters unchanged, except in such changes as may have been made by the constitution; and the existence of each municipality under its charter is continued by the constitution until a majority of the electors of the municipal body determine to reincorporate under the general law, or to frame a charter for its government. *Desmond v. Dunn*, 55 Cal. 242; *Wood v. Board of Election Com'rs*, 58 Cal. 561.

We are not aware that the city of Los Angeles has reorganized or

reincorporated under any general law, or that its charter has been changed since the constitution went into effect pursuant to its provisions. The judicial power of the city is therefore vested in the court to be held by the judicial officer provided by the charter; and as such he could exercise such judicial powers as may be contained in the charter, and try and determine all local causes within the charter jurisdiction conferred upon him. *People v. Henry*, 62 Cal. 557; *Ex parte Carillo*, 4 Pac. Rep. 695. The fact that the same person officiated as mayor, and as mayor presided in the local legislative body which passed the ordinance, did not divest him of his authority under the charter to act as the judicial officer of the court. The provisions of the charter which made the mayor of the city a component part of the council, and "*ex officio* city judge," are not in conflict with the constitution. As was said in *Uridias v. Morrill*, 22 Cal. 474, "there is nothing in the constitution which prohibits the legislature from declaring the mayor of a city to be *ex officio* a justice of the peace; and, under such a law, the same person may constitutionally exercise the functions both of mayor and justice." See, also, *People v. Provines*, 34 Cal. 520. A mayor's court, or a city court as a mere municipal court, is regarded as a justice's court.

The city court had jurisdiction of the action and the person of the defendant. Having jurisdiction of the action and the party defendant, the judge of the court had power to proceed to the final disposition of the same, unless from interest, or some other reason, he was disqualified from acting. His qualification to act was challenged by an affidavit, made and filed by defendant, which contained a statement of defendant's belief that he could not have a fair and impartial trial in the city court on account of the prejudice and bias of the judge who, as judge of the court and mayor of the city, was the subject of much acrimonious discussion by the newspapers and persons within the municipality in connection with the passage of the ordinance; and, in consequence thereof, "the said mayor and judge is interested in the result of the trial, and is interested in convicting affiant."

It is also urged that as section 12 of article 5 of the charter provides that "all fines collected in said city court shall be paid by the said judge into the city treasury, and be placed to the credit of the salary fund," and as subdivision 1 of section 2 of article 11 of the charter provides that the mayor of the city shall receive a monthly salary of \$150, the mayor, as *ex officio* city judge, was interested in convicting the petitioner of violating the ordinance. It is difficult to see how these provisions of the charter made the judge of the court personally or pecuniarily interested in a criminal action for violating an ordinance, so as to incapacitate him from trying it, and from enforcing conviction by the collection of a municipal fine or imprisonment. Nor does the fact stated, in the affidavit, "that the action of the mayor in approving the ordinance has been largely assailed in the city by individuals and by the press," disqualify the mayor, as *ex officio* city judge,

from exercising his judicial functions in proceedings before him, within his jurisdiction; nor was it sufficient as a basis for an application to change the place of trial in the proceedings; and there was no excess of jurisdiction in denying the application made upon the affidavit for that purpose. *People v. Williams*, 24 Cal. 31; *McCauley v. Weller*, 12 Cal. 500.

Writ dismissed and petition remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.; MORRISON, C. J.

Ross, J., (*dissenting*.) I think the portion of the ordinance involved in this case is void for the reason that the power conferred on the mayor and council by the charter of the city is in effect delegated by that body to the board of police commissioners. By the charter of the city of Los Angeles the power "to license the carrying on and conducting of any and all professions, trades, callings, occupations, or other business, by any person, natural or artificial, within the corporate limits of said city," is vested in the *mayor and council*. "The principle is a plain one," says Dillon in his work on Municipal Corporations, "that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others*. Thus, where by charter or statute local improvements, to be assessed upon the adjacent property owners, are to be constructed in 'such manner as the common council shall prescribe' by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must be exercised in strict conformity with the charter or incorporating act. So, where a power—for example, *the power to issue licenses*—is granted by law, or by an ordinance duly passed, to the *mayor and aldermen*, they are constituted to act as one deliberative body, to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination; and when this is the case, the board of aldermen cannot, even by a vote, delegate the power to the mayor alone." Section 96, 1 Dill. Mun. Corp. And in section 357 of the same volume the learned author says: "Where, by the charter of a city, the power to license a particular occupation within its limits is given to the common council, such power involves the necessity of determining, with reasonable certainty, both the extent and duration of the license and the sum to be paid therefor; and *must be exercised by the common council, and cannot be delegated by it, in whole or in part, to any person or authority*." See, also, *Cooley*, Const. Lim. 204.

Now, the ordinance here in question provides, among other things,

"that no license to keep a saloon, bar, or other place for the sale of spirituous, vinous, malt, or mixed liquors shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council, and the board of police commissioners shall have power to issue such permit and revoke the same at any time; and, after the filing of such revocation with the clerk of the council, the said clerk shall issue no further license to the party whose permit is revoked until a new permit be granted said party." This language does not admit of construction. It is direct and simple, and clearly and unequivocally makes the granting of the licenses in question to depend upon the action of the board of police commissioners. Nor is there any limit to the power thus attempted to be conferred upon that board. No conditions whatever are imposed, but the broad and unconditional power attempted to be given to grant or withhold permits at will. As by the terms of the ordinance no license can be issued for conducting the business in question until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council, it follows, necessarily, that the granting or withholding of such licenses is in effect vested by the ordinance in that board. No argument can make this plainer. It is, it seems to me, a self-evident proposition.

In the case of *City of East St. Louis v. Wehring*, 50 Ill. 28, the charter conferred upon the city council power "to restrain, prohibit, and suppress tippling-houses, dram-shops, gaming, bawdy, and other disorderly houses." The ordinance declared that "licenses may be granted under this article to proper persons for a period of not less than one month, nor more than six months, to be determined by the city treasurer in each case; but the city treasurer may, in his discretion, reject any application for license under this article for a longer period than one month, and, with the concurrence of the mayor, he may reject any application for license under this article." The court said:

"The provision of the charter manifestly intended that the power should be exercised by the city council, under reasonable and proper ordinances, and not that they should authorize an individual to grant or refuse a license, or to fix the amount which should be paid for a license. If the treasurer may, under this ordinance, refuse licenses with the concurrence of the mayor, then they, and not the city council, would regulate or suppress dram-shops; and if the treasurer may, in his discretion, fix the sum to be paid, then he, and not the city council, would discharge that duty. In the proper exercise of this power the city council should adopt general ordinances, prescribing a general rule by which licenses might be obtained. They might, no doubt, prescribe the character of persons who might or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant such licenses. The ordinances should prescribe the amount required to be paid for such license, either by an ordinance relating to the entire city, or grade the rates by divisions or portions of the city, or otherwise. The ordinance should be of that general character that all per-

sons coming within its requirements should be entitled, by complying with its provisions, to receive a license, and the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the city."

These observations by the supreme court of Illinois are applicable to the case before us. Of course, if the business in question, or any other licensed business, be conducted in a manner that is offensive or dangerous to the public interests, the governing body of the city may direct the manner to be changed, and prescribe regulations for its prosecution. But the right to regulate its prosecution is an altogether different thing from the right to delegate the power to license.

As, in my opinion, the portion of the ordinance involved in this case is void for the reason above given, it is unnecessary for me to consider any other point.

It results from these views that the petitioner is illegally restrained, and should be discharged.

69 Cal. 105

LEVY v. WILSON, Judge, etc. (No. 11,366.)

Filed March 17, 1886.

1. WRIT OF PROHIBITION—JURISDICTION.

Prohibition lies in California only to arrest proceedings of a judicial tribunal when they are without or in excess of its jurisdiction, and there is no plain, speedy, and adequate remedy in the ordinary course of law.

2. CRIMINAL LAW—INDICTMENT—SUPERIOR COURT—JURISDICTION.

When a criminal prosecution is founded upon an accusatory paper, purporting to be an indictment, but which is void by reason of not being found by a valid grand jury, the superior court can acquire no jurisdiction thereunder.

3. GRAND JURY—ORDER FOR DRAWING, AMENDMENT OF.

A drawing of a grand jury for the city and county of San Francisco, ordered as required by sections 219 and 241 of the Code of Civil Procedure, at a designated hour, on a certain day, was not invalidated by the fact that on such day the judge before whom the drawing took place amended the order by changing the hour designated therein; and such amendment did not divest the court of jurisdiction over the proceeding, nor did the absence of the presiding judge of the department of the court invalidate the drawing.

4. SAME—DEFICIENCY IN PANEL, HOW FILLED.

Where, from the persons summoned, a sufficient number to constitute a grand jury cannot be obtained, the superior court has jurisdiction, under the California statute, to fill out the deficiency of the original panel, either by an order for a sufficient number of jurors to be forthwith drawn and summoned to attend the court, or by an order entered in its minutes directing the sheriff forthwith to summon so many good and lawful men of the county, or city and county, to serve as grand jurors as may be required.

In bank. Application for writ of prohibition.

Davis Louderback, for petitioner.

J. N. E. Wilson and *T. Z. Blakeman*, for respondent.

MCKEE, J. On the twentieth of September, 1885, there was returned and filed in department 11 of the superior court of the city and county of San Francisco an indictment for felony against the petitioner in this case, found by the grand jury. After the indictment

was filed the presiding judge of the superior court assigned it to department 1 of the said court for trial. The petitioner was afterwards arrested on a bench warrant issued upon the indictment, and was brought into court for arraignment. On his arraignment he challenged the panel and the individual jurors of the grand jury, moved to set aside the indictment returned by it, filed a plea in abatement, and moved to strike the indictment from the files of the court. The challenge, motions, and plea were based upon the grounds of want of jurisdiction, and irregularities and errors in law in the proceedings taken for ordering and impaneling the grand jury. The court disallowed the challenge, denied the motions, decided against the plea in abatement, and required the defendant to plead. He pleaded not guilty, and as the court is about to proceed to try the issues raised by the indictment and plea, the petitioner has applied for a writ of prohibition to restrain the court from proceeding to try him upon the indictment.

The petition contains the same grounds, as a basis for a writ of prohibition, upon which, in the court below, the petitioner challenged the panel and individual jurors of the grand jury. Most of the grounds stated for the purpose are irregularities and errors in law occurring before and after the finding and return of the indictment. But as these are matters which are reviewable and remediable on appeal in the action, they are not grounds for a writ of prohibition. Prohibition lies to arrest the proceedings of a judicial tribunal when they are without or in excess of its jurisdiction, and the writ is issuable only in cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civil Proc. §§ 1102, 1103.

One of the grounds stated in the petition is that the indictment was found by a body of men styled a "grand jury," that was not in law and fact "a valid and constitutional grand jury." If that be so, the accusatory paper returned by them to the court below as an indictment is worthless and void, (*People v. Thurston*, 5 Cal. 69,) and the court has no jurisdiction to try the petitioner upon it; for no person can be held to answer for crime unless on information, after examination and commitment by a magistrate or an indictment of a grand jury, and in order that offenses committed in a county may be prosecuted by indictments, the constitution requires that a grand jury shall be drawn at least once a year. Const. § 8, art. 1.

As defined by the Code law of the state, a grand jury is a body of men, 19 in number, returned in pursuance of law from the citizens of a county, or city and county, before a court of competent jurisdiction, impaneled and sworn, according to law, to inquire into public offenses committed or triable within the county, or city and county. Code Civil Proc. § 192. For constituting such a body the legislature has provided that each of the superior courts of the counties of the state, whenever in its judgment the public interest requires it, shall make and file with the county clerk an order directing him to have

drawn, at the time designated in the order, in the manner prescribed by law, the designated number of names of persons to be summoned as a grand jury, and to certify a list of the names drawn to the sheriff of the county, who shall summon them, according to law, to be and appear before the court at the time designated in the order. Id. §§ 219, 241.

According to the petition, these things were done. On July 8, 1885, an order for a grand jury was made in the superior court of the city and county of San Francisco, and filed with the county clerk. That order was signed: "F. W. LAWLOR, Presiding Judge Superior Court; D. J. TOOHY, Judge of the Superior Court." One o'clock P. M. of the day on which the order was made and filed was the hour designated in the order, as originally made and filed, for the drawing. That day, in department 11 of the superior court, the court opened at 10 o'clock A. M., and upon the opening of the court the clerk read aloud the order, as originally signed, for a grand jury; after which the judge of the court amended the order by changing the hour designated in the order for drawing the jury from 1 o'clock P. M. to 10 A. M. of the day; and upon such change being made on the face of the order, the clerk, in open court, in presence of the judge of the court,—the presiding judge of the departments of the superior court being absent during the proceedings,—did draw from the grand jury box the names of the requisite number of grand jurors, pursuant to the order as amended, and in the manner prescribed by section 219 of the Code of Civil Procedure.

Of the names thus drawn by the officer a certified list was made and delivered to the sheriff, who returned that he had found and summoned 21 of the persons named on the list, to be and appear in department 11 of the superior court, at 10 o'clock A. M., on the tenth day of July, 1885; and at that time the jurors summoned appeared in court. The persons who appeared were summoned by the proper officer, and their names were drawn by a proper officer, in the performance of a ministerial duty required of him by an order of a court of competent jurisdiction. The absence of the presiding judge of the department of the court in which the duty was performed did not invalidate the drawing, nor did the change made by the judge of department 11 in the original order of the hour at which the drawing was to take place divest the court of jurisdiction over the proceeding. The change made, if an irregularity or error in law, was an irregularity which happened, or an error committed, within the jurisdiction of the court, which did not affect the existence of the order under which the clerk acted; and as the order was made and amended within and not without the jurisdiction of the court, it was not void for want of jurisdiction, nor for an excess of jurisdiction. Therefore the names were legally drawn from the grand jury box, and the persons listed and summoned who appeared in court were returned, in pursuance of law, before a court of competent jurisdiction.

But of the persons summoned and who appeared, 13 were excused for cause, and only 6 of the original panel remained. The grand jury was therefore incomplete, and, in order to fill the panel, the judge of the court, by an order entered in the minutes of the court, directed the sheriff to summon 15 persons, from the body of the city and county, to be and appear in department 11 of the superior court on the fourteenth day of July, 1885, to serve as grand jurors. That was done. Under the order the sheriff summoned 15 persons from the body of the city and county, returned their names into court, and the persons who were summoned appeared in court at the hour named in the order. Two of them were excused for cause, and the remaining thirteen, with the six jurors of the original panel, were recognized by the court, and declared to be the grand jury, and as such were impaneled and sworn, and afterwards found and returned into court the indictment against the petitioner.

The petition states that there were, at the time of the proceeding taken for filling the original panel, 135 names in the grand jury box from which a grand jury could and ought to have been drawn, and it is contended that in making the order for summoning the jurors from the body of the city and county the court exceeded its jurisdiction. But the names of a sufficient number of persons to constitute the grand jury having been drawn from the grand jury box, and those persons having been summoned and returned according to law, of whom, for cause, such numbers were excused that there were only present six of the original panel, the court had jurisdiction to fill out the deficiency of the original panel, either by an order for a sufficient number of jurors to be forthwith drawn and summoned to attend the court, or by an order entered in its minutes directing the sheriff forthwith to summon so many good and lawful men of the county, or city and county, to serve as grand jurors, as may be required. Code Civil Proc. §§ 226, 242. There was therefore no excess of jurisdiction in the order made for a special *venire* for summoning the requisite number of jurors from the body of the county to complete the grand jury, instead of an order for having the number drawn from the grand jury box.

We are of opinion that the court below, in exercising its discretion, ought to have ordered the panel to be filled by requiring the clerk, in open court, and in the presence of the judge, to draw the requisite number of names from the grand jury box instead of requiring the sheriff to summon jurors from the body of the city and county. The former course of proceeding is more consistent with the correct administration of justice. But the course adopted by the court was one authorized by the Code. The persons summoned and in attendance were drawn, summoned, and impaneled under a valid law, and according to its provisions, (*People v. McDonell*, 47 Cal. 136; *People v. Ah Chung*, 54 Cal. 398; *Leahy v. Southern Pac. R. Co.*, 3 Pac. Rep. 622;) and as they were qualified to sit as grand jurors, and were rec-

ognized by the court and sworn as a grand jury, the indictment found by it against the petitioner is a good indictment.

It follows that the application for a writ of prohibition must be denied. It is so ordered.

McKINSTRY, SHARPSTEIN, and THORNTON, JJ., concur.

69 Cal. 129

MARTIN *v.* WARD. (No. 9,262.)

Filed March 23, 1886.

1. EJECTMENT—ADVERSE POSSESSION.

In an action of ejectment a finding that defendant repudiated plaintiff's title, and set up title in himself, only about three years prior to the action, and the fact that defendant had failed to pay the taxes required to make out an adverse possession, are fatal to a claim of adverse possession by defendant.

2. TRIAL—DIRECTING VERDICT—NO CONFLICT IN EVIDENCE.

Where there is no conflict in evidence, the court may properly direct a verdict.

3. APPEAL—ERROR WITHOUT INJURY.

It is no ground for reversal on appeal that errors have been committed in the court below, if such errors inured to the benefit of the appellant.

4. SAME—CONFLICTING AND HOSTILE TESTIMONY—PROVINCE OF JURY.

Where the evidence on a trial was radically hostile and conflicting, it is peculiarly within the province of the jury, and the verdict should not be disturbed on appeal.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

J. N. Thorne, for appellant.

J. L. Murphy, for respondent.

SEARLS, C. This is an action of ejectment to recover a lot of land 25 feet front by 69 feet deep, situated on Douglas street, city and county of San Francisco. The appeal is from a judgment in favor of plaintiff, and from an order denying a new trial. The complaint is in the usual form in ejectment, avers the value of the rents and profits of the demanded premises to be \$200, and demands judgment for possession, for \$500 damages for withholding possession thereof, and for \$200, the value of the rents and profits, and for costs. The complaint is followed by the usual affidavit in verification, but does not appear to have been sworn to, and must be treated as an unverified complaint. The answer contains: (1) A general denial of "each and every allegation in said complaint contained." (2) Sets up that plaintiff's action is barred by sections 318 and 319 of the Code of Civil Procedure of the state of California. (3) A plea of a judgment in favor of defendant, determining the title to the demanded premises in defendant's favor. (4) And for a further and separate defense, and as a cross-complaint, defendant avers, in substance, that in the latter part of 1868, plaintiff being the owner of 75 feet front

by 125 feet deep on Douglas street, in consideration that defendant would build for her, said plaintiff, on said land, a house, agreed to convey to him, the defendant, the northerly one-third, or 25 feet front by 125 feet deep, parcel of said land; that on or about January, 1869, defendant entered into possession of said land so agreed to be conveyed, and has ever since held the exclusive, visible, open, and notorious possession thereof, adverse to all the world claiming title thereto; that the defendant built the house for plaintiff as per the agreement, and that the same was accepted by her; that plaintiff agreed to execute to defendant a deed, but has never done so. Wherefore defendant prays that he be decreed to be the legal owner of the premises, and that plaintiff execute to him a deed, etc.

At the trial it was admitted that the plaintiff was the owner of the land in 1869, at the time of the alleged agreement, and by consent of parties the following special issues were presented to the jury, and answered as herein stated:

"(1) Did the plaintiff, in the latter part of 1868, or the early part of 1869, enter into any agreement with the defendant whereby she promised that she would convey to him the premises on which he now resides, in consideration that he would construct for her, at his own expense, a dwelling-house upon that portion of the premises where she is now residing? Yes. (2) If you find the above in the affirmative, then did the defendant construct a dwelling-house for the plaintiff upon that portion of the premises where she is now residing at his own expense? No. (3) If you find the above in the negative, then did the plaintiff, in the latter part of 1868, or the early part of 1869, agree with the defendant that if he would pay a certain mortgage then existing upon the premises in controversy to the Hibernia Bank, for about the sum of \$300, or refund the amount, she would convey to him the premises upon which he is now residing? Yes. (4) If you find the last above in the affirmative, then did the defendant pay said mortgage or refund the amount thereof to the plaintiff? No. (5) If you find the last above in the affirmative, then did the defendant enter upon said premises in pursuance to said agreement? Yes. (6) If you find that the defendant entered upon the possession of said premises under either of the agreements above mentioned, then has he ever repudiated said agreement, and claimed to hold the premises as his own, prior to the commencement of this litigation? Yes, on or about three years ago."

Upon the coming in of this special verdict the court instructed the jury to find a verdict for the plaintiff for the possession of the demanded premises, and for the rental value thereof, at eight dollars per month, from the date of the filing of the complaint, and thereupon the jury rendered its verdict in favor of the plaintiff as follows: "We, the jury, in the above-entitled cause, do find for the plaintiff, and assess the damages in the sum of \$104." To the instruction of the court directing a general verdict counsel for defendant excepted, and the ruling is assigned as error.

At the trial no evidence was offered in support of the plea of a former adjudication and judgment. Title in plaintiff in 1869 was admitted, and the only evidence upon the subject of the value of the rents and profits was that of the defendant, who said: "I suppose the

property might bring probably about \$10 a month, or thereabouts," and that of Peter Ward, a witness on behalf of plaintiff, who fixed it at eight dollars per month.

The sixth finding of the jury, to the effect that defendant repudiated the agreements and claimed to hold the premises as his own, "on or about three years ago," coupled with the fact that he himself testified that for two or three years before suit was brought he had not paid the taxes on the property, as required by section 325 of the Code of Civil Procedure to make out an adverse possession, are conclusive of defendant's plea of the statute of limitations.

There remained, then, nothing to dispose of, except the value of the use and occupation, and if plaintiff was willing to accept the smallest amount named by any witness, defendant who had fixed the value somewhat higher, should not be heard to complain. Assuming as the court did, the lowest sum named as the value, there was upon *this question* no conflict in the testimony. Where there is no conflict in the evidence, the court may properly direct a verdict. *Chenery v. Palmer*, 6 Cal. 122; *Watson v. Damon*, 54 Cal. 278; *Page v. Tucker*, Id. 121. The error, if any, in instructing the jury as to the amount to be found, inured to the benefit of appellant, and it is no cause for a reversal of the judgment. Upon the other issues the evidence was not only conflicting, it was radically hostile and conflicting, in the extremest sense of the term, and involved considerations peculiarly within the province of a jury to determine; and, under the circumstances, the result reached should not be disturbed, and the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 112

GIRDNER and others v. BESWICK. (No. 9,843.)

Filed March 20, 1886.

1. APPEAL—NOTICE, CONSTRUCTION OF.

Where the language of a notice of appeal is "from an order overruling and denying defendant's motion for new trial upon the judgment made and entered in above-entitled action, which said order overruling and denying defendant's motion for new trial was made and entered by said court herein on the sixteenth day of September, A. D. 1884," the appeal taken thereby is from the order denying the motion for a new trial.

2. NEW TRIAL—NOTICE OF INTENTION TO MOVE FOR.

A party has 10 days after the service on him of notice of a decision within which to give notice of his intention to move for a new trial, and therefore, if nothing appears on the record showing service of a notice of the decision, but the notice of intention to move for a new trial properly appears, it cannot be held that such latter notice was not in time, so as to constitute a ground for dismissal of an appeal.

3. SAME—SETTLEMENT OF STATEMENT ON MOTION—CERTIFICATE.

A certificate appended to a statement on motion for a new trial, as follows:

"I hereby certify that the foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor. EDWIN SHEARER, Superior Judge,"—is a sufficient certificate of settlement of the statement within the statute. Code Civil Proc. Cal. § 659, sub. 3.

4. TRIAL—FAILURE TO FIND ON IMMATERIAL ISSUES.
Failure to find on immaterial issues is not error.
5. SAME—FINDINGS OF FACT, WHAT PROPER.
Findings which find only matters of evidence, and are not findings of fact, have no proper place in the findings of the court; and if they do not affect the result of a cause, and afford no ground for reversal, they should be disregarded on appeal, as if they did not appear in the findings at all.
6. APPEAL—FINDINGS—SUFFICIENCY OF.
Various findings reviewed, and held sufficient.
7. SALE OF ANIMALS—WARRANTY OF NUMBER—ACTION FOR BREACH—DAMAGES.
The plaintiffs bought of the defendant a band of animals which, by his agreement, the latter guaranteed should be 170 head, less five head of horses, which he was allowed to retain. There were then sold a band of 165 animals. Of these plaintiffs got only 117 head, leaving a difference of 48 head, for the value of which, and not for the value of 53 head, the plaintiffs were entitled to recover as damages, and the trial court erred in allowing the value of more than 48 head.

In bank. Appeal from superior court, county of Siskiyou.

Wm. McConaughy and J. V. Brown, for appellant.

W. I. Nichols and H. B. Warren, for respondents.

THORNTON, J. This action was brought to recover \$2,000 damages for breach of a contract entered into between plaintiffs and defendant. The contract is as follows:

"\$4,500. SISKIYOU CO., CAL., June 20, 1882.

"For and in consideration of the sum of four thousand five hundred dollars, in hand paid, I this day sell my entire band of horses, mules, and jack to J. Girdner and J. W. George, except five head of horses reserved, and I hereby agree, when gathered up, that there shall be one hundred and seventy head, not including the colts of 1882, brand,—hat brand, (——): provided, that there shall not be some disease to kill off, or that it becomes known that they have died from any other cause.

[Signed]

"R. BESWICK."

The breach assigned is that at time of sale by defendant to plaintiffs there were not more than 119 head of the band of animals sold, as defendant well knew, and that plaintiffs, on gathering up said animals, got no more than 117 head of said band, including 2 that had died. From this it appears that there was a deficiency of 53 head. The court gave judgment for \$2,000, the value of the 53 head, in favor of plaintiffs. The defendant moved for a new trial, which was denied.

If there is any appeal herein it is from the order denying defendant's motion for a new trial. It is contended that there is no such appeal. The language of the notice of appeal is: *From an order overruling and denying defendant's motion for new trial upon the judgment made and entered in above entitled action, which said order overruling and denying defendant's motion for new trial was made and entered by said court herein on the sixteenth day of September, A. D.*

1884." The notice was properly entitled in the cause. An order denying the motion for a new trial on the sixteenth of September, 1884, appears in the transcript. The notice in its last clause refers to this order by its correct date as then made, and speaks of it as an order overruling and denying defendant's motion for new trial, and thus defines it the order from which the appeal is taken. It would be an unwarranted construction of this language to hold that this was not the order appealed from. It was plainly intended as an appeal from this order. There is nothing in the language used to mislead the plaintiffs or their counsel as to the order intended to be appealed from. We feel bound to hold it as an appeal from the order denying the motion of defendant for a new trial. The undertaking on appeal, though inartificially drawn, is in our judgment sufficient.

The only appeal here, as above stated, is from the order of the court denying defendant's motion for a new trial. It is now urged that this appeal should be dismissed because the notice of intention to move for a new trial was not given in time. The only notice of intention which we can take notice of here is that referred to in the order denying the motion for a new trial. The other notices appearing in the transcript we cannot take notice of because they are not embraced in the statement or bill of exceptions. Such notices are not a part of the judgment roll, and they must be made to appear as part of the record by a statement or bill of exceptions, as other matters which are not a part of the judgment roll must be made a part of the record. The order denying the motion for a new trial was made on the sixteenth of September, 1884, and is as follows:

"(Title of Court and Cause.)

"At a regular term of the honorable superior court, continued and held within and for said county, at Yreka city, the county-seat thereof, on Tuesday, September 16, A. D. 1884, court met pursuant to adjournment, and was duly called by the sheriff. Present: Hon. EDWIN SHEARER, superior judge, and officers of the court.

"In pursuance of the notice of motion to move for a new trial, filed herein on the sixteenth day of August, A. D. 1884, the defendant, by W. I. Nichols and H. B. Warren, his attorneys, moves the court to set aside the decision and judgment rendered in this action, and grant a new trial thereof upon the following grounds, to-wit: (1) Insufficiency of the evidence to justify the decision, and that the decision was against law. (2) Errors in law occurring at the trial, and excepted to by defendant; and that the statement on motion for new trial, as settled and allowed by the judge of said court, and filed herein on the fifteenth day of August, A. D. 1884, and the pleadings, papers, and records in said case, are herewith presented in support of said motion.

"W. I. NICHOLS,

"H. B. WARREN,

"Attorneys for Defendant.

"And said motion having been submitted to the court for judgment thereon, it is ordered and adjudged by the court that said motion be, and the same hereby is, overruled and denied. EDWIN SHEARER, Superior Judge."

The notice of intention herein referred to is stated to have been filed on the sixteenth of August, 1884. The decision herein was filed on the seventh of March preceding. The defendant had 10 days after notice of the decision of the court within which to give notice of his intention to move for a new trial. When this notice was given does not appear. In fact, it does not appear that any notice of the decision was ever given; nor does it appear that any objection was ever made in the court below that this notice of intention was not given in time. Under these circumstances we cannot hold that this notice was not in time, and the appeal cannot be dismissed on the ground that it was not so given. We are bound to hold, nothing appearing to the contrary, that the notice referred to in the order above quoted was in all respects regular, and was given in time.

It is contended that it does not appear that the statement was properly settled. This contention is directed at the certificate of the judge appended to the statement, which is as follows:

"I hereby certify that the foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor.

"EDWIN SHEARER, Superior Judge."

We are of opinion that this certificate accords with the statute. Code Civil Proc. § 659, sub. 3.

The contention presented herein for consideration is that the court below failed to find on certain material issues. It is said that the complaint contains the following allegation:

"That plaintiffs are informed and believe, and upon their information and belief aver, that the defendant's band of animals so sold as aforesaid to plaintiffs did not, at the time of said sale, or at any time thereafter, consist of 170 head, nor of more than 119 head, exclusive of colts foaled in the year 1882, and that defendant well knew that he did not own more than 119 head of such animals at the time of said sale."

It is also said that this allegation is denied. The only attempt at denial to which we have been referred or which we can find is as follows:

"And upon information and belief avers that he, said defendant, at the time of the making of said sale, was the owner of horses and mules, branded with his brand, and numbering about 170 head in the aggregate, exclusive of the colts foaled in 1882."

The issue as to the number of horses defendant owned at the time of the sale is immaterial. The averment in the complaint to that effect is of immaterial matter, and, conceding for the argument that it was denied, the issue thus joined would be immaterial. The contract was that the animals referred to should be, when "*gathered up*," 170 head, and not at the time of sale. We cannot conclude that the sale and the gathering were to be simultaneous. The contract refers to the *gathering up* as something to be done after it (the contract) was entered into. The fair inference from the language of the contract is that the animals spoken of in it were dispersed over a range from which it was necessary to collect them. As to that part of the

allegation above quoted from the complaint, "that defendant well knew that he did not own more than 119 head of such animals at the time of sale," the knowledge of defendant here averred is not denied at all. If it had been denied, it would have raised an issue entirely immaterial, for the reasons above given as to the other part of the allegation. The failure to find on immaterial issues is not error.

The third and fourth findings find only matters of evidence. They are not findings of fact, and have no proper place in the findings. They do not, however, affect the result and afford no reason for a reversal of the order. They should be and are disregarded by this court, as if they did not appear in the findings at all.

The findings as to the number of animals gathered up are in form sufficient. The requisite facts are found in them in the following words:

"That said plaintiffs have made thorough search in their efforts to gather up the band of animals so purchased by them of said defendant, over the different ranges where said animals were known to range, and did range, and that plaintiffs have used diligence, and made earnest efforts to find all the animals purchased by them of the defendant. That of the whole number of animals purchased by plaintiffs of defendant, to-wit, one hundred and seventy head, plaintiffs have recovered one hundred and seventeen head, leaving fifty-three head of said animals, which plaintiffs have not recovered, and were not able to find and recover."

The above findings are not lacking in sufficiency. The court finds that 53 head of the animals sold were not gathered, and that plaintiffs, on a thorough search, were not able to find and recover them. It finds the value of these 53 horses to be \$2,000, and at that sum assesses the damages to plaintiffs. The plaintiffs bought of the defendant a band of animals which, by his agreement, the latter guaranteed to be 170 head, less 5 head of horses which he was allowed to retain. There was then sold a band of 165 animals. Of these plaintiffs got one 117 head, leaving a difference of 48 head, for the value of which, and not for the value of 53 head, the plaintiffs were entitled to recover as damages.

We will add here, in explanation, that the 2 head, which it is admitted by the pleadings died between the time of sale and the gathering, should be counted and were properly included in the 117 head as gotten by plaintiffs. The plaintiffs having bought the band of animals on the twentieth of June, 1882, from that time the death of any of them was at their risk, and they must suffer the loss of those which died. The court seems to have so ruled, and in doing so ruled correctly. But in allowing plaintiffs the value of more than 48 head the court erred, and for this error the order must be reversed, and the cause remanded, with directions to the court below to find from the evidence heretofore offered in the cause, and any further evidence which may be offered therein, the value of the 48 head, and having found the same, enter judgment for the sum so found as damages in favor of plaintiffs. Ordered accordingly.

We concur: McKEE, J.; SHARPSTEIN, J.; MCKINSTRY, J.

ROSS, J., (*concurring*.) The record does not contain the notice of intention to move for a new trial, nor does the statement on motion for new trial recite the giving of such notice, but the plaintiffs' attorney *accepted* the draft of the statement without any objection, and at no time in the court below objected to the settlement, or consideration of the statement, on the ground that proper notice of intention to move for a new trial had not been given. The court below, in denying the motion, does not appear to have proceeded upon the supposed want of notice of intention, but upon the determination of the questions presented by the motion itself. We must presume, therefore, that the court found that proper notice was given, or that defendant had waived the objection. *Gray v. Nunan*, 63 Cal. 220.

Upon the merits, I concur in the conclusions reached by Mr. Justice THORNTON.

SUPREME COURT OF CALIFORNIA.

69 Cal. 120

BYRNES v. CLAFFEY. (No. 9,301.)

Filed March 23, 1886.

PAYMENT—APPLICATION OF PAYMENTS.

Money paid to a creditor on account of his debtor may, in California, be applied towards the extinction of any obligation due him by the debtor, unless the latter manifests an intention that the money should be applied to some particular obligation.¹

Commissioners' decision.

Department 2. Appeal from superior court, county of San Mateo.

E. A. & G. E. Lawrence, for appellant.

Fox & Ross, for respondent.

SEARLS, C. This is an action upon a promissory note for \$900, made by defendant on the twentieth day of November, 1871, payable to plaintiff five days after date, with interest at 1 per cent. per month. Plaintiff had judgment for \$916.60, from which, and from an order denying a new trial, defendant appeals. Plaintiff was a merchant, and as such had an account with defendant, which, at the date of the note, was settled by the giving of such note. Defendant made two payments, one of \$374 on the twenty-eighth of December, 1871, and the other of \$101.40, about May 28, 1872, which were credited on the note. It appears that on September 24, 1873, plaintiff received for account of defendant from George Fox \$220, and in December, 1874, from one Kelso \$250; also in October, 1874, \$15 in cash, which sums defendant claims should be credited on the note. Plaintiff, on the other hand, asserts that defendant had in the mean time become indebted to him on a new book-account since the note was given in an amount in excess of the payments; that most of this was for cash advanced to defendant, and for mules sold to him, and that, as defendant did not direct him where to apply the payments, he applied them, at the date of payment, in part satisfaction of the open account.

The findings are in accord with the theory of the plaintiff, and are amply supported by the evidence. Indeed, about the only evidence which militates against plaintiff's theory is a statement of account made out by one Lovell, a clerk of plaintiff, since suit brought, in which defendant is allowed interest on the several payments as though made upon the note, and not upon the open account. This statement, plaintiff testifies, is not in accord with the books by him kept; and, as he presented his books at the request of the defendant, and as the latter makes no pretense that they contradict the testimony of the

¹ See note at end of case.

plaintiff, we may assume that they corroborate his statement. The testimony of Lovell also lends strength to the testimony of plaintiff, in several respects, though in others it seems to conflict therewith.

The Civil Code, § 1479, provides:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows: (1) If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation be manifested to the creditor, it must be so applied. (2) If no such application be then made, the creditor, within a reasonable time after such performance, may apply it towards the extinction of any obligation, performance of which was due him from the debtor at the time of such performance; * * * and an application once made by the creditor cannot be rescinded without the consent of [the] debtor."

The payments were applied in accordance with this rule, and the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

A debtor, when making a payment, has the right to direct its application. *Michigan Air-line Co. v. Mellen*, (Mich.) 6 N. W. Rep. 845; *Miles v. Ogden*, (Wis.) 12 N. W. Rep. 81; *Mack v. Adler*, 22 Fed. Rep. 570.

The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor. *Nichols v. Knowles*, 17 Fed. Rep. 494.

A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule. *Id.*

A debtor may direct, upon paying money to his credit, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. *Mackey v. Fullerton*, (Colo.) 4 Pac. Rep. 1193.

Upon the neglect of a debtor to direct the application of payment made by him, the creditor may make such application as he sees fit. *Corliss v. Grow*, (Vt.) 2 Atl. Rep. 388. See *Marye v. Strouse*, 5 Fed. Rep. 483.

A creditor receiving payments without any directions as to application, may appropriate them to any debt, not illegal, even though it would not support an action; e. g., a debt on which no action would lie by reason of the statute of frauds. *Haynes v. Nice*, 100 Mass. 327.

Where money has been received in part payment of a running account, and no specific application has been made of the same, a chancellor can, in his discretion, apply such money to that portion of the account which remains unsecured, without regard to the order of time in which the indebtedness for the several items of the account was incurred. *Schuelenburg v. Martin*, 2 Fed. Rep. 747.

In a case of voluntary payments made by the debtor, where no application is made by either party, and there is but one continuous account of several items, forming one and not separate or distinct debts, the payment will be applied on the account according to the priority of time; that is, the first item on the debit side of the account will be discharged or reduced by the first item on the credit side. *Hersey v. Bennett*, (Minn.) 9 N. W. Rep. 590. See *Kenton Furnace & Manuf'g Co. v. McAlpin*, 5 Fed. Rep. 737.

The rule for the appropriation of payments on running accounts is that the first item on the credit side of the account will be applied to extinguish the first item on the debit side of the account. *Mack v. Adler*, 22 Fed. Rep. 570.

Payments on account, not applied by either party at the time, will be applied by the court as equity may require; and, in case of an open running account, would be ap-

plied to the earlier items, if that were necessary to prevent the running of the statute of limitations. *Hannon v. Engelmann*, (Wis.) 5 N. W. Rep. 791.

The law will apply a payment in the way most beneficial to the creditor, and therefore to the debt least secured. *Coons v. Tome*, 9 Fed. Rep. 532.

Where a mortgage is given to secure both an individual note of the mortgagor, and a note upon which he is a joint maker with another, the mortgagee may apply the mortgage first to the payment of the individual note, and will not be required to prorate the proceeds arising from a sale of the mortgaged premises upon both claims. *Small v. Older*, (Iowa,) 10 N. W. Rep. 734.

Where a mortgagor gave a note, including both a prior indebtedness not secured by mortgage, and also a debt secured by mortgage, and the mortgagee applied payments made to him upon the note generally, it was held equivalent to an application on the secured and unsecured indebtedness *pro rata*, and that he could not afterwards make a different application. *Sheldon v. Bennett*, (Mich.) 7 N. W. Rep. 223. See, also, *McMaster v. Merrick*, (Mich.) 2 N. W. Rep. 895.

A creditor foreclosing a mortgage on real property given him to secure the payment generally of several debts, after they became due him from the mortgagor, may, in the absence of any special equities between the parties, and in the event that the proceeds of sale of the mortgaged property are insufficient to satisfy all the debts so secured, apply such proceeds towards the payment of any one or more of such debts in full, leaving a balance unpaid in whole or in part; and a surety of the debtor on such unpaid debts cannot compel a different application of such proceeds. *Wilson v. Allen*, (Ore.) 2 Pac. Rep. 91.

69 Cal. 122

WRIGHT v. SEYMOUR. (No. 8,906.)

Filed March 23, 1886.

1. PUBLIC LANDS—MEXICAN GRANT—PATENT—CONFIRMATION—CONSTRUCTION.

The patent issued to a claimant upon the confirmation of a Mexican grant is the only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government.

2. SAME—UNITED STATES PATENT—LANDS BORDERING ON TIDE-WATER—BOUNDARIES.

Under a United States patent to lands bordering upon a stream in which the tide ebbs and flows, the grantee, in the absence of an intent appearing in the patent to the contrary, does not acquire title to any land below high-water mark.

Commissioners' decision.

Department 2. Appeal from superior court, county of Sonoma.

Henley & Oates, for appellant.

Sidney V. Smith & Son, for respondent.

SEARLS, C. This is an action of ejectment to recover a parcel of land situate in the county of Sonoma. The cause was tried by the court without a jury, written findings filed, and judgment entered in favor of defendant, from which, and from an order denying a new trial, plaintiff appeals. Plaintiff's claim to the demanded premises is based upon a patent from the United States of America to Stephen Smith, dated April 18, 1859, which shows a grant of the Bodega ranch, lying between Russian river, the Pacific ocean, and Bodega bay. The description contained in the grant, so far as it borders on Russian river, is as follows: "To a stake marked 'B, 185,' on the bank of Russian River Station 185; thence, meandering down the Russian river north, 46 deg. 15 min. west, 19 chains, to Station 186, by 49, courses and distances, to the place of beginning." Plaintiff derails title from the original patentee.

The land in controversy, consisting of about 40 acres, constitutes an island in Russian river about one mile from its mouth at the Pacific ocean. The main channel of the river runs on the northerly side of the island, and south of it is a slough, by which it is separated from the main-land, between which and the island the water is, in places, very shallow, and, according to some of the witnesses, at low tide and in very dry time, has been known to entirely disappear near the lower end of the island. The evidence shows, further, that the ocean tides flow up the river to a point above the island. The river is not navigable for boats larger than canoes, skiffs, etc, and is not *in fact* a navigable stream for commercial purposes.

The question for determination is, does the land of plaintiff extend to the thread of the stream,—*usque ad filum aquæ*,—or is it bounded by a line at high-water mark on Russian river? If the former, then the channel of the river being on the north side of the island, constituting the demanded premises, the land falls within the prior grant, under which plaintiff holds, and he is entitled to recover; while if, under the calls of the grant, his boundary only extends to high-water mark, then and in that case the island is without the grant, and the construction placed by the court below upon the patent, under which the plaintiff claims, is the correct one.

Russian river, at the point in question, is a stream in which the tide ebbs and flows. At common law, all streams in which the tide ebbed and flowed were navigable streams, and those in which there was no flow and reflow of the tide were innavigable streams. This rule did not depend upon the navigability or non-navigability *in fact* of a stream, but upon the criterion afforded by the influx and reflux of the tide. A little reflection will suffice to convince the inquirer of the reasonableness of this rule in the land of its origin. The streams of England are all, of necessity, springing from the limited extent of the country, short, and, owing to the topography of the country and their limited flow of water, are not, *in fact*, as a rule, navigable until tide-water is reached. These facts borne in mind, and the reason of the rule is apparent. In the sense of the common law, Russian river, at the point indicated, is as completely a navigable stream as the Hudson at New York, or the Thames at London.

In the case of *Royal Fishery in the River Banne*, Davey, 149, it was resolved "that there are two kinds of rivers,—navigable and not navigable; that every navigable river, so high as the sea ebbs and flows in it, is a royal river, and belongs to the king, by virtue of his prerogative; but in *every other* river, and in the fishery of such other river, the terre-tenants on each side have an interest of common right, the reason for which is that so high as the sea ebbs and flows it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows." One of the results of this royal prerogative was that a grant of land extending to and bounded by or including a navigable stream within its boundaries, did not operate to pass title to

the bed of the stream, while a grant from the sovereign of land bordering upon a stream not navigable in the common-law sense—that is, above tide-water—would be presumed to extend to the thread of the stream. We must not be understood as indicating that at common law the bed of a navigable stream could not be granted to a subject by a sovereign, but only as saying that it did not pass, except in those cases where the specific intent to so grant was apparent in the conveyance.

“All rivers above the flow of tide-water are,” says Angell, Water-courses, “by the common law, *prima facie* private; but when they are naturally of sufficient depth for valuable *floatage*, the public have an *easement* therein for the purposes of transportation and commercial intercourse; and, in fact, they are *public highways* by water. Public water-courses, in this last sense, are both public and private. They are or may be the objects of private ownership subject to public use.” Ang. Water-courses, § 535. Such a river is “not a navigable river, however deep and large, in common-law language, being above tide-waters, but one under servitude to the public interest, and over the waters of which the public have a right to pass.” *Spring v. Russell*, 7 Me. 290.

Tyler, in his work on Boundaries, after reviewing the authorities says:

“It may, then, be affirmed that it is a settled principle in the laws of this country and of England that the right of soil of owners of land bounded by the sea, or, which is the same, on navigable rivers where the tide ebbs and flows, extends only to high-water mark; and that the shore below common but not extraordinary high-water mark belongs to the state, as trustee for the public.”

In England the crown, and in this country the people, have the absolute proprietary interest in the shore of these waters, though it may by grant or prescription become private property. 3 Kent, Comm. (7th Ed.) 514, 515. But the grantee of such shore will not take a fixed freehold, but one that shifts as the shore recedes or advances, (*Scrutton v. Brown*, 4 Barn. & C. 485;) “so that, in all cases where the land of a private individual is bounded upon sea, *prima facie* the boundary is the shore at ordinary high-water mark.” Tyler, Law of Boundaries, 39. “The same principle which governs the question of boundary of property adjoining the sea applies to arms of the sea, estuaries, and navigable rivers below tide-water.” Tyler, Bound. 40; Washb. Real Prop. 633, 634; Ang. Tide-waters, § 74; Hale, De Jur. cap. 4; *Canal Com'rs v. People*, 5 Wend. 443; *Canal Com'rs v. Kempshall*, 26 Wend. 414. The lands under water, where the tide ebbs and flows, belong to the state by virtue of her sovereignty, and, in the absence of an express showing to the contrary, it will not be presumed that the government of the United States intended to convey it. *Up-ham v. Hosking*, 62 Cal. 250; *Guy v. Hermance*, 5 Cal. 74; *Chapin v. Bourne*, 8 Cal. 295; *Teschmahcer v. Thompson*, 18 Cal. 11; *People v.*

Morrill, 26 Cal. 353; *Rondell v. Fay*, 32 Cal. 364; *Ward v. Mulford*, Id. 372; *More v. Massini*, 37 Cal. 432.

The doctrine of the common law in reference to the rights of riparian proprietors upon streams which are navigable in fact, though not subject to the flow and reflow of the tide, has been modified in some respects in many of the states of the Union. In Pennsylvania, Alabama, Tennessee, and some other states the doctrine is held that in all streams navigable in fact the riparian proprietor only takes to low-water mark, the soil and water formed between the lines that described low-water mark being retained as eminent domain for the use of all citizens, and that the right of navigation in all such navigable waters is the paramount public right of every citizen. *Flanagan v. Philadelphia*, 42 Pa. St. 219; *Monongahela B. Co. v. Kirk*, 46 Pa. St. 112; *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Elder v. Burrus*, 6 Humph. 356-358. We fail, however, to find in any of the United States an adjudged case in which it has been held that a conveyance of land bordering upon a tidal stream, in the absence of an express intention so to do, has been construed to pass title to any land below high-water mark, and the doctrine of sections 830 and 670 of our Civil Code is believed to be but a declaration of the law on this subject as it has existed since the formation of our state government.

Section 830 is in the following language:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark. When it borders upon a navigable lake or stream where there is no tide, the owner takes to the edge of the lake or stream at low-water mark. When it borders upon any other water the owner takes to the middle of the lake or stream."

Section 670, *supra*, is as follows.

"The state is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide-water within the state; of all land below the water of a navigable lake or stream," etc.

The description in the patent under which plaintiff claims is such as would be sufficient to include the bed of Russian river to the thread of the stream, were such a river a private stream, and is not sufficient in law to convey the land in a tide-water stream below high-water mark.

The contention of appellant that his title is derived from the government of Mexico; that the patent from the United States government was simply a confirmation of pre-existing rights under the grant; that at the date of the grant the common law did not exist as a rule of action or decision in California, and consequently that as none of the rights of the patentee conferred by the preceding sovereignty can be divested,—is substantially correct.

But the question remains, what were those rights? When we answer this question, in the light of the evidence presented by appellant through the patent of his grantor, we are constrained to say that

he has failed to show any right to the land in question. *More v. Masini*, 37 Cal. 435. We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related; and that, upon confirmation, the patent issued to the claimant is the evidence, and only evidence, of the extent of the grant, and the terms used in such patent relating to extent and boundaries is subject to like rules of construction with other grants from the government. Had the government found the claimant entitled to the bed and banks of a tide-water stream we must suppose it would have used in the patent apt words for its conveyance. Not having done so, the presumption is that it was not intended to convey the bed of the stream.

The witness Cox, to whose testimony appellant now takes exception, appears to have been introduced without objection, and the motion afterwards made to strike it out cannot avail the appellant. *People v. Long*, 43 Cal. 446.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 149

In re HANG KIE. (No. 20, 122.)

Filed March 24, 1886.

CONSTITUTIONAL LAW—VALIDITY OF LAUNDRY ORDINANCE.

Under the California constitution, the city of Modesto has power to prohibit the conduct of the business of a public laundry or wash-house in the city except within certain prescribed limits.¹

In bank. Application for writ of *habeas corpus*.

S. W. Geis, for petitioner.

Schell & Bond, *A. K. Pritchett*, and *Alfred Clarke*, for respondent.

MORRISON, C. J. Petitioner complains that he is unlawfully restrained of his liberty because the ordinance under which he was arrested and imprisoned is unlawful and void. On the second day of July, 1885, the board of trustees of the city of Modesto passed an ordinance in the following language:

"It shall be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are washed and cleansed for hire, within the city of Modesto, except within that part of the city which lies west of the railroad track and south of G street."

A section of the ordinance further declares that any laundry carried on in violation of the foregoing section is a nuisance, and, by

¹See note at end of case.

section 3, a violation of the ordinance is declared a misdemeanor, punishable by fine and imprisonment, or both. The defendant was charged with a violation of the ordinance, and is now suffering by imprisonment the penalty thereof, from which he seeks to be relieved, on this application, under the *habeas corpus* act.

The only question submitted for our consideration involves the legality of the ordinance in question; or, in other words, the power of the board of trustees of the city of Modesto to pass it. The objections to the ordinance are two: (1) That it is *unreasonable*, the rule being that when a power to pass an ordinance is not given in *express terms*, but is derived from a general power to legislate, the ordinance must be reasonable. *Ex parte Chin Yan*, 60 Cal. 78. (2) That it violates the state constitution, art. 1, §§ 11, 21, inasmuch as it is not uniform. Both of these objections seem to be answered by *Ex parte Moynier*, referred to hereafter. It is claimed, in answer to the prayer of the petitioner for a discharge, that the power exercised by the board of trustees was duly vested in that body, not only under the act approved March 13, 1883, but also under the provisions of the state constitution. We will confine ourselves to a consideration of the powers vested in the municipal corporation by the constitution, as that will be sufficient for the present case.

By section 11 of article 11 of the constitution it is provided "that any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." In the case of *Ex parte Moynier*, 2 Pac. Rep. 728, this court had under consideration an ordinance very similar in its provisions to the one now under consideration, and held that the power exercised by the board of supervisors of the city and county of San Francisco, fixing certain limits in the city for the carrying on of the laundry business, was properly exercised under the section of the constitution above referred to. The opinion in that case says: "That the regulations of the order are, as to portions, (perhaps all,) police regulations, and as to some sanitary, we have no doubt." And in the case of *Barbier v. Connolly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, the supreme court of the United States in a laundry case says:

"The fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from 10 o'clock at night until 6 o'clock in the morning of the following day. * * * The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies."

The case of *Soon Hing v. Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730, which was also of the same character, lays down the same doctrine. Other cases might be referred to, but a decision of the supreme court of this state, and two of the supreme court of the United

States, holding such an ordinance to be a police or sanitary regulation, are deemed sufficient.

We can see nothing unreasonable in the ordinance, but, on the contrary, good reasons may have moved the board of trustees to pass the order in question.

Writ dismissed, and petitioner remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.; ROSS, J.

NOTE.

It was held in *Re Yick Wo*, (Cal.) 9 Pac. Rep. 139, that under the California constitution the board of supervisors of the city and county of San Francisco has power to prevent the establishment, maintenance, or carrying on of laundries except in brick or stone buildings, unless the consent of such board to do otherwise is first obtained.

In the case of *Barbier v. Connolly*, 5 Sup. Ct. Rep. 357, it was said by the United States supreme court that class legislation—discrimination against some in favor of others—is prohibited by the fourteenth amendment to the constitution of the United States; but that the legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment; that neither the fourteenth amendment, nor any other amendment, to the constitution of the United States was designed to interfere with the power of a state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, or good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

In *Soon Hing v. Crowley*, 5 Sup. Ct. Rep. 730, it is said that the specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind; and that it is not discriminating legislation that branches of the same business, from which danger is apprehended, are prohibited during certain hours of the night, while other branches, involving no such danger, are permitted.

69 Cal. 146

HAHN and others v. GARRATT. (No. 9,045.)

Filed March 24, 1886.

ANIMALS—TRESPASSING CATTLE—FENCING LANDS.

Owners of land in Santa Clara county are not required, under the California statute of April, 1863, as amended in March, 1872, to fence such land against the cattle of others; and where the owner of cattle allows them to stray upon another's land, and do damage, he is liable for the damage done, whether the land was fenced or not.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

John Reynolds and *C. D. Wright*, for appellant.

Burt & Pfister, for respondents.

BELCHER, C. C. This was an action to recover damages for trespasses committed by the defendant's cattle upon the plaintiffs' crops. The plaintiffs' land was situate in Santa Clara county, and was not inclosed. At the trial the defendant asked the court to instruct the jury that the plaintiffs could not recover without first showing that the premises on which they claimed the trespasses were committed, were inclosed by a substantial fence, sufficient to prevent the ingress of stock, or that the defendant had voluntarily and intentionally

herded his stock upon the plaintiffs' land. The court refused so to instruct the jury, but did instruct them as follows:

"In this county a man is not bound to fence his land against the trespasses of the cattle of his neighbor. The owner of the cattle in this county must fence in his cattle, or in some way keep them from trespassing upon his neighbor's premises. * * * In this case, it makes no difference whether the plaintiffs' premises were inclosed with any inclosure or not, the defendant was bound to take such care of his cattle as would prevent them from trespassing upon the premises of plaintiffs."

The refusal to instruct the jury as requested, and the giving of the above instructions, constitute the only errors assigned in the case.

It is claimed for the appellant that the rule of the common law of England which required every man to keep his cattle within his own close, and made him liable in damages for all injuries resulting from their being permitted to range at large, has never prevailed in this state, and counsel cite, in support of this view, *Waters v. Moss*, 12 Cal. 535; *Comerford v. Dupuy*, 17 Cal. 308; and *Logan v. Gedney*, 38 Cal. 581. When the common law was adopted, in 1850, it was made the rule of decision in all the courts of this state, so far as it was not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state. At that time the principal industries of the state were mining and cattle-raising. To encourage and promote these industries, acts were passed by the legislature, before the adoption of the common law, which have been held to be inconsistent with some of its rules, and, among others, with that above referred to. Since then farming and fruit-raising have become important industries, and to encourage and protect them, special acts have been passed for some of the counties which in effect restored the rules of the common law. One of these acts was passed in April, 1863, entitled "An act concerning estrays, and animals found running at large, in the county of Santa Clara." St. 1863, p. 581. This act was amended in March, 1872, (St. 1871-72, p. 580,) and section 1, as amended, reads as follows:

"Any person finding at any time an estray horse, mare, mule, jack, jennet, or any estray cattle, sheep, hogs, or goats, or any number of such animals, upon his farm, land, or other premises, or any person finding any or all such animals running at large upon any public street, road, lane, alley, avenue, highway, square, or any other public thoroughfare, whether the owners of such animals are known or unknown, may take the same up, and proceed therewith as hereinafter directed; and no person shall remove such animals from the possession of the taker-up, or from the possession of the officer into whose hands they may be placed for the purpose of sale, except as hereinafter provided. Any of the above-named animals herded or found grazing upon any public street, road, highway, avenue, alley, or public square, or upon private property, without the consent of the owner thereof, whether accompanied by a herder or not, shall be deemed and held to be estrays, and animals running at large, within the meaning of this act, and shall be dealt with as hereinafter provided, and be subject to the penalties herein named."

It is then provided that the person taking up such animals shall confine them in a secure place, and shall post notices containing a

description of the animals taken up, etc., and that unless the owner shall appear and claim the property and pay certain damages within 10 days, the animals shall be sold at public sale "in conformity with the law concerning sales on execution." It is further provided by section 8 that "all acts and parts of acts in conflict with this act are hereby repealed, so far as they relate to the county of Santa Clara: provided, that nothing herein contained shall be construed so as to deprive any person of the right to sue and recover damages for trespass by any animals mentioned in this act."

It is very evident from this that in 1882, when the trespasses complained of here were committed, the owner of land in Santa Clara county was not required to fence it against his neighbor's cattle, and that if the owner of cattle allowed them to stray upon another's land and do damage, he at once became liable for the damage done, whether the land was fenced or not.

As we find no error in the action of the court below, the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 142

WOODSUM v. COLE. (No. 9,300.)

Filed March 24, 1886.

1. PROMISSORY NOTE—INDORSEMENT AFTER MATURITY.

The indorsee of a promissory note after maturity is not an indorsee in due course, and therefore does not acquire an absolute title to the note so that it is valid in his hands notwithstanding defects in the title of the party from whom he acquired the note.

2. SAME—ACTION—PARTIES—REAL PARTY IN INTEREST.

Actions must be prosecuted in the name of the real party in interest, in California, and therefore, to entitle a party to maintain an action upon a promissory note, he must be the legal owner, and have the right of possession of the instrument, and such ownership must be sufficient to protect the defendant upon a recovery against him from a subsequent action, and the defendant in such action may show that plaintiff was not the legal owner of the note, and paid no money or value therefor.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.
S. O. Houghton, for appellant.

C. D. Wright and *S. F. Leib*, for respondent.

BELCHER, C. C. This is an action to recover the amount due on a promissory note. The plaintiff sues as indorsee of the note, and the defendant, by his answer, denies that the plaintiff has any right or title to the note, or any interest in the money due thereon; and

alleges that one A. C. Woodsum, the payee named therein, is the owner of the note, and entitled to receive payment thereof, and that, before the commencement of this action and since, he had directed the defendant not to pay the same to any person other than himself; and, further, that A. C. Woodsum had extended the time of payment, and the note was not due or payable when the action was commenced. It appears from the record that the note was dated October 2, 1880, and was payable to the order of A. C. Woodsum, 90 days after its date. It was really the property of Abby F. Woodsum, wife of the payee, and shortly after he received it, he indorsed it in blank, and delivered it to her. She retained it for some time, and then delivered it back to him, to hold and collect as her agent. Afterwards, about the tenth or twelfth of March, 1881, at his request, and while he was holding the note, V. B. Woodsum indorsed his name upon the back of it, and A. C. Woodsum then borrowed some money of other parties, and used the note as collateral security. This loan was paid, and the note returned. After that A. C. Woodsum delivered the note to V. B. Woodsum, and directed him to see Cole, the maker, and get the money due on it if he was ready to pay, but he gave him no authority to institute any action upon it. V. B. Woodsum reported that he had seen Cole, and that Cole had no money just then, and was not ready to pay. Subsequently, but before this action was commenced, A. C. Woodsum saw Cole, and told him he could have until January 1, 1883, in which to pay the note. No consideration ever passed from V. B. Woodsum to A. C. Woodsum for the note, but while he held it, as above stated, he delivered it to his wife, who is the plaintiff here. The plaintiff was called as a witness in her own behalf and testified that she received the note in March or April, 1881, and that ever since then it had been in her possession or in that of her attorney. On cross-examination she was asked if any money was paid by her at the time she received the note, and the question was objected to as irrelevant and immaterial. The objection was overruled, and thereupon she answered that "the note was delivered to her by V. B. Woodsum in part payment of a sum of money owing by him, but no money was paid by me." Upon the facts the court below was of the opinion that the plaintiff was not entitled to recover, and thereupon judgment was rendered in favor of the defendant. The appeal is from the judgment and an order denying a new trial.

1. It is clear that V. B. Woodsum was not the owner of the note, and was never authorized to do anything with it, except to see Cole and receive the money if he was ready to pay it. It is equally clear, as the note was overdue when it was delivered to plaintiff, that she was not "an indorsee in due course," and so did not acquire an absolute title thereto, so that it was valid in her hands notwithstanding any defect in the title of the person from whom she acquired it. Civil Code, §§ 3123, 3124.

2. If the plaintiff has any right which she can assert to the note, it must be because she obtained it under such circumstances as estop the true owner from claiming it as against her. The principle is well established that "where the true owner holds out another or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Brewster v. Sime*, 42 Cal. 147; *Barstow v. Savage Min. Co.*, 64 Cal. 388; S. C. 1 Pac. Rep. 349; *Chase v. Whitmore*, 9 Pac. Rep. 942. But we are unable to see how the plaintiff can avail herself of this principle. There is nothing to show that she was an innocent purchaser of the note. No attempt was made to prove that, when she took it, she had not full knowledge of all the circumstances under which, and the purposes for which, V. B. Woodsum held it. The burden was upon her to show her innocence and good faith, and that was not accomplished by the mere production of the note, and showing when and from whom she obtained it.

3. In this state actions must be prosecuted in the name of the real party in interest. Section 367, Code Civil Proc. To entitle a party to maintain an action upon a promissory note, he must be the legal owner, and have the right of possession of the instrument; and such ownership must be sufficient to protect the defendant upon a recovery against him from a subsequent action. It was competent, therefore, for the defendant to show, if he could, that the plaintiff paid no money for the note, and was not the legal owner of it. *Hays v. Hathorn*, 74 N. Y. 486; *Towne v. Wason*, 128 Mass. 517.

4. The findings are sufficient, and we think the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 241

In re Estate of SCHEDEL. (No. 11,479.)

Filed March 31, 1886.

APPEAL—APPEAL FROM ORDER OF DISTRIBUTION—EFFECT TO STAY PROCEEDINGS.

On an appeal taken by a legatee from a decree of distribution, the execution of the undertaking provided for by section 941 of the California Code of Civil Procedure, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300, stays proceedings in the court below, upon the judgment appealed from.

Department 1. Appeal from superior court, city and county of San Francisco. Application for order staying proceedings in court below pending appeal.

Marcus Rosenthal, for petitioner.

Ross, J. The question in this case is whether, on appeal taken by a legatee from a decree of distribution, the execution of the undertaking provided for by section 941 of the Code of Civil Procedure, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300, stays proceedings in the court below upon the judgment appealed from. Under the provisions of our Code we think it does. Section 949 of the Code of Civil Procedure reads:

"In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section 941 stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within this state; and except, also, where the order grants, or refuses to grant, a change of place of trial of an action."

The provisions of sections 942, 943, 944, and 945 have no application to the case of an appeal by a legatee from a decree of distribution. It is not claimed for the respondent that any of them do, unless the case comes within the "spirit" of section 943, which provides:

"If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

It is a sufficient answer to the suggestion to say that the decree appealed from does not direct the assignment or delivery of any documents, nor the assignment or delivery of any personal property,

within the meaning of that section. The decree appealed from distributes certain moneys; but money is not included within the "personal property" spoken of in section 943. Sections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the judgment or order appealed from. This is manifest from their language. But the appellant in the present case is not required to do anything. It feels aggrieved by the decree, however, and has the right of appeal. The case is one "not provided for in sections 942, 943, 944, and 945," and consequently, by the terms of section 949, the perfecting of the appeal, by giving the undertaking mentioned in section 941, stays proceedings in the court below upon the judgment appealed from.

Let the order issue.

We concur: MCKINSTRY, J.; MYRICK, J.

69 Cal. 239

In re Estate of ARMSTRONG. (No. 9,434.)

Filed March 31, 1886.

EXECUTORS AND ADMINISTRATORS — SPECIAL ADMINISTRATOR — INDEBTEDNESS, CHARGEABLE IN ACCOUNT.

A person indebted to a decedent, and who is appointed special administrator of his estate, is, upon settlement of his account as such special administrator, properly charged by the probate court with the amount of the indebtedness.

Department 1. Appeal from superior court, city and county of San Francisco.

E. D. Sawyer, for appellant.

Maurice B. Blake, for respondent.

J. M. Allen, for certain heirs.

Ross, J. The question in this case is whether a person, indebted to the deceased, and who was appointed special administrator of the estate, was, upon the settlement of his account as such special administrator, properly charged by the probate court with the amount of the indebtedness. It is admitted for the appellant that, if he had been the general administrator, he would have been properly chargeable, but it is claimed that, under the provisions of the statute in respect to special administrators, such a charge is not permissible. The duties of a special administrator are thus defined by section 1415 of the Code of Civil Procedure:

"The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims, and demands, of the estate; must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator. He may sell such perishable property as the court

may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the deceased."

Among the duties thus devolved by statute upon the special administrator is that of collecting the debts of the estate; and for that and other like purposes the right to commence and maintain suits and other legal proceedings as an administrator is conferred upon him. And by section 1417 of the same Code it is provided that "the special administrator must render an account, on oath, of his proceedings, in like manner as other administrators are required to do."

It was the duty of the special administrator in this case to collect the debts due the estate for which he was acting, and to bring suit where necessary for the purpose. But he could not sue himself. Yet the statute of limitations might work a bar of his debt during his administration, unless (the debt being due) he is to be deemed to hold the amount due in his hands, and accountable for the same on the settlement of his administration. It is so with ordinary administrators, as is conceded by appellant's counsel, and we discover nothing in the provisions of the statute in respect to special administrators that demands or would warrant the application of a different rule as to them. Order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

69 Cal. 244

SANKEY v. LEVY, Judge. (No. 11,394.)

Filed March 31, 1886.

MANDAMUS—NOT REMEDY FOR CORRECTION OF ERROR.

Mandamus does not lie to correct the error of a superior court in rendering a judgment in a case on appeal from a justice's court, without filing findings of fact.

Department 1. Application for *mandamus*.

S. Sankey, for petitioner.

BY THE COURT. This is an application for a writ of mandate to compel the respondent to restore to the calendar of the superior court a case tried in that court some two years ago on appeal from a justice's court. The ground of the application is that the superior court rendered judgment in the case without filing findings of fact. But, at most, this was but error, for the correction of which *mandamus* does not lie. Writ denied, and proceedings dismissed.

CROWELL v. BROWN. (No. 11,375.)

Filed March 31, 1886.

APPEAL—FAILURE TO FILE POINTS AND BRIEF.

Judgment affirmed for failure to file points and authorities.

In bank. Appeal from superior court, county of Sacramento.

Henry Edgerton, for appellant.*S. C. Denson, W. H. Beatty, and J. W. Armstrong*, for respondent.

BY THE COURT. Appellant's counsel having failed to file points and authorities as authorized by the order of the court made December 8, 1885, the judgment is affirmed.

68 Cal. 506

GAVITT v. MOHR. (No. 11, 248.)

Filed January 30, 1886.

1. PUBLIC LANDS—STATE LANDS—TO WHOM THEY MAY BE GRANTED.

By section 3 of article 17 of the constitution of California, state lands suitable for cultivation shall be granted only to actual settlers.

2. SAME—WHO IS AN ACTUAL SETTLER.

An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state.

3. SAME—RIGHT TO GRANT—HOW EARNED BY SETTLER.

An actual entry upon land belonging to the state, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications required by law, an inchoate right to purchase the land, and operates as notice to all the world of the right.

Department 2. Appeal from superior court, Los Angeles county.

J. R. Scott and F. H. Howard, for appellant.*A. W. Hutton*, for respondent.

McKEE, J. This action is brought to have determined which of two applicants had the right to purchase from the state a tract of agricultural land situate in Los Angeles county, and known as the N. $\frac{1}{2}$ of section 36, township 6 N., range 12 W., San Bernardino meridian line. It is conceded that the thirty-sixth section, of which the land involved in the contest is part, belonged to the state; that prior to April, 1872, the township was surveyed and sectionized by the United States; and that the plat of survey was approved and filed in the local United States land-office of the district in which the land is situate. The first application to purchase was made by defendant. On the sixth of June, 1884, he caused to be filed his affidavit, in due form, made under the provisions of title 8, pt. 3, Pol. Code, (section 3495, Pol. Code,) paying all the fees and charges of the application; and at the time of making and filing his application

he had the qualifications prescribed by law for becoming a purchaser from the state. The application of plaintiff was not made and filed until 60 days after the defendant's application had been filed. On the eleventh of August, 1884, he made his affidavit, in due form, under the provisions of the same law, and filed it with the surveyor general of the state, paying the costs and charges, and he also was, at the time of his application, possessed of the qualifications requisite to purchase.

The court decided in favor of plaintiff, finding "that, prior to any settlement upon the land by defendant, the plaintiff, on the thirtieth of July, 1884, entered and settled upon the land; that he has since continuously resided upon it; that he was an actual settler upon it on the eleventh of August, 1884, when he made and filed his application to purchase it; and that the defendant was not an actual settler upon the land at the time of filing his application, nor an occupant of it at any time prior to the fifth of August."

Section 3 of article 17 of the constitution declares: "Lands belonging to the state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." And section 3495 of the Political Code, after prescribing the conditions and terms for purchasing cultivable land from the state, provides that an applicant to purchase must make and file an affidavit in the office of the surveyor general of the state, setting forth the qualifications of the applicant, the character and condition of the land which he wants to purchase, whether the land is or is not suitable for cultivation, and, if it is, that the applicant is an actual settler thereon. Under the law, therefore, a claimant to purchase from the state a tract of its cultivable land must be, at the time of filing his application, an actual settler.

An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession, for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state. For that purpose, an actual entry upon land belonging to the state, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land, and operates as notice to all the world of the right. Now the finding that defendant was not an actual settler when he applied to purchase the land is founded upon evidence which tended to show "that on May 27, 1884, he caused a survey of the land to be made; had hauled upon it about \$20 worth of lumber, with which he, assisted by a companion, commenced to build a house 8 by 10 feet; that he had laid the foundation of the house, consisting of 2 by 4 timbers; had erected at each corner two corner boards, which were joined on

top by 2 by 4 cross-pieces ready for the sides, and for the rafters of the roof; also had cut part of the boards for the sidings, and put down a temporary floor, which he and his companion, while working on the house, occupied until early in June, 1884, when defendant went to Los Angeles to make his application to purchase; and having done so, returned to the land, when he was taken ill; and about the seventh of June he left the land and went to the house of a friend, several miles away, where he lodged during his sickness until about the first of August, except that at occasional intervals in the months of June and July he returned to the land, resumed work upon it, and by the last of July he had the house roofed in, and furnished with a bed, a table, and some boxes, and he himself went into the house about the fifth of August, and since then he has continuously resided there.

That being the evidence of the defendant's settlement, the question arises whether it warrants the finding that defendant was not an "actual settler" on the sixth day of June,—the day that he made and filed his application to purchase the land from the state. We think the evidence sufficiently showed that the land was subject to settlement when the defendant entered upon it; that he entered to make a settlement thereon; and that, in the exercise of his right, he began making his improvements upon the land with a view to future occupancy and residence thereon. These acts, and the occupation of the land while engaged in performing them, gave the defendant the *status* of an actual settler in the sense of the law which authorized him to purchase; and as he made and filed his application to purchase while engaged in the act of settlement, the law protected him for 60 days after settlement. Pol. Code, § 3497. The finding that the defendant was not an actual settler at the time of filing his application is therefore against the evidence.

Appellant also challenges the finding that the plaintiff was an actual settler at the date of his application. The finding is also based upon evidence which tended to show that in June, 1884, plaintiff was on the land for about 10 days, and passed over it several times. At that time he saw no one in personal occupation of it; but there was some lumber on the land, and the appearance of the commencement of a house,—“there were sills and four corners put up, and about two hundred or three hundred feet of lumber there.” Leaving the land in that condition, the plaintiff did not return to it until about the last of July, when he discovered that “some more work had been done on the shanty, and that it was about completed.” At that time, according to the evidence, “the shanty was eight feet by ten feet, nine feet high, and seven feet in rear;” and, as there was no one living in it, he “on the thirtieth of July, 1884, entered and settled upon the land by pitching upon it a cloth tent, in which he resided; and afterwards he built on the land a corral sixteen feet long and eighteen feet wide, one side of which was a cedar thicket, in which he stored some

hay, and sunk a well ninety-eight feet deep," and continued to reside there until the first of January, 1885, when he gathered his tent, removed it from the land, and never put it back.

Where there is no adverse occupancy of public land, a settler has the right to enter upon it for the purpose of making a settlement. But when he makes an application to purchase the land, he must make an affidavit * * * that there is no occupancy of such land adverse to any that he has. Pol. Code, § 3495. An affidavit to that effect was made by the plaintiff on the eleventh of August, 1884; and the court finds that at that time there was no occupation of said lands adverse to the occupation of plaintiff. But the uncontradicted evidence shows that the defendant had finished his house by the last of July, and moved into it on the fifth of August, and thereafter continued to reside there, and was in the adverse occupancy of the land when the plaintiff made his affidavit as the basis of his application to purchase; therefore the finding is not sustained by the evidence, and the conclusion that the plaintiff was entitled to purchase the land is illegal.

Judgment and order reversed, and cause remanded for a new trial.

Ross and McKINSTRY, JJ., concurred.

SUPREME COURT OF CALIFORNIA.

69 Cal. 133

PFISTER and others v. WADE and others. (Nos. 8,863, 9,022.)

Filed March 23, 1886.

1. PLEADING—COMPLAINT WITH SEVERAL COUNTS—DEMURRER.

Where a general demurrer is taken to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action, such demurrer should be overruled if any of the counts are sufficient.¹

2. SAME—JOINDER OF PARTIES AND CAUSES OF ACTION.

Joinder of defendants and causes of action are proper, where the same arise out of a transaction in which all the defendants are directly interested, and relate to a sum of money claimed by each.

3. SAME—COPARTNERSHIP, AVERMENT OF.

A copartnership is properly averred in a complaint which states that "for several years last past the plaintiffs have been and now are copartners, doing business under the firm name of A. P. & Co.;" and if the date of the formation of the partnership is not sufficiently specific, this should have been remedied by motion to have the proper date inserted.

4. EVIDENCE—EFFECT OF PLEADINGS AS EVIDENCE.

A party ordinarily is only bound by the admissions in the pleadings upon which he goes to trial, and not by those in pleadings which have been superseded; yet the original pleadings may be admitted as evidence of some independent fact connected with the case; as, in a case where the original pleading contained an offer to pay the money in dispute into court, the same is admissible as evidence of such offer, in connection with evidence that the money was so paid.

5. APPEAL—REVERSAL OF JUDGMENT—RETRIAL.

If, on appeal, a judgment is reversed, and is thereupon vacated and set aside on motion, the party procuring the same to be done, cannot object to the right of another party, who had not appealed, to participate in the new trial.

6. ATTORNEY—POWER TO CONFESS JUDGMENT.

Unless an attorney has express power from his client so to do, he cannot consent to a judgment by confession.

7. PAYMENT OF MONEY INTO COURT—RIGHT OF DEFENDANT TO INTEREST.

A defendant is entitled to interest on an award to him of money which is a portion of a sum paid into court by a plaintiff, to be distributed between two adverse claimants as the court may determine, if defendant was delayed in receiving it by reason of the improper or defective proceedings of the plaintiff.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

M. Lynch, for appellant James Judson in No. 8,863.

Burt & Pfister, J. R. Lowe, John Reynolds, and C. D. Wright, for respondent.

Burt & Pfister, for plaintiffs and appellants in No. 9,022.

C. D. Wright, J. R. Lowe, and M. Lynch, for respondents.

SEARLS, C. In September, 1874, one Trenouth began storing wheat with defendant Wade, and in March, 1875, had so stored 128,438 pounds. Between September 19, 1874, and April 24, 1875,

¹See note at end of case.

Trenouth borrowed from Wade, on the security of the wheat, several sums of money, which amounted in the aggregate, with the sum due for storage, to \$1,950, exclusive of interest. Upon the first of January, 1878, Trenouth sold the wheat to the plaintiffs, who, it was agreed by all the parties, should pay Wade the amount due him out of the funds arising from the sale of the wheat. After this arrangement was made, Wade delivered the wheat to plaintiffs. Trenouth was indebted to one Bliss, and on the tenth day of January, 1878, assigned to him his claim against plaintiffs arising out of the sale of the wheat, of which fact plaintiffs were notified. On the sixth of January, 1878, the parties had met and agreed that there was then due to Wade \$2,640, and it was estimated there would be a balance due to Trenouth of \$200 to \$300, which plaintiffs agreed to pay as soon as the wheat was all delivered and the transaction closed. After delivering all of the wheat, Wade demanded payment from plaintiffs, to which they objected on the ground that Bliss, the assignee of Trenouth, demanded the entire proceeds of the sale. Wade threatened suit against plaintiffs, whereupon the latter filed a bill in the district court, and procured an injunction restraining both Wade and Bliss from suing them on the claim. A decree was entered, allowing the plaintiffs Pfister & Co. to pay the money into court, and requiring Wade and Bliss to interplead, and, by an action between themselves, determine their respective rights to the money. Plaintiffs paid the amount (\$2,889.88) into court, where it still remains.

Defendant Bliss appealed to this court, and the judgment of the court below was reversed. 56 Cal. 43. The cause again came up on appeal from an order denying a motion to dissolve the injunction, and is reported in 59 Cal. 273. Prior to the last trial the pleadings were amended, and a cross-complaint was filed by defendant Bliss, in which he sought to recover the full sum of \$2,889.88, with interest thereon from January 1, 1878.

The cause came on for trial March 30, 1882, when, it appearing that defendant Bliss had assigned his interest in the subject-matter of the action to James Judson, the latter was, on motion, substituted as defendant in place of said Bliss. The cause was tried by the court, without a jury, and judgment entered in favor of defendant Wade for \$3,470.33 against the plaintiffs, and in favor of the defendant James Judson and against the plaintiffs for \$269.27, etc. Defendant Judson appeals from the judgment, and from an order denying the motion for a new trial. The plaintiffs also appeal from the judgment, and, by stipulation, their appeal, (No. 9,022,) is based upon the transcript in this case, and for convenience sake we shall consider the appeals together.

The second amended complaint consisted of four several counts. A demurrer was interposed to the whole; and as some of the counts were unquestionably sufficient, the demurrer was properly overruled, so far as the general objection that it did not state facts sufficient to

constitute a cause of action was concerned. There was not a misjoinder of parties defendant or of causes of action. The whole transaction grew out of a state of things in which both the parties defendant were directly interested, and related to a sum of money claimed by both. The complaint averred that said plaintiffs, for several years last past, have been and are now copartners, doing business under the firm name and style of A. Pfister & Co., etc. This was sufficient as an averment of copartnership. If not sufficiently specific as to the time of its formation, the court would doubtless, on motion, have required the proper date to be inserted. A complaint may well contain all the essential averments to a good pleading, and yet state them in a form too general to enable the defendant to meet them by a specific technical defense. Such an objection should be met, not by a demurrer, but by a motion to make the pleading more specific. Had the demurrer been improperly overruled for this cause, the error would have been cured by the cross-complaint of defendant, which sets out the partnership of plaintiffs. There was no error in overruling the demurrer.

The motion of the defendant for judgment on the pleadings was properly overruled for two reasons: *First*. The answer of plaintiffs to the cross-complaint of Bliss, in effect, denies the allegations, or, what is the same thing, states other facts inconsistent therewith, and which, if true, would defeat defendant's right to recover on his cross-complaint. *Second*. While the pleading of defendant Bliss is denominated an "answer, counter-claim, and cross-complaint," yet most of its allegations are, properly speaking, of a character to be treated as constituting a defense of counter-claim, and as such are to be taken as denied.

Objection was made at the trial to the testimony of defendant Wade upon the ground that he was not a party to the suit, and therefore his testimony was irrelevant and immaterial to any issue before the court. Wade was a party to the transaction, and to the suit, and was called by plaintiffs as a witness to prove, and did testify to, matters of vital importance in the determination of the case. The contract for the sale of the wheat to plaintiffs by Trenouth was in writing, dated December 31, 1877. The agreement of plaintiffs to recognize the lien of Wade on the wheat, and to pay the amount due him, and to which Trenouth assented, was an entirely different contract, made between different parties, at a different time, and in relation to a different matter. It was a verbal agreement, and the testimony in relation to it was properly admitted. Plaintiffs' Exhibit B was not, as was said by the court, a contract, but a memorandum or receipt, showing the quantity of wheat delivered.

Plaintiffs, in their second amended complaint, averred that they were, and always had been, ready and willing to pay over to the parties entitled thereto the amount due upon the wheat, and offered to pay the money into court. At the trial plaintiffs, for the purpose of

showing their offer to fulfill the contract by paying the money into court, offered in evidence the original complaint filed January 25, 1878, which contained such offer, and which for that purpose was admitted. There can be no question but that an amended complaint takes the place of the original, and that, when filed, the original ceases to perform any further functions as a pleading. *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKibben*, 54 Cal. 192. And although a party is bound by the admissions in his pleading, yet it is only by the admissions in the pleadings upon which he goes to trial, and not by those in pleadings which have been superseded, that he is bound. *Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222; *Kentfield v. Hayes*, 57 Cal. 409.

It would work rank injustice to hold a party bound by statements or admissions in a pleading, which had been amended, for the very reason that they were inserted by inadvertence or mistake, and yet the rule which would admit it in evidence would have just this effect. To permit it to be introduced generally as evidence in favor of the party by whom it was filed would be to permit a party to manufacture testimony in his own behalf. While the general rule excludes all pleadings which have been superseded by others, it does not follow that an original pleading thus superseded may not be admissible in evidence in support of some independent fact connected with the case. Whenever the date at which a pleading was filed becomes important, it may be introduced as evidence of that fact, although a later pleading has taken its place. So, too, if a pleading contains a copy of an instrument, the original of which is afterwards lost, the fact that it is embodied in a pleading, and the further fact that such pleading has been superseded by another, does not prevent the copy from being introduced in evidence, upon proof of its authenticity, just as though it was a separate instrument. In other words, it is, in a proper case, admissible in evidence, not because it is found in the pleading, but as a fact proper to be admitted.

In the present case, had the plaintiffs served a written notice of their offer to pay the money into court upon defendant Bliss, the notice would have been proper evidence, and the circumstance of the offer having been contained in the pleading did not alter its admissibility. This was followed by proof that the money was actually paid into court, and that it still remains there, subject to the final disposition of the case. Under the pleading, we are of opinion all this evidence was proper.

It is contended by appellant Judson that as Wade never appealed from the original judgment entered in this cause, the reversal thereof did not apply to him, and, as a consequence, that he had no right to participate in the last trial. The answer to the position is that this court reversed the judgment of the court below, and that thereupon, on motion of counsel for Bliss, the assignor of Judson, the judgment in the court below was *vacated and set aside*. This action having

been brought about by the action of defendant Bliss, he and his assignee are not in a position to question its regularity.

The judgment by confession in favor of Wade and against Trenouth was entered without the direction, knowledge, or consent of Wade. The fact that Wright was the attorney of Wade in this cause did not authorize him to act on behalf of the latter, and consent to a judgment by confession in that case. We do not understand that the motive of the attorney is impugned. He doubtless acted with a good intent, and, as he supposed, in the interest of his client; but as he was not authorized so to do, and as the client is not shown to have ratified his acts, they cannot be upheld. The findings seem responsive to and cover all the material issues made by the pleadings, and are supported by the evidence.

We deem it unnecessary to discuss minutely all of the minor objections presented by the record, as they present no errors calling for a reversal of the case, and we are of opinion defendant Judson obtained judgment for all that to which he was entitled, and that the judgment and order appealed from should be affirmed.

The only question presented upon the appeal of plaintiffs in the same cause, (No. 9,022,) not hereinbefore considered, is founded upon the fact that there was due from them at the date of suit brought the sum of \$2,889.85 on account of the wheat purchased, which they paid into court. Of this sum, \$2,620.50 was due Wade, and the balance of \$269.35 was payable to Bliss, or his assignee, Judson. The court finds that the plaintiffs were at all times ready and willing to pay this sum to Bliss, but that he refused to receive it, and therefore very properly refused to add interest to his judgment. The court, however, rendered judgment in favor of Wade for the amount due him in January, 1878, with interest and costs. The contention of plaintiffs is that this was error; that the fund by them paid into court should have been distributed to the parties entitled thereto, in the proper proportions; and that to extend their liability beyond the actual amount due from them was error. Had the theory upon which plaintiffs brought their action been sustained, the result they claim would have followed. This court, however, held their pleading insufficient to support that theory; and it was only upon the amendment of their pleading, and the filing of an answer, counter-claim, and cross-complaint by the defendant Bliss, that the character of the action was so far changed that a final disposition of the whole matter could be had in this cause. Defendant Wade was always ready and willing to receive what was confessedly due him. That he was delayed in receiving it was no fault of his, and, if a burden is to be borne by the accumulation of interest, it is more in consonance with law and equity that plaintiffs, who, by their improper or defective proceedings, caused the delay, should bear the burden occasioned thereby, than that defendant Wade, who was in no wise in fault, should bear it.

We think, under the circumstances, the judgment in favor of Wade and Judson was proper as rendered, and that it should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgments and order are affirmed.

NOTE.

A general demurrer, addressed to the whole complaint, is properly overruled if in any part of the complaint a cause of action is stated. *Fleming v. Albeck*, (Cal.) 7 Pac. Rep. 659.

A general demurrer to an answer cannot be sustained where there is one count that presents an issue for trial. *Board of Co. Com'rs of San Miguel Co. v. Long*, (Colo.) 8 Pac. Rep. 923. See *Caldwell v. Ruddy*, (Idaho,) 1 Pac. Rep. 339.

A general demurrer to a whole pleading must be overruled if there be one good cause of action, or one good defense, in a pleading to which it is interposed. *First Nat. Bank of St. Paul v. Nathan*, (Minn.) 9 N. W. Rep. 626.

Where one count of a complaint states, in itself, a good and complete cause of action for a personal judgment, a general demurrer thereto will not lie merely because another count attempts and fails to state another cause of action for a lien. *Bronson v. Markey*, (Wis.) 10 N. W. Rep. 166.

Where the allegations of a petition are indefinite, but the language, when given its ordinary meaning, shows a liability of the defendant in favor of the plaintiff, a demurrer, on the ground that the facts stated do not constitute a cause of action, should be overruled. *Rathburn v. Burlington & M. R. R. Co.*, (Neb.) 20 N. W. Rep. 390.

If one of the several paragraphs of a complaint is good, it is error to render judgment upon a general demurrer in favor of the defendant. *Burke v. Simonson*, (Ind.) 3 N. E. Rep. 826.

Where a complaint states facts sufficient to constitute a cause of action for part of the relief demanded, it will be held good on demurrer. *Culbertson v. Munson*, (Ind.) 4 N. E. Rep. 57.

71 Cal. 452

HISK v. ATKINSON and others. (No. 9,017.)

Filed March 24, 1886.

ACTION—ABATEMENT OF ACTION PENDING EARLIER ACTION FOR SAME CAUSE.

If at the commencement of an action there was another action pending and undecided, brought by the same plaintiff against the same defendant, and for the same cause of action, the former must abate pending the latter.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Joseph Mee, for appellant.

A. Campbell and Campbell & Sanderson, for respondent.

FOOTE, C. This is an appeal from a judgment rendered in an action on an undertaking for the release of an attachment, and an order denying the defendant a new trial. As one of his defenses set up in his answer, Byrnes (Atkinson not having been served with process) alleged that there was another action pending against him, brought by the same party plaintiff, for the same cause of action. Findings of fact were waived, but the statement in the record of this cause plainly indicates that the contention of the defendant is true, and

that at the time the present action was instituted there was another action pending and undecided, brought by the same plaintiff against the same defendant, and for the same cause of action, and the latter should have had judgment rendered in his favor in the trial court that the present action be abated. The judgment and order appealed from should therefore be reversed, and the court below directed to enter judgment in favor of the defendant that this action abate, and for his costs and disbursements.

We concur: SEARLS, C., BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to enter judgment in favor of defendant Byrnes that the action abate, and for his costs and disbursements.

69 Cal. 180

PEOPLE v. WONG AH FOO. (No. 20,142.)

Filed March 26, 1886.

1. HOMICIDE—MURDER—EVIDENCE—STATEMENTS OF DECEASED AS PART OF RES GESTÆ.

On a trial for murder, statements made by deceased, following almost instantly upon the infliction of the fatal wound, though not made in defendant's presence, are admissible in evidence.¹

2. CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be authorized by newly-discovered evidence which is merely cumulated.

3. SAME—APPEAL—FAVORABLE INSTRUCTIONS NOT GROUND FOR REVERSAL.

A defendant cannot object to instructions which are more favorable to him than they should be, and though erroneous are no ground for reversal.

4. HOMICIDE—MURDER—INSTRUCTION—WHERE EVIDENCE NOT CONFLICTING.

If there is no conflict in the evidence as to the act committed being murder, it is not error for the court to so state to the jury.

5. CRIMINAL LAW—TRIAL—EVIDENCE—RELATION OF WITNESS TO ACCUSED.

Where, in a criminal trial, a witness testifies in behalf of his father, the court may properly admit evidence of their relationship, and, alluding to such fact as being in evidence, charge the jury that they may consult their general knowledge and experience in life as to whether or not a son would be apt, in giving his testimony, to favor his father.

6. SAME—INSTRUCTIONS—EVIDENCE OF ALIBI.

Instructions concerning the kind of evidence which might be resorted to to prove an *alibi* reviewed, and held not erroneous.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

Charles B. Darwin, for appellant.

E. C. Marshall, Atty. Gen., for respondent.

FOOTE, C. The defendant was found guilty by a jury of murder in the first degree. From the judgment of conviction, and the order de-

¹ See note at end of case.
Cal. Rep. 9-11 P.—29

nying his motion for a new trial, he prosecutes this appeal. The declarations of the man slain were properly admitted in evidence in the exercise by the court of a sound discretion. They had been made only a few moments preceding his death, and appear to have been uttered, if not in the immediate presence of the accused, yet before the latter had proceeded more than across Clay street from the place where the deceased fell wounded, following almost *eo instanti* the firing of the fatal shot; thus being cotemporaneous with, and illustrative of, the character of the main facts under consideration. 1 Greenl. Ev. § 108; *Com. v. McPike*, 3 Cush. 181; 1 Bish. Crim. Proc. § 10986, note 4, and cases cited.

It was not error for the court to refuse a new trial because of the offer made by the defendant, by affidavits of him and others, of alleged newly-discovered evidence. That evidence was in the main cumulative, and, besides, those affidavits were contradicted in a material respect by that of I. M. Floyd, offered by the people.

The court refused two instructions asked by the defendant, but they were afterwards included in the charge given on the part of that tribunal. There is no error of which the defendant can be heard to complain, from the fact that the court charged the jury they should acquit if they had, from the evidence, a reasonable doubt of the defendant's guilt or *innocence*. It was really more favorable to him than he had a legal right to expect.

We see no error in the court informing the jury that there was *some* evidence in the case of a circumstantial nature. Taking the whole charge, it did not convey to them any opinion of the court as to the weight of it, as evidence.

Under the facts of this case, as given in evidence, we can perceive no error in the judge stating to the jury, in the charge, that he understood from the argument and testimony that the offense committed was probably murder or nothing. There was no conflict in the evidence as to the act committed being murder; the conflict was as to who was the actual perpetrator of it.

As part of its charge, which is most strenuously assailed by the defendant, as being calculated to mislead the jury, and to inform them that evidence of an *alibi* is to be distrusted, in that it is more easily fabricated, and holds out greater temptation therefor, than other kinds of evidence, this language was employed:

"Now, in determining that fact, gentlemen, I instruct you that evidence to establish an *alibi*, like any other evidence, may be open to special observation. Persons may, perhaps, fabricate with greater hopes of success, or less fear of punishment, than most other kinds of evidence; and honest witnesses often mistake dates and periods of time and identity of people seen, and other things about which they testify."

Upon a close examination of the whole charge, including the part quoted, and giving to it an unstrained interpretation, we do not perceive that the court charged the jury upon the weight of evidence. It is

undoubtedly true, as a matter of fact, that untruthful witnesses may fabricate anything, and testimony of an *alibi* may, perhaps, be more easily fabricated than most other kinds, and those facts are within the knowledge of most persons of ordinary understanding and experience; and in support of this theory we have the authority of eminent jurists. It is perfectly proper for a court, where a son testifies in behalf of a father, to admit evidence to the jury of their relationship; and, alluding to such a fact as being in evidence, to charge the jury that they may consult their general knowledge and experience in life as to whether or not a son would perhaps be apt to favor his father in giving his testimony, and the like, this being in the nature of an observation upon a witness and his relationship to the accused. Bish. Crim. Proc. § 982. And in the present instance we do not see how the jury could have understood that they were to lay less stress upon the evidence of *alibi* than any other testimony; for, in fact, they were expressly informed that "evidence to establish an *alibi*, like any other evidence, may be open to special observations;" and these special observations did not go to the length of informing the jury positively that such evidence was less reliable than other testimony in the present case, but informed them simply of the legal infirmities which were "perhaps" inherent in such testimony, leaving to the jury fully and exclusively as their province to determine its truth or falsity; and, viewed in the light of good sense, we do not see that the language complained of went beyond a reasonable and fair latitude of observation permissible from the judge to the jury. Bish. Crim. Proc. §§ 982, 1064.

There being no error in the record, the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

In the trial upon an indictment for murder, the exclamations of the deceased immediately upon the firing of the shot by which he was killed, and to an answer to a question asked within a very few minutes thereafter, are admissible as part of the *res gestæ*. People v. Simpson, (Mich.) 12 N. W. Rep. 662.

In the trial of an indictment for murder, the statements of the deceased, made some days after the shooting, are not admissible in evidence as part of the *res gestæ*. People v. Wasson, (Cal.) 4 Pac. Rep. 555.

In an indictment for murder, declarations of the deceased, made half or three-quarters of an hour after an affray in which the deceased was fatally shot, and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest, and when deceased had been for that length of time among his friends, are inadmissible as a part of the *res gestæ*. People v. Dewey, (Idaho,) 6 Pac. Rep. 103.

The declaration of the deceased, on trial of an indictment for murder, made immediately after the shooting, as to who shot him, is, in the discretion of the trial court, admissible in evidence as part of the *res gestæ*. People v. Callaghan, (Utah,) 6 Pac. Rep. 49.

A man having been shot by another, not fatally, exclaiming, "You have killed me," ran some 80 feet to the door of another room in the same house, and, on being admit-

ted, said: "I am shot; William Kirby has shot me." Not more than two minutes had elapsed from the time of the shooting. The court held that these declarations were proper in evidence against Kirby on an indictment. *Kirby v. Com.*, 77 Va. 681

69 Cal. 169

PEOPLE v. FRENCH. (No. 20,071.)

Filed March 26, 1886.

1. WITNESS—EXAMINATION—FORMER CONTRADICTORY STATEMENTS.

On a trial for murder, if a witness for the defense testifies to facts from which the jury might infer that the deceased, on the day of the homicide, left his house for the purpose of bringing about an encounter with the defendant, the prosecution may cross-examine him as to any former statements made by him relative to the matter inconsistent with his direct testimony, and to any matter connected with it tending to show the mental condition of the deceased towards the defendant.

2. SAME—TESTIMONY BY WITNESS AS TO MEANING OF WORDS USED.

On a trial for murder, a witness cannot testify as to his understanding of the meaning of words used by another, or to inferences drawn by him from a combination of circumstances tending to throw light on the question of feeling between the defendant and the deceased. Such matter is for the jury, on proof of the words or circumstances themselves, and if the testimony concerning the witness' understanding or inference is stricken out, and the jury is instructed to disregard it, the court does not in so ordering commit any error prejudicial to the defendant.

3. SAME—WITNESSES IN MURDER TRIAL—REDIRECT EXAMINATION.

On a trial for murder, a witness for the prosecution may, on redirect examination, testify as to a statement made by the defendant relating to and connected with the circumstances of the homicide, as detailed on the examination in chief and on his cross-examination.

4. HOMICIDE—MURDER—TRIAL—PROVINCE OF JURY IN FIXING PUNISHMENT.

On a trial for murder, if the jury, after agreeing to find the defendant guilty of murder in the first degree, are unable to agree upon the punishment, and thereupon come into court; and the judge instructs them explicitly that they have the right to fix the penalty at death, or imprisonment for life, or to bring in a verdict of guilty of murder in the first degree without specifying the penalty; and the jury subsequently returns for further instructions, when the judge again charges them as above stated, adding that "if there is nothing specified in your verdict as to the penalty, the court will have its duty to perform, but what that duty will be the court will not say;" and the jury subsequently brings in a verdict of guilty of murder in the first degree, without specifying the penalty; and counsel for the defendant then state to the jury that the effect of their verdict is to impose upon him the death penalty, whereupon one of the jurors says: "If that is the effect of the verdict, it is not my verdict;" but upon polling the jury such juror, after considerable hesitation, consents to the verdict, and states that he leaves "the responsibility to the court,"—such instructions are without error, as the jury could not have been misled thereby on the question of punishment.

5. SAME—FAILURE OF JURY TO FIX PUNISHMENT.

Where, upon a trial for murder, the defendant is convicted of murder in the first degree, he cannot escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or returned a verdict which was silent as to the penalty.

In bank. Appeal from superior court, county of San Joaquin.

Eagon & Armstrong, for appellant.

E. C. Marshall, Atty. Gen., for the State.

McKEE, J. Uzza F. French, defendant and appellant in this case, was convicted by the verdict and judgment of the superior court of San Joaquin county of murder in the first degree, for the unlawful killing of Peter Wells, and sentenced to suffer the death penalty; and

he appeals from the judgment, and the order denying a motion made by him for a new trial.

The homicide was committed on the fourteenth of March, 1884, in the town of Oleta, in Amador county.

The contention made on the appeal is that the conviction is illegal because of irregularities and errors in law committed at the trial, against the exceptions of defendant. The errors assigned are predicated upon the admission of testimony against the defendant's objections and exceptions, and upon instructions given to the jury to his prejudice.

1. Marcellus Lee, a witness for defendant, on his examination in chief, gave testimony tending to show that between 8 and 9 o'clock of the morning of the day of the homicide, Wells, having made preparation to leave his house for the town of Oleta, asked the witness, who was then in his employment, to go with him; but the witness refused to go, and urged Wells not to go, because he believed "from what had occurred a day or two before that French would be at Oleta;" and he said to Wells, "It would be going into the enemy's camp;" to which Wells replied, "He could not help that; he was going, * * * and if there was to be trouble, there was no use in trying to stave it off." About 9 o'clock A. M. Wells rode off to Oleta in company with his son. On cross-examination the witness testified, without objection, that he and Wells were the only persons present at the conversation stated in his direct testimony; but that he had had on that morning two or three other conversations with Wells, at which other persons were present; and that, on the day before the conversation, he had heard Wells say he was going to Oleta to hunt for one of his horses which was lost. After so testifying on his cross-examination, the state asked him this question: "Within three or four days after the shooting did you have any conversation with Mrs. Wells, in which you said you had told Peter Wells that if he would let you have a rifle you would put French in a prospect hole, and that Wells replied he 'didn't want anything of that kind in his.' " To that question defendant's counsel objected: "The answer must be immaterial, and to lay the foundation for a contradiction of an immaterial statement; it is immaterial." The objections were overruled and the defendant excepted. Answering the question, the witness testified "that in a conversation which occurred a day or two before * * * the trouble, I told Wells, 'If I thought that man [French] was hunting us in the *chaparral*, I would take a rifle and go down and get him;' * * * and Wells said to me, 'No;' * * * and I think I told Mrs. Wells what, in substance, I said to Wells."

It is contended that neither question nor answer was in response to the matter testified by the witness in his examination in chief. But the matter of the direct testimony of the witness was the fact that Wells, being armed, left his own house, on the morning of the

day of the homicide, to go to Oleta, where he knew French was, and the statement made by him, before starting, as to the trouble between French and himself, from which the jury could have drawn the inference that the object of Wells in going to Oleta, under the circumstances, was to bring about a rencounter between French and himself. Whether Wells went to Oleta with a hostile or peaceable intent towards French—with a determination to force a fight or quarrel upon him or not—was therefore a matter presented to the consideration of the jury by the direct testimony of the witness; and in the consideration of that question the jury were entitled, on the cross-examination of the witness, to any former statements made by him relative to the matter inconsistent with his direct testimony, and to any matter connected with it tending to show the mental condition of the deceased towards the defendant. The Code rule is that a witness in a civil or criminal action may be asked, on cross-examination, whether he has made any statement inconsistent with his direct testimony relative to any fact therein stated, and may also be examined as to any matter relevant to or connected therewith. Sections 2048, 2049, 2052, Code Civil Proc. Besides, in the cross-examination of a witness, much must be left to the discretion of the judge who presides at the trial. Unless the record on appeal shows an abuse of discretion, appellate tribunals do not interfere. We think there was no abuse of discretion in overruling the objections made to the question. The matter stated in the question and answer was not irrelevant or immaterial.

2. The next assignment of error is that the court, at the close of the evidence given for defendant, permitted the prosecution to ask of Joseph Young, a witness called by the prosecution in rebuttal of certain evidence given by defendant, the following question: "During your association with the deceased, Wells, and the *actions* on his part,—from *words* of his, and a combination of all the circumstances that would tend to throw light on the subject,—what was the feeling, and the expressed feeling, between the deceased, Wells, and the defendant?" The question was asked of the witness on his redirect examination. It was objected that the question was incompetent, irrelevant, and immaterial; but the court, against the objections and exceptions taken, permitted the witness to answer.

We think the ruling was erroneous. A witness cannot testify to his understanding of the meaning of words used by another, or to inferences drawn by him from a combination of circumstances tending to throw light on the question of feeling between two persons. That is a matter for the jury, upon proof of the words or circumstances themselves. But although the question was answered, the answers of the witness were afterwards stricken out. In answering the questions the following took place:

Witness. "He [Wells] told me 'if Uz [French] would come there he would be treated just as well as ever.' I never heard him make any threats at all."

The Court. "The last part of his answer is stricken out." *Witness continued:* "He said if Uz would come to his house he would be treated just as well as he ever was; this was said two or three days before the shooting. * * *" *Question.* "I understand the remark made was two or three days before the killing?" *Answer.* "Either two or three." *Defendant's Counsel.* "I move that that be stricken out. * * *" *The Court.* "You have your exception." *Defendant's Counsel.* "We move to strike out the answer of the witness: 'If he had come to his house he would have been treated just as well as ever,' on the grounds that it is incompetent, irrelevant, and immaterial." *District Attorney.* "Let it be stricken out. We do not care anything about it."

This was the only testimony in the case stricken out by consent; and the court, in its charge to the jury, instructed upon the subject as follows:

"The court instructs the jury that they should carefully exclude from consideration all matters of evidence offered and excluded, and also that which was admitted and afterwards stricken out, either by express order of the court, or by consent of counsel by whom it was adduced."

As, therefore, the answers of the witness were stricken out, and the question remained unanswered, the ruling of the court as to the question did not affect any substantial right of the defendant.

3. The next assignment of error is that the court overruled objections made by defendant to a question asked by the prosecution on the redirect examination of a son of the deceased, who had been examined in chief by the district attorney and cross-examined by defendant's counsel. The question was this: "State whether, as defendant passed by you, going down the street, did you hear him say anything about Joe Young." *Defendant's Counsel.* "We object to it; that is something not testified before." The court overruled the objection, and the witness answering, testified: "He [French] said: 'If I had the other load into Joe Young I would be satisfied.'"

We think there was no error committed in overruling the objection. The witness testified on his examination in chief to the effect that on the morning of the fourteenth of March he left home with his father to hunt for a horse which was tracked to a stable in Oleta; that they remained at the stable four or five minutes, and then walked from there into Main street, where, after walking about 150 yards, they saw defendant, with a double-barreled shotgun, sitting in front of a saloon on the opposite side of the street; and, according to the testimony of the witness, the following occurred in the street:

"French, when he saw us, called out: 'Stop, you s—— of a b——; I've got you where I wanted you!' 'Hold on,' said father; 'you are accusing me wrongfully.' About that time French raised the gun and cocked it. My father stopped, and did not move after that at all. My father said: 'Hold, now! you are too fast;' and French said: 'You are a damned liar;' and father said: 'You are accusing me wrongfully. I don't want any of this.' French said: 'I do; I have been hunting for it;' and father said: 'Uz, set down your gun, and come to me like a man, and we will settle it;' and French said: 'You are a liar and a s—— of a b——;' and then he said: 'Take the children out of the way; get out of that window, woman!' and then he shot.

Saw my father's hands,—there was nothing in them; they were by his side. My father did not make any attempt or demonstration towards drawing a weapon. After the shot my father fell backwards on the porch. He was shot in the forehead with a buckshot."

On his cross-examination the witness also testified:

"About four days before that French said he had heard considerable threats that my father and Joe Young had made against him. Father knew what French had said. My grandfather had told him."

After which the witness, being recalled by the prosecution, on his redirect examination testified, without objection, that French, just after he shot, stepped into the saloon, and immediately stepped out again, with his gun in his hand, and started to go down the street, passing within four or five feet of the witness. Upon this the question, to which the defendant objected, was asked and answered; and as both question and answer related to and were connected with the circumstances of the homicide, as detailed on the examination in chief and cross-examination of the witness, the objection taken to the question was properly overruled.

4. The last assignment of error is that the jury were misled by the instructions of the court, upon the question of punishment, to return a verdict of murder in the first degree, without a declaration of what the punishment should be. In its elaborate charge to the jury the court several times—twice of its own motion and once at the request of the prosecution—instructed them as to their powers and duties upon the question of punishment. In those given of its own motion the court instructed them substantially in the language of section 190 of the Penal Code, which declares: "Every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same." And the instruction upon the same subject, given at the request of the prosecution, was as follows:

"Should the jury believe from the evidence, and beyond a reasonable doubt, that the defendant is guilty of murder in the first degree, and should the jury so find, then the jury has the right, in such verdict, to fix the penalty of death or of imprisonment in the state prison for life. The jury has the right, in case they find a verdict of guilty of murder in the first degree, to do so without fixing the penalty. In other words, gentlemen of the jury, if you find the defendant guilty of murder in the first degree, and believe that he should be punished by death, you may say in your verdict, 'We, the jury, find the defendant guilty of murder in the first degree,' or if you find him guilty, and believe that his punishment should be confinement in the state prison for life, you should say so in your verdict."

The instructions which were given were correct. *People v. Jones*, 63 Cal. 168; *People v. Murback*, 64 Cal. 369.

Upon receiving the charge of the court the jury retired for deliberation, and afterwards returned into court, and by their foreman reported that they had not agreed upon a verdict, and that a juror desired to be further informed upon the question of punishment. The juror referred to then arose and the following proceeding took place:

"Juror. I did not want to sentence the defendant to death. *Court.* Do I understand the jury to disagree simply upon the matter of punishment? *Juror.* Yes, sir; I am not willing to pass sentence * * * by which the man should be killed, because I think there were some mitigating circumstances. * * * *Court.* The jury have the right to fix the penalty at death or imprisonment for life. * * * If the jury bring in a verdict of guilty of murder in the first degree, without specifying the penalty, they may do so. *Juror.* Then we are not compelled to do it? *Court.* You are not compelled to do it."

Again the jury retired, and again they returned into court for information upon the same question. The court read to them section 190 of the Penal Code, and, after it was read, the same juror arose and said: "I got the impression that if the verdict was returned of guilty of murder in the first degree, without anything further, it inflicted the death penalty. Some of my fellow-jurors thought it did not. I want to be certain of that." Again the court read section 190 of the Penal Code, and in connection therewith informed the jury as follows:

"I think it is the duty of the jury to fix the penalty, but at the same time, if you have agreed on a verdict of murder in the first degree, the court will receive it. If there is nothing specified as to the penalty, the court will have its duty to perform, but what the duty will be the court will not say. I think it is a jury's duty to fix the penalty,—they ought to do it."

Upon receiving this information the jury once more retired, and afterwards returned into court with their verdict. It was declared by the foreman, and the court asked defendant's counsel if he desired to have the jury polled, to which counsel replied: "We do not." Thereupon the clerk was directed to record the verdict; and that being done, the clerk read it to the jury as recorded, and inquired of them "if that was their verdict;" but before all the jurors answered defendant's counsel interposed with the following expression: "That verdict has been rendered under a misapprehension of the court's instructions and the law, and if the jury knew, as is the fact, that that means hang, they would not have brought in that verdict." After this the same juror arose and said: "If that is the effect of my verdict, that is not my verdict." Upon that expression of disagreement the court again asked defendant's counsel if he at that time desired to have the jury polled, to which counsel answered: "Yes; we do." Under the direction of the court the clerk proceeded to poll the jury, each of whom, as his name was called, answered that it was his verdict. When the name of the hesitating juror was called the record shows that he expressed his agreement in the manner following:

"The Clerk. Is this your verdict? *Juror.* No; not if—; and murmured in a low tone of voice something which could not be heard. *The Court.* What we desire to know is whether this is your verdict. *Juror.* Yes; that is my verdict, and I will leave the responsibility to the court."

The polling of the jury proceeded further, and all the jurors answered: "Yes; that is my verdict." The jury was then discharged,

and the defendant was remanded into the custody of the sheriff and an order duly entered fixing the time for sentence.

Hesitancy upon the part of the juror upon the question of punishment is very apparent; but that was not due to the instructions upon the question. The instructions iterated and reiterated, time and again, were unambiguous, and entirely consistent with the criminal law of the question as formulated by section 190 of the Penal Code. They were not contradictory. On the contrary, they were pointed and definite as to the powers exercisable by the jury upon the subject of punishment, in case they agreed upon a verdict of murder in the first degree. The instructions were therefore correct; and being correct, and free from ambiguity of expression, it is not to be presumed that the jurors to whom they were given did not apprehend them, or that any juror may have been misled by them.

It is true that the judge himself seems to have hesitated about giving information to the jury as to what *his* duty would be in case of the return of a verdict of murder in the first degree, without an expression of agreement upon the question of punishment; but the juror who was instructed as to his duty could not have been misled by that in considering the question. He knew from the instructions that if no verdict was returned upon the question of punishment the responsibility of inflicting the punishment upon the verdict to which he did agree would be upon the court, and there, as he expressed it, he "would leave it."

Of the duty of the court upon receiving such a verdict there could have been no doubt in the mind of the judge. As declared by this court in *People v. Welch*, 49 Cal. 185:

"If a jury shall agree that a defendant is guilty of murder in the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the court to pronounce judgment of death. The jury need not declare that death shall be inflicted in cases where they cannot agree on imprisonment; since if the verdict is silent in respect to the penalty, the court must sentence the defendant to death."

In other words, a person convicted of murder in the first degree shall not escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or, which is equivalent to the same thing, returned a verdict which was silent as to the penalty.

We find no prejudicial errors in the record, and the judgment and order must be affirmed. It is so ordered.

We concur: THORNTON, J.; MORRISON, C. J.; MYRICK, J.

69 Cal. 160

HALE v. AKERS and others. (No. 8,099.)

Filed March 26, 1886.

1. PUBLIC LANDS—LAND TITLES IN CALIFORNIA—EFFECT OF DECREE OF CONFIRMATION.

The final decrees of the board of commissioners, or of the district or supreme court, or any patent issued under the act of congress of March 3, 1851, to ascertain and settle private land claims in California, are conclusive only between the United States and the claimants, and do not affect interests of third persons; such third persons being those whose title accrued before the duty of the government and its rights under the treaty with Mexico attached.

2. SAME—DECREE OF CONFIRMATION OF LAND CLAIM IN CALIFORNIA—SURVEY.

Where a claim to public land in California has been confirmed by a decree of the district court, under the act of congress of March 3, 1851, and the decree fixes the boundaries of the claim, and remains unreversed, the survey must, in all respects, conform to the decree.

3. SAME—OVERLAPPING OF PATENTS TO LAND—BOUNDARIES.

A grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises in determining a controversy in regard thereto, caused by the overlapping of two patents, than would a floating grant, although the latter be first surveyed and patented.

4. SAME—MEXICAN TITLES IN CALIFORNIA—PUEBLO LANDS.

Where, under the Mexican law, pueblos were established, they became invested, even without any formal assignment, with a certain title to the pueblo lands, and this title was recognized by the act of congress of March 3, 1851, as in the nature of a grant, and has ever since been upheld and protected by the courts.

Commissioners' decision.

Department 2. Appeal from superior court, county of Sonoma.

William D. Bliss, for appellants.

Porter & Rutledge, for respondents.

BELCHER, C. C. This is an action to recover possession of about 15 acres of land in Sonoma county. Both parties claim title in fee. The plaintiffs deraign their title from Jacob P. Leese, to whom a Mexican grant of five and a half leagues was confirmed, and in August, 1859, patented by the United States. The defendant Stephen Akers deraigns his title from the city of Sonoma, to which a patent was issued by the United States in March, 1880, for certain lands confirmed to it as Pueblo lands. Both patents cover the land in controversy, and the question for decision is, which party shows the better right to it?

The facts as found by the court below are as follows: In October, 1841, the governor of California made a grant to Jacob P. Leese of the place called Huichica, in the neighborhood of Sonoma, containing two square leagues, and having for its western boundary the Arroyo Seco. In July, 1844, the governor made a second grant to Leese of three and a half leagues of the land called Huichica, and bounded "on the west by Estero de Sonoma, as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little hills of Huichica."

In April, 1852, Leese presented to the board of land commissioners a claim for confirmation of his title to the whole Huichica tract of five and a half leagues, and his claim was confirmed by the board in April, 1853, and by the United States district court in 1856. The appeal to the supreme court was dismissed in December, 1856. The decree of confirmation gave to Leese the land known by the name of Huichica, containing five and one-half square leagues, and bounded it "on the south by the marshy land adjoining the bay of San Francisco, and on the west by the *estero* of Sonoma, as far as the Trancas, taking the direction (*el rumbo*, direction or course) of the Arroyo Seco." Under this decree a deputy surveyor made a survey of the Huichica in December, 1858, and his survey was approved by the United States surveyor general for the state, on June 4, 1859. No notice was given of the survey or of its approval, and neither the city of Sonoma, nor any officer thereof, nor the defendant, had any notice of the proceeding relative to its approval. In accordance with this survey, a patent for the Huichica *rancho* was issued by the United States to Leese, dated August 3, 1859. It was in the usual form of patents issued for confirmed Mexican grants, and recited the second grant, the confirmation, and the survey. The western boundary, as shown on the plat in the patent, is the Sonoma creek, from a post marked L, at the lower landing, as far as a post marked L, at the Trancas; and thence a straight line running north, 37 deg. east, 156 chains, to a post marked L, on the Arroyo Seco, at the Huichica hills. This last line is known as the "Trancas Line."

In June, 1835, the governor of California instructed Gen. Vallejo, director of colonization, to establish the pueblo of Sonoma; and in that year Vallejo established the pueblo, and made a survey thereof, with the following boundaries: "On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma creek; thence up that creek to the Agua Caliente creek; thence easterly to the foot-hills north of the city to the place of beginning." This tract Gen. Vallejo laid out and platted into lots and blocks, and in the year 1835 established families on the same, occupying the tract along the Arroyo Seco down to the point where it entered the salt marsh. He also made a report of all his proceedings to the governor, and they were duly approved.

In May, 1852, the mayor and common council of the city of Sonoma presented to the board of commissioners their claim, as successors of the pueblo, for all the land of the pueblo of Sonoma, as established by Vallejo; and their claim was confirmed by the board in January, 1856. An appeal was taken to the district court, and under the provisions of an act of congress passed July 1, 1864, the case was transferred to the circuit court, where the claim was confirmed on the second day of November, 1864. The decree of confirmation fixed the Arroyo Seco as the eastern boundary of the pueblo.

In September, 1868, a survey of the land so confirmed was made

by the surveyor general, and in August, 1872, was reported to the land department for approval. Due notice of this survey was given and published, as required by the act of congress of July 1, 1864, and the matter of the conflict between this survey and the survey of the Huichica grant was heard before the commissioner of the general land-office in March, 1876. That officer adjudged and determined that "a direct line running from the point marked 'Trancas,' on Sonoma creek, to the point where the Arroyo Seco enters the salt marsh, and thence following the direction of the Arroyo Seco to the Little Huichica hills, should constitute the south-easterly boundary of the pueblo of Sonoma;" and directed the surveyor general to amend his survey accordingly. An amended survey was made as required, and due notice thereof given. The amended survey was reported to the general land-office for approval, and, upon a hearing had before the commissioner in December, 1878, that officer approved the survey, and fixed the Arroyo Seco as the boundary between the pueblo of Sonoma and the Huichica grant. No appeal was taken from this decision, and the same became final. A patent for the pueblo lands was issued by the United States to the mayor and common council of the city of Sonoma, in accordance with the decrees of confirmation and survey, dated March 31, 1880; and this patent covered 423 acres of land embraced in the Huichica patent, of which the 15 acres in controversy are a part.

In 1851 the defendant Stephen Akers entered into the possession of the land sued for under a contract with the city of Sonoma for its purchase, and he has remained in possession, cultivating and improving it, ever since. In May, 1858, the city conveyed to him this land and enough more to make 111 acres, it all being within the city limits as surveyed and patented. In January, 1859, the grantee of Leese conveyed to Theodore L. Schell, the plaintiff's testator, 470 acres of land, parcel of the Huichica grant, as surveyed and covering the 111 acres conveyed as aforesaid to Akers. In September, 1860, Schell commenced an action against Akers to recover from him the possession of all of the 111 acres; and while the action was pending the parties to it, on the eleventh day of October following, entered into a written agreement, which was signed and acknowledged by them and recorded. By this agreement Akers released to Schell the east half of the 111-acre tract, which was described by metes and bounds; and the agreement then proceeded as follows:

"The said Schell hereby covenants and agrees that in the event the city of Sonoma establishes her claim to any part or portion of the above released tract of land, that he will deliver the possession of the same, or such portions thereof as may be so established, together with a yearly rent from this date of \$5 per acre for the land so to be delivered; and the said Akers hereby covenants and agrees that in the event of the city of Sonoma not being able to establish her claim beyond the present line of the Huichica patent, that he will deliver possession to the said Schell of all or such portion of the remainder of said above-described tract of land as may be within the line of said Huichica patent,

and will pay a yearly rent for the same, at the rate of \$5 per acre, to the said Schell."

The action was then dismissed, and a fence was built by the parties, extending northerly across the land, and dividing it into two fields of nearly equal size. Akers surrendered to Schell all that portion lying east of the fence, and retained possession of all that portion lying west of it. The land in controversy here is a part of the land which Akers so retained in his possession. Upon the findings the court rendered judgment in favor of the defendants. The plaintiffs appealed, and the case is brought here on the judgment roll.

There are two sufficient answers to the claims made by the appellants:

1. It was expressly provided by the act of congress, passed March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California," that the final decrees of the board of commissioners, or of the district or supreme court, or any patent to be issued under the act, should be conclusive only between the United States and the claimants, and should not affect interests of third persons. *Rodrigues v. U. S.*, 1 Wall. 588. It has been held by this court that the "third persons" against whose interests the action of the government and patent are not conclusive are those whose title accrued before the duty of the government and its rights under the treaty attached. *Teschmacher v. Thompson*, 18 Cal. 27. Where two patents cover the premises in controversy, "the main question in the case, as in all cases where patents founded upon previously existing concessions overlap, is which of the two original concessions carried the better right to the premises?" This was said in *Henshaw v. Bissell*, 18 Wall. 255; and in that case, there being two patents covering the same land, it was held that in determining such a controversy a grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented.

Here it appears that the pueblo of Sonoma was established by the direction and with the approval of the governor of California in 1835. Its boundaries were surveyed and fixed. The tract was laid out in lots and blocks, and families were established upon those lots and blocks along the Arroyo Seco, which was its eastern line down to the salt marsh. "By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period of her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. Those laws

and ordinances provided for the assignment to the pueblos or towns when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land." *Townsend v. Greeley*, 5 Wall. 336. And when pueblos were established they became invested, even without any formal assignment, with a certain title to the pueblo lands. This title was recognized by the act of March 3, 1851, as in the nature of a grant, and it has ever since been upheld and protected by the decisions of this court and of the supreme court of the United States. *Hart v. Burnett*, 15 Cal. 530; *Grisar v. McDowell*, 6 Wall. 363.

In the first grant to Leese the Arroyo Seco is expressly named as its western boundary. In the second grant, and in the decree of confirmation, the western boundary is the Estero de Sonoma as far as the Trancas, thence taking the direction of the Arroyo Seco. It has been held, when a land claim had been confirmed by a decree of the district court, under the act of March 3, 1851, and the decree fixed the boundaries of the claim, and remained unreversed, that the survey must conform to the decree in all respects. *The Fossat Case*, 2 Wall. 649.

What was meant by the words, "taking the direction of the Arroyo Seco?" It seems to us, as it did to the commissioner of the general land-office, when the matter of the conflict was before him, that the line was to run from the Trancas to the nearest point on the Arroyo Seco, and thence up that creek or gulch. If this be so, then it is clear that the line, as run by the surveyor, did not conform to the decree, but took in lands not covered by it. It must follow that, to the lands so taken in, the original concession to the pueblo, and the patent issued upon confirmation thereof, carried the better right.

2. When Schell and Akers executed their written agreement in October, 1860, the Huichica patent had been issued to Leese, and Schell had his deed. The Sonoma claim had been confirmed by the commissioners, and took in the land lying between the Trancas line and the Arroyo Seco. The city was asserting a right to that land, and the case was pending before the courts. Akers had a deed to 111 acres of the land, and was in possession of it. Under these circumstances, the parties compromised the action, which had been commenced by dividing the 111 acres about equally between them. Akers released and surrendered to Schell the eastern half and retained the western half. In consideration of this, Schell agreed, "in the event the city of Sonoma establishes her claim to any part or portion" of the land released, to deliver back to Akers such part or portion, and to pay a yearly rent of five dollars per acre for the same while he might hold it. And Akers agreed, in the event the city should not be able to establish her claim beyond the line of the Huichica patent, to deliver to Schell so much of the land as he retained within that line, and to pay to him a like rent of five dollars per acre. It is clear from this, we think, that the only establishment of the Sonoma claim

which the parties contemplated was such as would result from the action of the courts upon it, and the issuing of a patent by the government in pursuance of their decrees. The parties evidently thought that if the city should finally succeed in establishing its claim, and receive a patent for any of the land within the lines of the Huichica patent, it would have the better title to the land. They could, therefore, avoid litigation and expense, and safely await the issue of the city's contest. As we have seen, they rightly interpreted the law, and so long as Schell lived he acquiesced in the arrangement. After his death his executors thought it their duty to raise the question again, and this action was commenced. In our opinion the agreement was intended to be and was binding upon the parties, and decisive of their rights when it was executed, and it remains so still.

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

69 Cal. 153

HOWELL v. STETEFELDT FURNACE Co., Original Defendant, and another, Substituted Defendant. (No. 9,206.)

Filed March 26, 1886.

1. ACTIONS—CHANGE OF VENUE—CONVENIENCE OF WITNESSES—TIME FOR APPLICATION.

A defendant is not entitled to have the place of trial changed, on the ground of the convenience of witnesses, until he has filed an answer in the cause.

2. SAME—RIGHT OF SUBSTITUTED DEFENDANT.

A person who is substituted involuntarily as the sole defendant in place of the original defendant, under section 386 of the California Code of Civil Procedure, is entitled to demand and have a change of the place of venue to the county in which he resides.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

D. L. Smoot, for appellant.

Charles F. Wilcox, for respondent.

FOOTE, C. The Stetefeldt Furnace Company had in its possession \$2,000, which John Howell and James M. Thompson respectively claimed. John Howell resided in Santa Clara county; the furnace company claimed to have its *situs* in San Francisco, and Thompson resided there. Howell brought suit in Santa Clara county against the furnace company to recover that sum of money. The company made no defense, but filed the necessary affidavit, under section 386, Code Civil Proc., gave the required notice to Howell and Thompson, paid the money into court, and obtained an order to be there made

and entered substituting Thompson in its place as defendant, and thereafter said company ceased to have any connection with the action. Upon Thompson being made the sole party defendant to the action, he filed a demurrer to the complaint, and at the same time, under section 396, Code Civil Proc., filed an affidavit of merits, and demanded in writing that the trial of the cause should take place in the county of San Francisco, where he resided. Notice of this motion was duly given by Thompson, and the motion denied by the court, from the order refusing which this appeal is taken.

It is contended on the part of the plaintiff, first, that so far as the defendant Thompson's right to a change of venue rested upon the claim that the convenience of witnesses required it, it should not be granted, because he had not filed an answer in the cause, and therefore the trial court was not placed in possession of the necessary facts to determine the propriety of granting the motion on that ground. And in this respect his contention is correct.

He claims further, however, that the defendant is not entitled to a change of venue to the county of his residence, because he did not move for or demand such change until after the court had obtained jurisdiction over the original defendant, and that it then became too late for the substituted defendant to rightfully claim such change.

The object had in view by the legislature in enacting section 396, Code Civil Proc., was to prevent trials of actions in counties other than those in which defendants resided, unless they waived such right. And the failure of the original defendant (even if it—a corporation—had possessed a residence, which it had not, as the term is used in sections 395, 396, Code Civil Proc.) to demand a change of venue to the county of its residence could not prejudice the right of a defendant, when upon his first appearance in the action, to which he had been made the sole substituted defendant *in invitum*, he moved for and demanded a transfer of the cause to the county where he resided. Thompson's first appearance in this cause as sole defendant was when he filed his demurrer to the complaint, and moved for and demanded a change of venue to the county of his residence. The appearance of the corporation was not his appearance. He was brought into the action, under section 386, Code Civil Proc., *in invitum*. He did not come in as a voluntary intervenor. From the moment he became such party to the action, and not until then, did he become entitled to the exercise of the right which accrued to him under section 396, Code Civil Proc. Therefore we are of opinion that the order of the court below should be reversed, and that tribunal directed to make and enter an order granting the change of venue as demanded.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed, with directions to the court below to grant a change of venue.

69 Cal. 184

PEOPLE v. MOODY and others. (No. 20,161.)

Filed March 29, 1886.

CRIMINAL LAW—INFORMATION, AMENDMENT OF—PLEA—ARRAIGNMENT.

Where an information as filed, to which the defendants pleaded not guilty, stated no defense, for the reason that the day of the alleged commission of the offense was a day after the accusation was made, and after a jury was impaneled the information was amended by alleging the commission of the offense on a day prior to the filing of the information, the defendants should have been arraigned and called on to plead to the amended information, and it was error to proceed with the trial without an arraignment or plea to the information as amended.

In bank. Appeal from superior court, county of San Luis Obispo.
E. & William Graves and J. N. Turner, for appellants.
E. C. Marshall, Atty. Gen., for respondent.

MYRICK, J. The defendants were jointly prosecuted by information. The information was filed June 18, 1885, and accused the defendants of the commission of a crime on the twentieth of July, 1885, *a day subsequent to the filing*. The defendants were arraigned and pleaded not guilty. After a jury was impaneled the district attorney moved for leave to amend the information by charging the offense to have been committed July 20, 1884, a day *before* the filing of the information. Leave to amend was granted, and after amendment the trial proceeded without an arraignment and plea to the information as amended. Without passing on the power of the court to permit an amendment to an information, it is sufficient to say: The information as filed stated no offense for the commission of which the defendants could be tried, in that the day of the alleged commission of the offense was a day after the accusation was made; therefore no offense was charged. The information, when amended, charged an offense, and this information, so amended, could have been treated as an original information then for the first time presented. On this information the defendants should have been arraigned and called on to plead. This omission was error. No issue was joined as to any possible crime.

Judgment and order reversed, and cause remanded for proceedings not inconsistent with this opinion.

We concur: SHARPSTEIN, J.; ROSS, J.; MORRISON, C. J.; THORNTON, J.; MCKEE, J.

69 Cal. 215

PEOPLE v. KEWEN. (No. 11,271.)

Filed March 30, 1886.

UNIVERSITY OF CALIFORNIA—HASTINGS COLLEGE OF THE LAW.

The Hastings College of the Law was by the California act of March 26, 1878, affiliated with the university, and the California constitution of 1879, having declared that the university should be continued in the form and character prescribed in the acts then in force, it was not competent for the legislature, by the acts of March 3, 1883, and March 18, 1885, to change the form of the government of the university, or of any college thereof then existing, and those acts are therefore void, in attempting to provide for a mode of selection of directors for the law college different from that in existence.

In bank. Appeal from superior court, city and county of San Francisco.

Ralph C. Harrison, for appellant.

Ryland Wallace and *The Attorney General*, for respondent.

MYRICK, J. The organic act of the University of California (St. 1867-68, p. 248, § 1) made provision that professional and other colleges might be added to and connected with the university. The act of March 26, 1878, (St. 1877-78, p. 532,) creating Hastings College of the Law, made provision for its affiliation with the university. The petition in this case is based on the fact of such affiliation, and it was held by this court, in *Foltz v. Hoge*, 54 Cal. 28, (decided in 1879,) that the law college had affiliated with the university, and had become an integral part thereof, subject to the same general provisions of the law as were applicable to the university. The constitution of 1879 (article 9, § 9) declared that the university should be continued in the form and character prescribed in the acts then in force, subject to legislative control for certain specified purposes only. Such being the case, it was not competent for the legislature, by the act of March 3, 1883, or that of March 18, 1885, or by any other act, to change the form of the government of the university, or of any college thereof then existing. The act of 1878 provided for a board of directors, to consist of eight persons, naming the first and providing for the selection of successors; the act of 1883 assumed to transfer the control of the college to the regents of the university; and the act of 1885 assumed to make another transfer by creating a board of trustees for the college, to consist of three, naming them, and providing for the appointment of successors. It was intended by the constitution to prohibit such changes as to the university; and if the college is a portion of the university, such prohibition would extend to it. The selection of the respondent as registrar by the board of directors existing under the act of March 26, 1878, was therefore a legal selection, and he is rightfully in office until removed by that board.

Judgment reversed, and cause remanded, with directions to sustain the demurrer.

We concur: THORNTON, J.; MCKEE, J.

MCKINSTRY, J. I concur. Taking it for granted (as is assumed by the respondent) that, prior to the adoption of the present constitution of the state, the Hastings Law College had "affiliated" with the university, I agree that the attempted changes in its organization, by statutes passed after the constitution was adopted, were attempted changes in the "form and character" of the university, prohibited by article 9, § 9. In saying this, I neither take judicial notice of an affiliation, nor hold that the fact is, for all purposes, determined by *Foltz v. Hoge*, 54 Cal. 28; but rest my concurrence upon the failure of the complaint to aver that such affiliation had not taken place, and upon averments in the complaint which assume it, as well as on the express claim of counsel for respondent in their points and authorities.

2 Cal. Unrep. 650

HOLMBERG v. HENDY. (No. 9,131.)

Filed March 31, 1886.

REPLEVIN—FORM OF VERDICT AND JUDGMENT.

In an action of claim and delivery, the verdict and judgment must be in the alternative, as provided by section 667 of the California Code of Civil Procedure.

Department 1. Appeal from superior court, Calaveras county.

Action for claim and delivery. The verdict and judgment were not in the alternative form, but merely for plaintiff for the sum of \$1,100, and interest.

Wm. H. H. Hart, for appellant.

Ira H. Reed, for respondent.

Ross, J. The action is claim and delivery. The judgment does not conform to the requirements of the statute in such cases, for which reason it must be reversed. Code Civil Proc. § 667; *Berson v. Nunan*, 63 Cal. 550. The verdict contains the same vice, for which reason a proper judgment could not be here ordered, assuming that none of the other points made by appellants are well taken. A new trial must therefore be ordered without reference to the other points.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; MCKINSTRY, J.

LA SOCIETE FRANCAISE D'EPARGNE ET DE PREVOYANCE MUTUELLE v.
FISHEL, Ex'x, etc., and others.

Filed April 2, 1886.

MUNICIPAL CORPORATIONS—SAN FRANCISCO—CONTRACT FOR STREET WORK—
EXTENSION OF TIME—STREET ASSESSMENT.

The board of supervisors of the city and county of San Francisco cannot, after the expiration of the time for the completion of street work under a contract, extend the time; and any attempt to do so, or to validate an assessment for such work done in pursuance of an extension of time, is void. On authority of *Beveridge v. Livingstone*, 54 Cal. 54, and *Fanning v. Schammel*, 9 Pac. Rep. 427.

Department 2. Appeal from superior court, city and county of San Francisco.

Action to foreclose a street-assessment lien for street work done in the city and county of San Francisco. The work was to be done under contract, within a specified time. At the expiration of such time the work was still uncompleted. Subsequently the board of supervisors passed an order extending the time in which to complete the work. Judgment was rendered for defendant.

J. M. Wood and Daniel Harney, for appellant.

Stanly, Stoney & Hayes, for respondent.

By THE COURT. The only point involved in this case was decided in *Beveridge v. Livingstone*, 54 Cal. 54, and in *Fanning v. Schammel*, 9 Pac. Rep. 427. Upon the authority of those cases the judgment is affirmed.

69 Cal. 155

COLTON v. ONDERDONK and others. (No. 9,130.)

Filed March 26, 1886.

1. TRESPASS TO REALTY—ACTION BY DEVISEE IN POSSESSION.

A devisee of land, in possession thereof pending the settlement of the testator's estate, may, after the death of the testator, maintain an action for the recovery of damages for a trespass to such land.

2. SAME—TRESPASS TO DECEDENT'S REALTY—RESPECTIVE RIGHT OF EXECUTOR OR DEVISEE IN POSSESSION TO SUE.

If a devisee of land, in possession thereof pending the settlement of the estate of the testator, be also the executrix of the testator's will, a recovery in an action by her, in her own name, is a bar to her recovery for the same cause of action in her capacity as executrix.

3. SAME—BLASTING BY GUNPOWDER AS TRESPASS.

One who owns a lot, situated in a large city, and adjoining the dwelling of another, and uses large quantities of gunpowder to blast out rock on his lot, is responsible for the damage done to such dwelling as the natural and proximate result of his blasting, such blasting being taken as an unreasonable, unusual, and unnatural use of his own property; and he cannot excuse himself from liability for such use of his property by showing any degree of care or skill.

Commissioners' decision.

¹See modification of opinion, *post*, 393.

Department 2. Appeal from superior court, city and county of San Francisco.

Fox & Kellogg, for appellants.

Crittenden Thornton and *Stanly, Stoney & Hayes*, for respondent.

FOOTE, C. The plaintiff instituted this action for the recovery of damages which she claimed the defendant had caused to her dwelling-house while he was engaged in blasting rock, in grading another lot adjoining that on which the plaintiff's dwelling stood. The cause being tried by a jury, their verdict was in favor of Mrs. Colton for \$7,500. This was on the nineteenth of March, 1883. Afterwards, on the nineteenth of June, 1883, a judgment thereon was rendered for the sum of \$7,631.25, and interest from said date at 7 per cent. per annum, together with costs and disbursements in the sum of \$464.45. From said judgment and an order refusing his motion for a new trial the defendant appeals.

His first contention is that the complaint showed no cause of action, because, as he claims, it is doubtful whether the plaintiff claims to have been in possession of the damaged house as devisee under her husband's will, or as executrix; and by the allegations of that pleading that the decedent's estate not having been distributed, the executrix alone could sue in such an action, and not having done so, no recovery could legally be had. We do not think this proposition is successfully maintained. The complaint, as we think, in its statements, conveys to the ordinary intellect that Mrs. Colton claimed damages from the defendant for injuries done to the dwelling-house of which she was in possession as a sole devisee under her husband's will, and the further fact that she was also the executrix of that will. There was a statement therein that the defendant had damaged the property of which she, Ellen M. Colton, in her own proper person, was in possession, which was the gist of the action, and no contradiction of that statement. Therefore the case of *Dickinson v. Maguire*, 9 Cal. 46, cited by the appellant, is not in point. And if it was ambiguous or doubtful from the language of the pleading what it meant to convey as to the capacity in which Mrs. Colton sued, that should have been taken advantage of by special demurrer, and such course not having been taken, the defect was waived. Code Civil Proc. § 434.

At common law the right of action in such a case as this—trespass upon realty—was in the heir or devisee in possession. Pom. Rem. (2d Ed.) § 219; Wat. Tresp. 979, 980; *Lyman v. Webber*, 17 Vt. 489; *Aubuchon v. Lory*, 23 Mo. 99, 100; *Railroad Co. v. Knapp*, 51 Tex. 576, 577.

It is true that in California the administrator or executor is entitled to the possession of the real estate of his decedent for certain purposes, even as against the heir or devisee; but the title to the land is vested in the latter subject to the former's lien for the payment of

debts and the expenses of administration. *Estate of Woodworth*, 31 Cal. 604. Under sections 1452, 1581, Code Civil Proc., the possession of an executor is that of the heir or devisee, and, as against third persons, the latter can maintain an action of ejectment as well as the former. The defendant is a mere trespasser upon the rights of one in possession of the realty against whom he does not attempt to assert any paramount title; therefore she, being in possession, can institute the action. *Polk v. Henderson*, 9 Yerg. 310; *Darling v. Kelly*, 113 Mass. 29-31; *Sweetland v. Stetson*, 115 Mass. 49, 50; *Kilborn v. Rewee*, 8 Gray, 415-417.

But it would make no difference to the defendant's rights how she, the plaintiff, sued,—whether as executrix or universal devisee,—as a judgment in her favor for damages to the dwelling while in her possession as such devisee would be a bar to her recovery for the same cause of action in the capacity of executrix. *Stewart v. Montgomery*, 23 Pa. St. 412; *Atherton v. Atherton*, 2 Pa. St. 112. And as to what she might do with the money recovered in this action, in accounting to the probate court, is no concern of the defendant, a mere trespasser, and not a creditor of her decedent's estate; as, having once paid the amount recovered by her in the capacity in which she sued, his responsibility would cease.

The allegations, therefore, of the complaint, which are admitted by the answer to be true, that the plaintiff, Ellen M. Colton, at the time the trespass complained of was committed by defendant was entitled to and in possession of the premises as the owner thereof in fee since the death of her husband, David D. Colton, taken with the other facts set out therein, sufficiently stated a cause of action. The fact that the defendant used quantities of gunpowder, a violent and dangerous explosive, to blast out rocks upon his own lot, contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling-house as the natural and proximate result of his blasting; for an act which in many cases is in itself lawful, becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling-house, or a concussion of the air around it, which had either damaged or entirely destroyed it.

The defendant seems, by his contention, to claim that he had a right to blast rocks with gunpowder on his own lot, in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken. Add. Torts. 9; *Transportation Co. v. Chicago*, 99 U. S. 635-

644; *Losee v. Buchanan*, 51 N. Y. 479, explaining *Hay v. Cohoes Co.*, 2 N. Y. 159-162; *Pixley v. Clark*, 35 N. Y. 520-532; *Heeg v. Licht*, 80 N. Y. 579-583; *Tiffin v. McCormack*, 34 Ohio St. 644; *Carman v. Railroad Co.*, 4 Ohio St. 417, 418; *Sutton v. Clarke*, 6 Taunt. 44; *Joliet v. Harwood*, 86 Ill. 110-116; *Farrand v. Marshall*, 19 Barb. 381-385; *Selden v. Canal Co.*, 24 Barb. 363, 364; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Wilson v. New Bedford*, 108 Mass. 261-266; *Shipley v. Fifty Associates*, 106 Mass. 194-200; *Ball v. Nye*, 99 Mass. 582-584; *Cahill v. Eastman*, 18 Minn. 324, (Gil. 299;) S. C. 10 Amer. Rep. 184-200.

The plaintiff being in possession as the sole devisee under her husband's will, and the owner in fee, was entitled to recover as damages a sufficient sum of money to restore her dwelling-house, as far as practicable, to the condition in which it had been prior to the injury inflicted by the defendant's acts. 2 Wat. Tresp. § 1093. We think, however, that the judgment was excessive, being for \$131.25 more than the verdict of the jury; and therefore should be modified so as to have judgment rendered for the plaintiff for the sum of \$7,500 and costs. The case should therefore be remanded to the court below, with directions to modify its judgment in accordance with the views we have herein expressed.

We concur: BELCHER, C. C.; SEARLS, C.

THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to modify its judgment in accordance with the views expressed in said opinion.

69 Cal. 155

COLTON v. ONDERDONK. (No. 9,130.)

Filed April 2, 1886.

OPINION MODIFIED.¹

Department 2. Appeal from superior court, city and county of San Francisco.

Fox & Kellogg, for appellant.

Crittenden Thornton and *Stanly, Stoney & Hayes*, for respondent.

MYRICK, SHARPSTEIN, and MCKEE, JJ. On motion of Stanly, Stoney & Hayes, for respondent, and good cause appearing therefor, it is ordered that the judgment heretofore rendered and entered in the above-entitled action be amended so as to read as follows: The order denying defendant's motion for a new trial is affirmed, and the cause is remanded to the court below, with directions to modify the

¹See *ante*, 395.

judgment by striking out the damages thereby awarded, and inserting instead thereof the sum of \$7,500. In other respects the judgment is affirmed.

69 Cal. 223

MARSHALL, Atty. Gen., and another v. DUNN, Comptroller. (No. 11,192.)

Filed March 30, 1886.

STATE OFFICERS—TRAVELING EXPENSES OF STATE OFFICERS—MANDAMUS.

Mandamus does not lie to compel the comptroller of the state of California to draw warrants in favor of the attorney general and the surveyor general, for traveling expenses, during the thirty-fifth fiscal year, in contests about public lands between the state and the United States, (under the California statute of March 9, 1883, appropriating \$1,000 for the payment of such expenses, but providing that not more than half such sum should be expended during the thirty-fifth fiscal year,) if the fund specifically appropriated for the purpose of such expenses during such year, viz., \$500, has already been expended when the demand is made on the comptroller for the warrant.

In bank. Appeal from superior court, county of Sacramento.

E. C. Marshall, for appellant.

R. T. Devlin and *R. M. Clarken*, for respondent.

MCKINSTRY, J. This is an appeal from a judgment in *mandamus* of the superior court of Sacramento county, denying the plaintiffs' petition that defendant be commanded to draw warrants in favor of plaintiffs for traveling expenses when engaged in contests about public lands between the state and the United States. The complaint is as follows:

"And now comes E. C. Marshall, attorney for plaintiffs herein, and respectfully moves this honorable court to issue its mandate against the defendant, J. P. Dunn, state comptroller, commanding him to issue his warrants against the treasury of said state, as follows: In favor of said petitioner H. I. Willey, surveyor general, in the sum of \$250, and in favor of said petitioner E. C. Marshall, attorney general, in the sum of \$750, in payment of accounts of said plaintiffs, as allowed by the state board of examiners on the seventh day of April, 1884, in pursuance of section 3413 of the Political Code of California. The legislature of the state of California, by an act entitled 'An act making appropriations for the support of the government of the state of California for the thirty-fifth and thirty-sixth fiscal years,' approved March 9, 1883, and found in the statutes of 1883, pages 12 and following, made the following appropriations: For traveling expenses of the surveyor general and the attorney general, when engaged in contests between the state and the United States about public lands, one thousand dollars. That warrants have been duly drawn by the defendant, J. P. Dunn, as comptroller aforesaid, during the thirty-fifth fiscal year, against said sum of \$1,000, in favor of said plaintiff H. I. Willey, surveyor general, amounting to the sum of \$500; that by section 4 of the act of March 9, 1883, it is provided that 'not more than one-half of any sum appropriated under this act shall be expended during the thirty-fifth fiscal year, unless such sum is exempted from the operation of this section;' that the services of plaintiffs were rendered during the thirty-fifth fiscal year, and the appropriation made by the said act of March 9, 1883, has been drawn upon for the sum of \$500; that there is of the appropriation of \$1,000 remaining the sum of \$500, against which no warrants have been

drawn; that the legislature has made no appropriation since March 9, 1883, for the payment of the traveling expenses of the plaintiffs in this action, nor does any appropriation for that purpose exist other than the said act of March 9, 1883, and that found in the section 3413 of the Political Code."

The only appropriation relied on by the plaintiffs is found in the act making appropriations for the support of the government for the thirty-fifth and thirty-sixth fiscal years, approved March 9, 1883: "For traveling expenses of the surveyor general and attorney general when engaged in contests between this state and the United States about public lands, one thousand dollars." By section 4 of that act it was provided that "not more than one-half of any sum appropriated under this act shall be expended during the thirty-fifth fiscal year, unless such sum is exempted from the operation of this section."

Warrants were drawn by the defendant, as comptroller, against the \$1,000 appropriation, in favor of the plaintiff the surveyor general, amounting to \$500 during the thirty-fifth fiscal year. The traveling of the plaintiffs, the expenses of which are involved in this proceeding, was done during the thirty-fifth fiscal year, and the statute does not exempt the \$1,000 appropriation from the operation of the fourth section. No question arises here with respect to the relative rights of the plaintiffs. Both join in this application.

"It is the duty of the comptroller * * * to draw warrants on the treasury for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law, and upon an *unexhausted, specific appropriation* provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the service for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof." See *Stratton v. Green*, 45 Cal. 151; Pol. Code, § 433.

Here the fund specifically appropriated for the traveling expenses of the plaintiffs during the thirty-fifth fiscal year had already been exhausted, when the demand was made on the comptroller for a warrant, and when this proceeding was commenced. Judgment affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.; ROSS, J.; MCKEE, J.; THORNTON, J.

69 Cal. 247

ROSS v. SEDGWICK. (No. 9,052.)

Filed March 31, 1886.

1. SALE—ACTUAL AND CONTINUED CHANGE OF POSSESSION.

Where the keeper of a lodging-house was notified by her landlord that she must leave the premises by a certain time, and she failed to do so; whereupon he sued her and obtained judgment of restitution, and for treble rent against her; and about the time of said judgment, but before execution, she transferred the furniture in said lodging-house to her brother in payment of an actual indebtedness to him, and gave him a bill of sale therefor; whereupon

he took possession, and exercised control over the property, taking up his abode in said lodging-house, and notifying the lodgers that he had bought the property,—it was *held*, that there was such an actual and continued change of possession of the property as would vest the title in him, notwithstanding the possession of the house could not be transferred, and was still in the vendor of the property.

2. FRAUDULENT CONVEYANCE—PREFERENCES.

A transfer of property by a debtor to one of his creditors, giving the latter a preference over other creditors, is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it will have the effect of defeating the collection of other debts; for to avoid the transfer there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts.¹

3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

To entitle a party to a new trial on the ground of newly-discovered evidence, he must show diligence in endeavoring to discover and produce the evidence on the former trial. A general averment is not sufficient, but he must state particularly what acts he performed to enable the court to decide what diligence he used; and if no such facts are shown, and every material fact disclosed by affidavit is contradicted by counter-affidavits, a new trial is properly refused.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Geo. D. Shadburne, for appellant.

Severance, Travers & Hornblower, for respondent.

BELCHER, C. C. This was an action to recover damages for the conversion by the defendant of certain household furniture, alleged to be the property of the plaintiff. The defendant justified the taking of the furniture upon the ground that he was sheriff of the city and county of San Francisco, and as such seized the property and sold it under an execution issued against one Annie P. Vallean, whose property he alleged it was at the time of such seizure. The case was tried before a jury, and the verdict was in favor of plaintiff. The appeal is by the defendant from the judgment and an order denying a new trial. The record shows that Mrs. Vallean was the keeper of a lodging-house in the city of San Francisco, for which she had been paying a monthly rental of \$65. The landlord notified her to leave the premises, and that her rent would be raised to \$100 per month. He commenced an action to remove her from the premises, and on the eleventh of September, 1882, obtained a judgment of restitution, and for \$300, treble rent for one month, and for costs. About this time she notified the plaintiff, who was her brother, and lived in the country, that she was in trouble, and wanted him to come down and help her. He came to the city on the fifteenth of September, took a room in the lodging-house, and remained there until the twenty-fifth of the month. On the 20th he took an inventory of all the furniture in the house, and then exacted, and Mrs. Vallean gave him, a bill of

¹ For a full discussion of the question of fraudulent conveyance, see *Lewin v. Hopping*, (Cal.) 8 Pac. Rep. 73, and note, 75-82.
v.10p.no.6—26

sale of it. She was indebted to him at the time in a sum equal to the value of the furniture, and the sale was made in payment of that indebtedness. He at once took possession of the property, notified the lodgers in the house that he had bought it, and continued to exercise control over it until it was seized by the defendant. Mrs. Val-leau engaged a room for herself in another house, but became ill, and was unable to leave the lodging-house until the early morning of the 25th, when she went away, taking some of her personal effects with her. On the afternoon of the 25th a deputy-sheriff under the defendant went to the lodging-house, and levied an execution, issued on the judgment above referred to, upon all the furniture which he found therein. The plaintiff was there, and, before the levy was made, notified the deputy that the property was his. After due notice the furniture was sold by the defendant under the execution.

At the trial the principal contention on the part of the defendant was that the sale by Mrs. Val-leau to the plaintiff was not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things sold; and it is now claimed that the evidence was insufficient to justify the verdict, and that the judgment should therefore be reversed.

We do not think this claim can be maintained. The case was submitted to the jury under instructions which stated the law upon the question involved very clearly, fully, and correctly; and, looking now at all the testimony, we are unable to say that there was not a sufficient change of possession to meet the requirements of section 3440 of the Civil Code. It is true that after making the bill of sale Mrs. Val-leau remained for a time in the house, but she had surrendered all control, and was sick, and most of the time in bed. The plaintiff had assumed control, and his possession was open, visible, and notorious.

The defendant asked the court to instruct the jury, in effect, that a tenant holds possession of leased premises for his landlord, and that after the landlord has obtained a judgment against his tenant for the possession of the premises the tenant cannot induct another into the possession thereon, and thereby create the relation of landlord and tenant between either himself and such person or his landlord and such person; hence any possession by plaintiff of the lodging-house, after the judgment against Mrs. Val-leau, was unlawful, and the possession was Mrs. Val-leau's until the premises were delivered to her landlord, "and the possession of the furniture in the house—a part of such real property—could not be transferred to any one by the delivery of the possession of the house to such person, and such a transfer would be void as to creditors." The instruction was properly refused. If given, it would have tended to mislead the jury. The plaintiff was not claiming the possession of the furniture because of the delivery to him of the possession of the house. He claimed to have taken the *actual* possession of the furniture, and this he might

have done notwithstanding, as matter of law, the possession of the house remained in Mrs. Valleau.

The defendant also asked the court to instruct the jury as follows:

"Every transfer of property made with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor; hence if from the evidence you should believe there was such a transfer of the property in question to the plaintiff, although the plaintiff might have been in possession thereof at the time of the seizure of the same by defendant, still you should find for defendant."

The court properly refused to give this instruction. It appeared from the testimony—and there was no conflict—that the furniture was conveyed to the plaintiff in payment of a just indebtedness from Mrs. Valleau to him. He had a right to exact the payment of his debt, and the transfer was not made void, under section 3439 of the Civil Code, though he knew that other creditors would thereby be hindered and delayed in the collection of their debts. As said in *Dana v. Stanford*, 10 Cal. 278:

"A conveyance giving such preference is not fraudulent, though the debtor be insolvent, and the creditor be aware, at the time, that it will have the effect of defeating the collection of other debts. To avoid the conveyance there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims."

See, also, *Randall v. Buffington*, 10 Cal. 491; *Wheaton v. Neville*, 19 Cal. 46; *Covanhoven v. Hart*, 21 Pa. St. 495.

There was no error in refusing to grant the motion for a new trial on the ground of newly-discovered evidence. No reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced at the trial. To entitle one to relief in such a case, strict proof of diligence is required, "and a general averment of diligence is not sufficient. He should state particularly what acts he performed, in order that the court may decide whether proper diligence was used." *Butler v. Vassault*, 40 Cal. 76. Besides, nearly every material fact disclosed by the affidavits is contradicted by counter-affidavits.

We discover no error in the record, and the judgment and order should be affirmed.

WE CONCUR: FOOTE, C.; SEARLS, C.

THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 650)

**SANTA CRUZ GAP TURNPIKE JOINT-STOCK CO. v. BOARD OF SUP'RS OF
SANTA CLARA. (No. 9,235.)**

Filed April 2, 1886.

TOLL-ROAD—MANDAMUS—DEMURRER TO PETITION.

Where an application is made to a superior court for a writ of mandate to compel the board of supervisors of a county to locate toll-gates and to fix rates of toll on a certain road which it is claimed in the petition the corporation petitioner had a right to collect tolls upon, the superior court is in error if it sustains a demurrer to such petition on the ground that it does not appear therefrom that the petitioner had or owned any road, or right of way for a road, as such a petition states, sufficient to entitle the petitioner to relief

Department 2. Application for a writ of mandate.

S. O. Houghton, for appellant.

J. H. Campbell and *S. F. Leib*, for respondent.

By THE COURT. This was an application to the superior court of the county of Santa Clara for a writ of mandate to compel the board of supervisors of that county to locate toll-gates and to fix rates of toll on a certain road which it was claimed the corporation petitioner had a right to collect tolls upon. An order was made requiring the respondent to show cause why the writ should not issue. The respondent moved to quash the petition upon the ground that it did not appear that the petitioner had or owned any road or right of way for a road. The court treated the motion as a demurrer and sustained it, and the petitioner declining to amend, judgment was entered denying the application. We think the court erred in its ruling. Looking at the whole petition we think it states all the facts necessary to entitle the petitioner to the relief demanded. The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

(69 Cal. 186)

**SWAIN and others v. GRANGERS' UNION OF SAN JOAQUIN VALLEY.
(No. 8,174.)**

Filed March 29, 1886.

CONTRACT—WRITTEN AGREEMENT TO PAY INDEBTEDNESS—PAROL EVIDENCE TO VARY.

Under a written contract providing for the payment of all the present and future indebtedness of another, parol evidence is inadmissible to show that a certain existing debt was not intended to be included; and the meaning of the words "all indebtedness, present and future," is not a question for the jury, but is a matter of law for the court.

In bank. Appeal from superior court, county of Stanislaus.

Terry, McKinne & Terry and *Johnson & Hazen*, for appellant.

W. E. Turner, for respondents.

THORNTON, J. The court erred in allowing the following question put to Swain, one of the plaintiffs, when called as a witness: "At the time this contract was executed, what indebtedness was referred to

by the parties when they speak of all indebtedness, present and future?" It also erred in admitting the answer of Swain.

The written contract stated the *indebtedness* referred to as "present and future." It could not be stated more plainly. Why, then, allow the question? The question permitted the witness to state what indebtedness was referred to. The writing fixed the indebtedness signified. To allow the witness to say that this indebtedness, existing or future, was referred to, and that was not, would be to allow him to alter the express terms of the contract. This clearly appears from the answer of the witness, for he testified that an indebtedness plainly existing when the contract was executed, was not referred to. We cannot conceive of a more plain infraction of the rule that the terms of a written agreement shall not be altered by parol testimony.

The following testimony of the secretary of defendant should also have been excluded:

"When we first entered into negotiations with the plaintiffs, and we signed Exhibit A, it was not understood that, before we would turn over this store and stock in trade to them as their own, they should pay us this \$6,000 note. There was no such understanding. The understanding was that, when they paid this \$2,600, which we had assumed, and pay for what amount of goods we had furnished up to that time, then we were to turn over everything to them. That was the understanding up to the time this contract [Exhibit A] was signed."

The court also erred in directing the jury that the written contract was so far ambiguous and uncertain that they must find from the testimony what indebtedness was meant by the words "all indebtedness, present and future." We see nothing ambiguous or uncertain in the words above mentioned. Their meaning was a question of law for the court, and not a question of fact to be determined by the jury. The direction left to the jury a question of law, which was plain and manifest error.

Witnesses may be allowed to testify what indebtedness, as a fact, existed when the written contract was made, and what, as a matter of fact, accrued after that date. But the meaning of the words employed in the contract and selected by the parties to express their intention was a question of law for the court only. The oral evidence thus indicated as admissible, is let in to show *the subject-matter of the written agreement*, and for this purpose is proper. 1 Greenl. Ev. §§ 287, 288.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; SHARPSTEIN, J.; MCKEE, J.; MORRISON, C. J.

MCKINSTRY, J. I concur. If the broadest view be adopted with respect to the admissibility of evidence of the circumstances surrounding the parties, or contemplated by them when a contract is entered into, the witness ought not to have been permitted to state what, in his judgment, was the result of the circumstances; or that, in his opin-

ion, they limited or changed the language of the written contract. Nor was this evidence of a usage or custom; or that language, unambiguous in itself, was, in the presence of such usage or custom, used in a peculiar sense, or bore a signification differing from that which it would ordinarily import.

69 Cal. 195

SKINNER v. HALL and others. (No. 8,456.)

Filed March 30, 1886.

HOMESTEAD—DECLARATION—RESIDENCE.

A declaration of homestead may legally be made upon property on which the declarant's actual residence has been for one day only, or on property which is partially rented out or used for purposes other than a residence. Evidence in this case reviewed, and *held*, that plaintiff was an actual resident on his property at the time of filing his declaration, so as to constitute the homestead valid.¹

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

William B. Hardy and *James R. Lowe*, for appellants.

J. C. Black, for respondent.

BELCHER, C. C. This action was commenced to restrain the sale of a lot of land in the city of San Jose under executions issued upon judgments against the plaintiff. The plaintiff claimed that when the executions were levied, the lot was his homestead, and therefore not subject to forced sale. The defendants denied that it was a homestead, and whether it was or not is the only question presented for decision.

The court found that on the fifteenth day of October, 1879, the plaintiff resided with his family, consisting of his wife and one child, in a dwelling-house on the lot, and on that day made and caused to be recorded a declaration, in proper form, claiming it as a homestead. On the sixth of December following, his house was partially burned, and more than half of his furniture was destroyed. Immediately after the fire, he went with his wife and child, to the house of his mother, on the adjoining lot, where it was agreed that he should pay for his board, and his wife should assist in the housework as a compensation for her board and that of the child. He proceeded to repair his house, and the repairs were completed in the month of May, 1880. After making the repairs he had not the means to refurnish the house; and that he might raise money to purchase the necessary furniture, he rented the house and lot by the month, for the monthly rental of \$15. The tenant entered into possession, and continued to occupy the premises until May, 1881. When he filed his declara-

¹To constitute a valid homestead under the California law existing in 1869, as well as under the present existing law, claimant must actually reside on the premises at the time of filing the declaration. *Pfister v. Dasey*, (Cal.) 10 Pac. Rep. 117.

tion of homestead in October, 1879, he owned the undivided half of the lot and of the adjoining lot where his mother lived, and she owned the other undivided half of the two lots. Between the month of May, 1880, and the twenty-fourth of January, 1881, he exchanged conveyances with his mother, and thereby acquired the title to the whole of the lot on which his house stood. On the last-named day he made an arrangement with his tenant, by which he gave up a part of the rent, and was permitted to occupy the front room of the house; and on the night of that day he took to the room some bedding and slept there. He continued to sleep in the room until May, when the tenant gave up the house, and his wife and child joined him, and occupied the same room with him after the fifteenth of February. On the twenty-fifth of January, 1881, he and his wife executed an abandonment of their homestead on the lot, and thereafter, on the same day, he executed a new declaration of homestead thereon. Both papers were then filed for record in the recorder's office,—the abandonment at 10 minutes, and the new declaration at 15 minutes, after 10 o'clock A. M. The abandonment was not made with any intention on the part of the plaintiff or his wife of abandoning the premises as their home and residence, but for the purpose of facilitating, as he believed, the division of the property held in common by him and his mother, and with the intent to immediately refile another declaration of homestead thereon. The lot had a frontage of 62 feet and a depth of 137½ feet. A board fence extended back from the front through the middle of the lot, a distance of 95 feet, and all back of that was inclosed in a poultry yard. The dwelling-house and out-buildings were on the north 31 feet front, and no improvements, except the fence surrounding it and the cross-fence of the poultry-yard, were on the south half of the lot. The value of the premises did not exceed the sum of \$3,000.

Upon these facts the defendants contended that there was no homestead, because the old homestead was abandoned, and the plaintiff was not residing on the premises when he filed his new declaration of homestead. The court, however, thought otherwise, and rendered judgment for the plaintiff. The appeal is from the judgment, and rests upon the judgment roll.

A homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as provided in the Civil Code. Section 1237, Civil Code. The declaration of homestead must contain, among other things, a statement that the person making it is residing on the premises, and claims them as a homestead. Section 1263, Civil Code. To constitute a valid homestead the claimant must *actually* reside on the premises when his declaration is filed. *Aucker v. McCoy*, 56 Cal. 524.

Was the plaintiff actually residing on the premises in question when his declaration was filed? After carefully considering the findings we are unable to say that he was not. Conceding, as claimed for the

appellants, that he went back to the house for the purpose of qualifying himself to file a new declaration, still it does not follow that his residence was not *actual*. He had taken up his abode in the house, and had slept there one night. His wife and child did not go with him, but it was not absolutely necessary that they should. One may have an actual residence in a house, though his family be away, and he take his meals elsewhere. Nor is the fact that he had slept there but one night, decisive of the question. After making an actual residence upon property, one may file a homestead upon it at the end of a day, as well as at the end of a month or a year. So one may file and maintain a homestead upon property which is partially rented out, or used for other purposes than his residence. *Ackley v. Chamberlain*, 16 Cal. 181; *Phelps v. Rooney*, 9 Wis. 70.

It is also claimed for the appellants that the south half of the lot, back as far as the poultry-yard fence, was not impressed with the character of homestead, and, to that extent at least, the court erred in its conclusions. As has been seen, the whole lot was but 62 feet wide, and was all inclosed. It was divided by a fence running back to the poultry yard, and the house and out-buildings were upon the northern half. Still the court thought it all constituted the homestead and was exempt from forced sale, and we cannot say its conclusions were not justified by the facts.

On the whole, we think the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

69 Cal. 207

SAYRE v. CITIZENS' GAS-LIGHT & HEAT Co. and others. (No. 8,785.)

Filed March 30, 1886.

JUDGMENT AFFIRMED.

In bank. Appeal from superior court, city and county of San Francisco.

George Cadwalader and G. L. R. Hayes, for appellant.

McAllister & Bergin, for respondent.

MYRICK, J. An opinion was filed by the court, in department, June 23, 1885. 7 Pac. Rep. 437. After hearing by the court in bank, we are satisfied of the correctness of the views expressed in that opinion. As to other points presented, but not referred to in the opinion, we will say we see no error. The court was correct in the views that the act of March 26, 1866, authorized an assessment on full-paid stock. The contract between Morris, the assignor of the plaintiff, and the Citizens' Gas-light & Heat Company did not call for unas-

sessable stock, even if it should be conceded that under the laws of this state a corporation is authorized to issue stock upon which no assessment can be levied.

The judgment and order are affirmed.

We concur: SHARPSTEIN, J.; MORRISON, C. J.; ROSS, J.; MCKINSTRY, J.; MCKEE, J.

69 Cal. 217

CROSS, Adm'r, v. KITTS. (No. 9,544.)

Filed March 30, 1886.

1. GRANT—GRANT OF PERCOLATING WATERS.

Percolating waters, collected or gathered in a stream running in a defined channel, are such property or incidents thereof as may be acquired by grant, express or implied, or by appropriation, and when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful acts of another.

2. SAME—GRANT OF LAND—EASEMENT PASSES BY.

An easement of receiving waters passes by a grant of land to which the easement is incident.

In bank. Appeal from superior court, county of Nevada.

H. V. Reardon, for appellant.

C. W. Kitts, for respondent.

MCKEE, J. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to quiet title to a water-right described in the complaint, and to enjoin the defendant from asserting any title to the water adverse to the plaintiff. The judgment was entered upon a decision given in writing and filed under sections 632 and 633, Code Civil Proc. On this appeal from the judgment the plaintiff in the action contends that he was entitled to judgment upon the decision, and that is the question. According to the decision, J. C. Gillespie was formerly the owner and in possession of a gravel claim known as the "Gillespie Claim," which adjoined a gravel claim known as the "Shanghai Claim," situated at the head of Gold Flat, in Nevada county. The Gillespie claim was excavated by a tunnel 200 feet long, known as the "McCormick Tunnel;" the ground at the entrance of which had caved, so that "no water, perceptible upon the surface, issued out of it;" and Gillespie, at or near to its entrance, made an open cut, from the front, bottom, and sides of which water percolated and collected "in such quantity as to form a running and defined stream of about two inches, miners' measure." This water came from near the inner end of the tunnel on or near the dividing line between the Gillespie and the Shanghai claims, and "where the bed rock pitched down into a low channel or basin." That was the condition of the Gillespie claim in the year 1864, when Gillespie, being in possession as owner, sold, and by deed transferred, to one A. D. Rich the right to the

water issuing from the tunnel in the claim, by the following description:

"That certain spring of water now issuing from the head of an open cut run by said Gillespie in the diggings of said Gillespie,—said diggings being at the head of Gold Flat, in Nevada township, Nevada county, state of California, and adjoining the Shanghai diggings on the west, and all waters now issuing or to issue from said spring, with the right and privilege to run another and deeper cut, or a tunnel, or cut and tunnel, to said spring, over and through the said diggings of Gillespie, and a right of way and easement to construct said cut or tunnel, and divert, manage, and control said waters, and make repairs, lay pipes and boxes, and convey and direct said water. The point from which said cut or tunnel is to be run to be the point on said Gillespie's diggings where the north-west corner of the said Shanghai diggings touches the diggings of said Gillespie."

When A. D. Rich acquired the water-right described in his deed, he and J. C. Rich were tenants in common of the Shanghai claim, adjoining the Gillespie claim, and of a parcel of property near to the two claims known as the "Half-mile House." There were two springs of water upon the Shanghai claim, and the proprietors of the Half-mile House brought the water from those springs, and from the spring issuing from the head of the open cut at the entrance of the tunnel in the Gillespie claim, by means of ditches, boxes, and pipes, down to their property for domestic use and irrigation; and in that manner they continued to use and enjoy the water from those sources until the year 1872, when they sold and conveyed the Half-mile House property to one G. M. Smith. The finding of the court is: "That said Half-mile House was by J. C. and D. A. Rich sold to G. W. Smith in 1872, and in the deed conveying the same several water-rights were described, and among them the following: 'Also that certain other water-right, situate in said township and county, consisting of a spring, and the waters arising therefrom, situate and being upon the Shanghai mining claim, formerly owned by Prior and Madison, on Gold Flat, in the ranch of Gillespie, together with all flumes and ditches used to divert and convey the waters of said spring to the lot and premises herein first conveyed.' And all the water-rights mentioned in the respective deeds from Rich & Rich to Smith * * * were likewise used at and appurtenant to said Half-mile House property at the time of the conveyance thereof to Smith."

As administrator of the estate of T. W. Sigourney, deceased, the plaintiff in the action derives title to the Half-mile House property, by mesne conveyances from Smith and A. D. and J. C. Rich. Sigourney died in 1880 seized and possessed of the property. From the year 1873, the date of his acquisition of title, until the time of his death, he occupied the property, and used and enjoyed the water appurtenant to it, to the same extent that his grantors, immediate and remote, had used and enjoyed it, except that some changes were made in the use, necessitated by the working of the gravel claims in which the springs were located; but the right of Sigourney to the water from

the McCormick tunnel in the Gillespie gravel claim was never questioned in his life-time. In fact, it was always admitted by the owners and workers of the claim. But in the year 1881, Kitts, defendants in the action, acquired the title of the Gillespie gravel claim, and, in working the claim by the hydraulic process, they mined away a portion of the McCormick tunnel, and stopped the waters from flowing into and through the Sigourney flume to the Half-mile House property, claiming that the water in the tunnel was their property.

The court decided in favor of defendants, holding, as matter of law, "that neither the plaintiff nor the plaintiff's intestate ever had or now has any estate, right, title, or interest whatever in the said * * * mining claim, and the said plaintiff does not now have, and did not have at the time of the commencement of this action, any right, title, or interest whatever in any water or water-right therein or thereon, or the right to take water flowing therefrom; and that said defendants * * * are the sole owners of all waters flowing from said mining claim and are entitled to the use and possession thereof; that they have the right to mine and work their said claims, and to divert, appropriate, and use all water that may be found therein that may flow therefrom."

The conclusion that the plaintiff had no right in or to receive the water flowing from the McCormick tunnel is not well drawn from the findings. The right in, and the right of receiving, the water (section 801, Civil Code) passed by the deed of Gillespie in 1864 to A. D. Rich, and all the actual title to the Half-mile House property passed from A. D. and J. C. Rich and their grantees by the mesne conveyances under which Sigourney derived the title. The right to the water from the McCormick tunnel, therefore, passed as an incident to the Half-mile House property. Section 1084, Civil Code; *Sparks v. Hess*, 15 Cal. 186; *Cave v. Crafts*, 53 Cal. 135. A transfer of real property, says the Code, passes all easements attached thereto, and creates, in favor thereof, an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. Section 1104, Civil Code. But the decision that the defendants, as owners of the Gillespie gravel claim, had the superior right to the water, seems to have for its basis the fact found by the court "that all the water that ever flowed through the McCormick tunnel was percolating water gathered from the ground through which said tunnel was run;" but the court also found as a fact that the water "percolated and collected in such quantity as to form a running and defined stream of about two inches, miners' measure."

There is no doubt that percolating water existing in the earth is not governed by the same laws that pertain to running streams. Water percolating in the soil belongs to the owner of the freehold.

"Each owner," says the supreme court of Connecticut, "has an equal and complete right to the use of his land, and to the water which is in it. Water combined with the earth, or passing through it, by percolation or filtration, or chemical attraction, has no distinctive character of ownership from the earth itself, any more than the metallic oxides of which the earth is composed. Water, whether moving or motionless *in the earth*, is not, in the eye of the law, distinct from the earth." *Roath v. Driscoll*, 20 Conn. 540. See, also, *Hanson v. McCue*, 42 Cal. 303; *Ballard v. Tomlinson*, 24 Amer. Law Reg. 636. But where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land. They are such property, or incidents to property, as may be acquired by grant, express or implied, or by appropriation, and when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful acts of another. In *Brown v. Ashley*, 16 Nev. 317, it was held that rights in water coming from a spring by percolation are acquirable by prior appropriation, and the appropriator cannot be divested of them by a subsequent owner of the soil, and *a fortiori* will that be the case where such rights are derived from the owner of the soil by express grant.

The plaintiff was entitled to judgment upon the findings. Judgment and order reversed, and cause remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J

69 Cal. 244

In re BOWMAN. (No. 11,396

Filed March 31, 1886.

INSOLVENCY—HOMESTEAD—RESIDENCE.

In order that an insolvent may have property set apart to him as his homestead, it is not necessary that it should have constituted his residence at any time. California insolvent act of 1880.¹

Department 1. Appeal from superior court, county of Alameda.

William Thomas and Henry P. Bowie, for appellant.

E. W. McGraw, for respondent.

Ross, J. Bowman was adjudged an insolvent under the insolvent act of 1880. No homestead had been selected by him under the homestead laws of the state prior to the adjudication. A lot of land upon which he never resided was set apart to him as a homestead by the insolvency court by virtue of the provisions of section 60 of the act of 1880, which declares:

"It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and

¹See note at end of case.

personal property as is by law exempt from execution, and also a homestead, in the manner provided by section 1465 of the Code of Civil Procedure."

The appellant contends that the court below erred in so doing, because the premises set apart to the insolvent never constituted his residence. The statute regulating this matter does not require that they should ever have constituted the residence. The finding of the court is that the property set apart is suitable and proper for a homestead, and that was a sufficient basis for the order setting it apart. As has been seen, the statute makes it the duty of the court to exempt and set apart for the use and benefit of the insolvent such real and personal property as is by law exempt from execution, and also a homestead, in the manner provided in section 1465 of the Code of Civil Procedure. That section is one of the sections relating to the estates of deceased persons, and reads as follows:

"Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children, of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded, provided such homestead was selected from the common property, or from the separate property, of the person selecting, or joining in the selection, of the same. If more has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead, in the manner provided in article 11 of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent."

The statute does not attach the condition that the decedent must have resided upon the premises before a given piece of property can be set apart for the use of the survivor, or, in case of his death, to the minor children of the decedent; but, in express terms, provides that if no homestead has been selected, designated, or recorded, (under the general homestead laws,) or in case the homestead so designated was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead, etc. Such a homestead, as was held in *Re Estate of Busse*, 35 Cal. 310, may be carved out of any property left by the decedent which is capable of being made a homestead.

Judgment affirmed.

We concur: McKINSTRY, J.; ROSS, J.

NOTE.

Respecting actual residence on property being required in California, when declaration of homestead is filed, see *Skinner v. Hall*, (Cal.) *ante*, 406, and note.

A city lot, bought by a man in contemplation of marriage, and for a homestead, and inclosed and improved after marriage, with the intention of building on it as soon as means permit, is exempt, even before any dwelling-house is built on it. *Reske v. Reske*, (Mich.) 16 N. W. Rep. 895.

69 Cal. 251

THORN and others v. FINN. (No. 11,505.)

Filed April 1, 1886.

NEW TRIAL—NOTICE OF INTENTION TO MOVE FOR—WAIVER OF NOTICE OF DECISION.

A party may give notice of his intention to move for a new trial without waiting for the service of the notice of decision upon him, and by so doing service of the notice of decision was waived.

Department 2. Application for *mandamus*.

W. H. Tompkins, for petitioner.

A. N. Drown, for respondent.

THORNTON, J. In *Savings & Loan Society v. Thorne et al.*, after the decision of the court was duly rendered in favor of plaintiff, and an order for judgment in favor of plaintiff entered on the minutes of the court, which was done on the thirty-first day of March, 1882, the defendants on the third of April, 1882, served and filed their notice of intention to move for a new trial. Subsequently a statement on said motion was prepared by defendants and served on plaintiff, to which plaintiff proposed amendments. These amendments were served on defendants. In the month of June, 1883, the plaintiff and defendants, by their respective attorneys, agreed to the statement. The statement they agreed on was afterwards, on the eighteenth of February, 1885, presented to the Hon. J. M. Allen, the judge of the superior court before whom the cause was tried, and by him was certified and allowed as correct. On a subsequent day the motion was regularly called for hearing in said court, and was on the sixth day of March, 1885, denied on the ground of "laches, failure, and lack of diligence in the prosecution thereof."

The findings in the cause above entitled were filed on the twentieth of October, 1882. No notice of this decision was ever served on defendants. Subsequently to the denial of the above motion, the defendants served and filed another notice of motion to move for a new trial, proposed a statement on said motion, and served the same on plaintiff's attorneys. To this statement plaintiff proposed amendments, at the same time reserving objections to this statement, and to the notice of intention to move for a new trial, just above mentioned. These objections were as follows:

"(1) That there is no motion for a new trial pending herein,—the record herein showing that defendants gave notice of motion for a new trial on the third day of April, 1882, and thereafter proposed, and caused to be settled and filed herein, their statement on said motion for a new trial; and that thereafter, on the sixth day of March, 1885, the said motion of April 3, 1882, for a new trial was regularly denied by this court, and that the alleged motion for a new trial, made upon the sixteenth day of March, 1885, and upon which the present proposed statement of the defendants rests and is founded, was and is wholly void and ineffectual and inoperative.

"(2) That the said alleged motion for a new trial, of which notice was given and filed March 16, 1885, was made and notice thereof given and filed

too late; being about two and a half years subsequent to the decision herein rendered.

"(3) That the so-called proposed statement of the defendants was not served or proposed in time; being two years and a half or thereabouts, subsequent to the decision herein, and being nearly three years subsequent to the making, serving, and filing of said defendants' first notice of motion for new trial herein.

"(4) That defendants have been guilty of gross laches and want of diligence in their failure to serve and file, for so long a period, the notice of motion for new trial, which was served and filed by them herein on March 16, 1885, and in delaying and neglecting for so long a time to propose the so-called statement on motion for a new trial heretofore, as aforesaid, served on April 4, 1885; and that by reason of such laches and negligence, defendants have forfeited and waived any right ever to prosecute the said motion of March 16, 1885, or to have settled the said proposed statement served on April 4, 1885.

"And hereby expressly reserving and claiming the benefit of the said exceptions and objections to the said motion for a new trial and to the said 'proposed statement' served and proposed on April 4, 1885, plaintiff furthermore comes and objects to the said proposed statement as a statement of the said case, and hereby proposes the following changes and amendments," etc.

Afterwards this statement, with the proposed amendments, were presented to Judge ALLEN for settlement, who refused to settle it on the grounds stated in plaintiff's objections. The statement and amendments were then presented to the Hon. J. F. FINN, the successor to Judge ALLEN, for settlement. Respondent also refused to settle the statement. This application is for the mandate of this court to Judge FINN, commanding him to settle the proposed statement.

We see no grounds for it. The motion for new trial was regularly heard and denied. The defendants contend that their first motion of intention having been served and filed before a notice of the decision was served on them, that it was a nullity, and that all proceedings under it were null. But a party may waive notice of the decision, and, by giving notice of intention to move for a new trial, he does waive it. This was substantially held in *Cottle v. Leitch*, 43 Cal. 322, and we think held correctly. Here the defendants not only gave notice of intention, but took all other steps preparatory to bringing that motion to a hearing down to a settlement of their statement in February, 1885, nearly three years after their first notice of intention was given. We do not think in this state of circumstances that the contention of defendants, that their notice first given was null, should be regarded with any consideration. If their conduct is not a waiver of notice of the decision of the cause, it would be difficult to say what conduct would amount to a waiver.

It is the judgment of the court that the application should be denied, and the proceedings dismissed. So ordered.

We concur: MCKEE, J.; SHARPSTEIN, J.

68 Cal. 245

ACKER v. SUPERIOR COURT. (No. 11,188.)

Filed April 1, 1886.

APPEAL FROM JUSTICE'S COURT—TRIAL IN SUPERIOR COURT.

A superior court has no jurisdiction, on an appeal from the justice's court on questions of law and fact, to order the case back to the justice's court for trial, but should, under section 976 of the California Code of Civil Procedure, proceed with the trial.

Department 1. Writ of review.*Royce & Cummins*, for petitioner.*Carl F. Graef*, for respondent.

BY THE COURT. Writ of review. On the application for the writ this court held that, on appeal to the superior court on questions of law and fact, the superior court has no jurisdiction to order the case back to the justice's court for trial, but should, under section 976, Code of Civil Procedure, proceed with the trial in the appellate court. The return of the writ is now before us, from which it appears that the appeal was taken as above indicated. For the reasons given in the opinion filed by this court in this case (9 Pac. Rep. 109) the order of the superior court remanding the cause to the justice's court for trial is annulled.

SUPREME COURT OF CALIFORNIA.

69 Cal. 188

THRIFT v. DELANEY. (No. 8,843.)

Filed March 30, 1886.

1. ACTION—RECOVERY OF REAL PROPERTY—SECOND ACTION INVOLVING SAME ISSUES—BAR OF JUDGMENT.

A judgment rendered in an action to recover real property, under the California system of pleading, is, as to all the matters put in issue and passed on in the action, conclusive between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters, occurring after its rendition, which give the defeated party a title or right of possession.

2. SAME—PRE-EMPTOR AFTER ENTRY FOR HOMESTEAD—ACTION BEFORE PRE-EMPTION—ESTOPPEL.

When a settler, without complying with the necessary conditions precedent to his right of obtaining a homestead patent, surrenders his claim in so far, and elects to, and by permission does, pay for the land as a pre-emptor, the patent that follows the new and original entry gives him a new title, and he cannot be barred or estopped from asserting such new title by any judgment in ejectment rendered before he obtained it.

Department 2. Appeal from superior court, Sonoma county.

Rutledge & McConnell and *A. W. Thompson*, for appellant.

George Pearce, for respondent.

BELCHER, C. C. On the twentieth day of January, 1879, the land in controversy was public land of the United States, and open to pre-emption or homestead entry. On that day the plaintiff, Sabin D. Thrift, made a homestead entry upon it by filing with the register and receiver of the proper United States land-office the requisite application and affidavit, and paying them the fee and commission required by law in such cases. On the fifteenth day of April, 1879, the defendant in this action commenced an action against Thrift to recover from him the possession of the land covered by his homestead entry. In the complaint it was alleged that the plaintiff was the owner and seized in fee of the premises, and that the defendant (plaintiff here) had entered and ousted him therefrom. The defendant appeared, and for answer to the complaint denied that the plaintiff was the owner or seized in fee of the premises, or entitled to the possession thereof. The case was brought to trial on the second day of June following. Upon the trial the plaintiff offered no evidence of a paper title, but relied solely on evidence of prior actual possession and inclosure of the land. The defendant contested his right to recover on that ground, but did not offer the receipt given him by the register and receiver, or any evidence of his homestead entry. The court found and adjudged that the plaintiff in the action was the owner of the premises sued for, and entitled to the possession thereof. On this judgment a writ of restitution was issued on the twenty-third

day of the same month, and under it the defendant was removed from the possession, and the plaintiff was placed in the possession, of the land. The judgment so rendered has never been reversed, modified, or set aside, but remains in full force and effect. Afterwards, on the fifth day of November, 1881, Thrift elected to commute his homestead entry to a cash entry, and to that end he surrendered his homestead entry receipt, paid for the land at the rate of a dollar and a quarter per acre, and received from the receiver of the land-office a receipt showing full cash payment. Upon this cash entry the United States issued to him a patent for the land on the fifteenth day of March, 1882. This action was commenced in November, 1882, to recover back the possession of the land. The defendant answered to the complaint, and, among other things, pleaded in bar of the action his former judgment.

The above is the substance of the facts found by the court, and upon the findings judgment was rendered in favor of the plaintiff, Thrift. The appeal is from the judgment and an order denying a new trial.

The principal question presented for decision relates to the plea in bar. It is not pretended that the appellant has any title or right to the land sued for, unless he can claim it under and by reason of his former judgment in ejectment. It is, however, insisted by him that when the former judgment was rendered the respondent had perfected his homestead entry, and was in such relation to the source of title that he might have defended successfully against the action, and, having failed or neglected to do so, the judgment is conclusive upon all rights he then had, or has since acquired, to the property involved in it.

There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar, in another action between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition which give the defeated party a title or right of possession. *Caperton v. Schmidt*, 26 Cal. 479; *Mahoney v. Van Winkle*, 33 Cal. 448.

Thus, it has been held, when judgment for the possession of a quarter section of land was rendered against one, after he had proved up and paid for the land under the pre-emption laws of the United States, and subsequent to the rendition of the judgment had received a patent for it, that the judgment was conclusive, and barred his rights in any subsequent action. *Byers v. Neal*, 43 Cal. 210. This ruling was made upon the ground that the pre-emptor, when he

proved up and paid for his land, acquired a title to it which he could sell or mortgage, or which could be sold out on process against him, and the patent afterwards received was not a new title, but merely a formal assurance of an estate which he had already acquired. It has also been held, where a pre-emptor had only settled upon and filed his declaration of intention to pre-empt a piece of public land, and then, in an action commenced against him for its possession, had been defeated and put out of it, but afterwards had gone upon another portion of the land, and again filed his declaration of intention to pre-empt the whole tract, and had then proved up and paid for the land, and obtained a patent for it, that the former judgment was not a bar or estoppel in any new action. *Montgomery v. Whiting*, 40 Cal. 294. And this ruling was made upon the ground that until the pre-emptor proved up and paid for the land he had no title to it, either inchoate or otherwise, and the judgment was not a bar to any title acquired by him after its rendition.

In this case it appears that when the judgment in *Delaney v. Thrift* was rendered Thrift had merely filed the necessary papers to enable him to take the land as a homestead; but this gave him no title to it. As said by the supreme court of the United States, quoting from an opinion of Atty. Gen. Speed:

"It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. * * * The land continues subject to the absolute disposing power of congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money." *Frisbie v. Whitney*, 9 Wall. 195.

Under the homestead laws of the United States every person who is the head of a family, or who has arrived at the age of 21 years, and is a citizen of the United States, or has filed his declaration of intention to become such, may make a homestead entry upon not exceeding one quarter section of unappropriated public land. To do this, he must file in the proper land-office an application for the land, and an affidavit showing his right to make the entry, and "that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person." Upon this entry no certificate or patent for the land can be issued to him until the expiration of five years from the date of the entry, and then only upon satisfactory proof that he has resided upon or cultivated the same for the term of five years immediately succeeding the time of filing his affidavit. If during the five years he changes his residence or abandons the land for more than six months at any time, then, and in that event, the land reverts to the government. He may, however, if he elects to do so, pay the minimum price for the land at any time before the expiration of the five years, and then obtain a patent therefor from the government, on

making proof of settlement and cultivation as provided by law granting pre-emption rights. Rev. St. U. S. § 2289 *et seq.*

It must be apparent from this statement of the law that the government offers to give to the qualified claimant a homestead upon condition that he reside upon or cultivate the land for five years, just as it offers to give to the qualified pre-emptor a right to purchase, upon certain conditions, at the minimum price. But no estate vests in the pre-emptor until he has performed the conditions, and has proved up and paid for the land. *Hutton v. Frisbie*, 37 Cal. 475; *Low v. Hutchings*, 41 Cal. 634; *Frisbie v. Whitney*, 9 Wall. 187. The same rule, it seems to us, must apply to the homestead claimant, and no estate in the land will vest in him until he has complied with the prescribed conditions. The bare entry of a homestead can no more confer a right to or estate in the land, or a right to its possession, as against the government, than can the filing by the pre-emptor of his declaration of intention to pre-empt. Here, without complying with the conditions which were precedent to his right to obtain a homestead patent, Thrift elected and was permitted to surrender his homestead claim, and to pay for the land as a pre-emptor. When he did this according to the instructions of the commissioner of the general land-office he made "a new and original entry," and was entitled to a "pre-emption certificate and receipt as in ordinary pre-emption cases." Zab. Land Laws U. S. 149. The patent which followed that new and original entry gave to him a new title, and it seems clear that he cannot be barred or estopped from asserting that title by any judgment in ejectment rendered before he obtained it.

We are cited by counsel for appellant to *Shinn v. Young*, 57 Cal. 525; but that case is not in conflict with what has been said. There the land had been listed to the state and sold to Young. Young commenced an action against Shinn to recover its possession, and rested his right to recover on his certificate of purchase. Shinn defended the action upon the ground that the premises were a part of his homestead claim, taken up under the act of congress. Judgment was rendered in favor of the plaintiff and affirmed in this court. 48 Cal. 26. When *Shinn v. Young* was before this court it was held that the judgment in the ejectment action between the parties determined the validity of the certificate of purchase issued to Young, and the invalidity of the subsequent application by Shinn, under the United States homestead law; that the validity of the state certificate of purchase necessarily involved the validity of the state selection, including the listing of the land over to the state; that all of these proceedings having been put in issue and determined in the action of ejectment, the judgment was conclusive and binding upon the parties; and that as it was thus determined as between the parties that the United States had transferred the land in question to the state, it had no title left to transfer to Shinn by patent or otherwise.

The other points made by the appellant do not require special notice.

We see no error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C., and FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 199

CHENEY and others v. O'BRIEN. (No. 8,655.)

Filed March 30, 1886.

1. RIGHT OF WAY—WAY OF NECESSITY—INTERVENING LAND—TITLE IN STRANGER—PROOF OF TITLE—PAROL EVIDENCE.

In order to establish a right to what is known as a "way of necessity," over defendant's land, it being required of plaintiff to prove that the land intervening between his land and the county road belonged to a stranger, such proof could be made by parol.

2. PLEADING—AMENDMENT—DISCRETION OF COURT.

Applications to amend pleadings are addressed to the sound discretion of the court, and unless it clearly appears that the rights of the party objecting have been prejudiced by the amendment, he will not be heard to complain.

Department 2. Appeal from superior court, Sonoma county.

George Pearce, for appellant.

William D. Bliss, for respondents.

BELCHER, C. C. After carefully going over all the evidence presented in the transcript, we are unable to see that it does not justify the findings of the court. Upon some points there is a slight conflict, but that was a matter for the court below to consider and determine. The way over the defendant's land which he was alleged to have obstructed was a "way of necessity," and, besides, had been used by the plaintiffs long enough to give them a right to it by prescription. The fact that when the ground was soft the plaintiffs had sometimes turned out at one point, and made as many as seven different tracks there, did not affect their rights to the way; nor was it material whether the road to which the way led was a county road, as testified to by one of the plaintiffs, or a mere by-road, as testified by defendant. It appeared, without contradiction, to be a road which the plaintiffs and others had used for a good many years, and that was all that was necessary for the purposes of the case.

In the progress of the trial four objections and exceptions to the admission of evidence were taken by the defendant, and the rulings are assigned as errors.

The first two relate to the road above referred to. A witness for plaintiffs, in giving his testimony, at one time called the road a "highway," and at another time a "county road." The defendant objected

that the testimony was secondary and incompetent, and moved to strike out the answers. We do not think the plaintiffs were called upon to show that the road had been formally laid out or dedicated so as to make it a public highway. It was beyond the defendant's land, and no question was raised as to the right of the plaintiffs to pass over it. Whether it was correctly designated by the witness or not was therefore altogether immaterial.

The next two objections were to questions in reference to the ownership of the land lying east of the plaintiff's land, and between that and the county road. A witness for the plaintiffs testified that prior to 1861 a Mr. Wardlow owned the land referred to, and a Mr. Car-riger was in possession of it as his agent, and again that Mr. Wardlow claimed to be the owner of it. Counsel for defendant objected to the evidence upon the ground that it was secondary and incompetent, and then moved the court that it be stricken out. To establish their right to what is known as a "way of necessity" over defendant's land, the plaintiffs were required to show, among other things, that they had no other access to the county road. To this end they were attempting to show that when they received their deed the land lying between this land and the county road was the land of a stranger. This could be shown by parol, and it was not necessary, in the first instance, to introduce record evidence of the stranger's title. Code Civil Proc. § 1963, subs. 11, 12.

After the trial had commenced the plaintiffs asked leave to amend their complaint by striking out certain words from it. The defendant objected, but the court overruled the objection and allowed the amendment to be made. The defendant reserved an exception to the ruling, and now assigns it as error. Applications to amend pleadings are addressed to the sound discretion of the court, and unless it clearly appears that the rights of the party objecting have been prejudiced by the amendment he will not be heard to complain of it. Here, after the amendment was made, it was agreed by the parties that the answer should stand as the answer to the amended complaint, and the defendant then, without objection, went on with the trial. No injury is pointed out, and we are unable to see how any could have resulted, from the amendment.

We find no error in the record prejudicial to the appellant, and the judgment and order should be affirmed.

WE CONCUR: SEARLS, C., and FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

SUPREME COURT OF CALIFORNIA.

(69 Cal. 226)

PEOPLE v. TREADWELL. (No. 20,140.)

Filed March 30, 1886.

1. EMBEZZLEMENT—ATTORNEY AT LAW—PAYMENT OF PROMISSORY NOTE—CONCEALMENT AND APPROPRIATION.

A verdict of embezzlement would be fully warranted in a case where an attorney at law, acting as agent for the payee of a note, received the amount from the drawee, and used the same for his own purposes, concealing from his principal the fact of the payment of the note.

2. SAME—AGENT—SPECIAL SERVICE—RELATIONS AFTER TERMINATION OF SERVICE AND PAYMENT OF COMPENSATION—QUESTION FOR JURY.

When a person is employed to render special services as agent for another, his agency ceases with performance of the services and payment of the compensation therefor, (Civil Code, § 2355,) unless there is an express understanding between them, or it may be implied from the circumstances that as to matters growing out of the original purpose of the agency the relations between the parties survived; and as to this question the jury is to decide.

3. SAME—INFORMATION—AVERMENT—OWNERSHIP—PROMISSORY NOTE INDORSER.

The absolute indorsement of a promissory note does not relieve the indorser from liability upon it. He has still an interest in it to see that any agent of his authorized to collect and pay it over performs his duty; and if, after his indorsement, the indorsee gives such indorser the possession and control of the note to collect interest upon it for his benefit, or to otherwise control it, that would be sufficient to sustain an averment of an ownership in an information for embezzlement.

4. SAME—SERVICE—AGENT—SERVANT.

In the sense of service, an agent is the servant of his principal; hence designating him in an information or indictment for embezzlement as agent and servant is not such a misnomer of his capacity as affects any of his substantial rights.

5. SAME—SPECIFICATION AS TO PROPERTY EMBEZZLED.

It is not necessary to specify, in an information for embezzlement, the coin, number, or kind of money embezzled.

6. SAME—TRIAL—INSTRUCTION TO JURY—GRAVAMEN OF OFFENSE—FRAUDULENT INTENT.

Upon a trial for embezzlement,—that is, "the fraudulent appropriation of property by a person to whom it has been intrusted,"—within section 503, Pen. Code, since an essential element of the offense is a fraudulent intent, an instruction relating to what constitutes embezzlement, and another relating to the question of fraudulent intent in the offense, both in substance containing the provisions of sections 506 and 508 of the Penal Code, were proper to be given by the court to the jury for their information.

7. SAME—CREDIT OF WITNESS—WORD "FALSE" WITHOUT "WILLFULLY" CONNECTED THEREWITH.

An instruction to the jury: "A witness false in one part of his testimony is to be distrusted in other parts,"—being substantially the language of subdivision 3, § 2061, Code Civil Proc., is not erroneous because of the absence of the word "willfully" before the word "false" therein.

8. SAME—READING OF LAW BOOKS TO JURY.

The refusal of the court to stop, at the instance of the defendant, the reading of extracts from law books to the jury by the people's counsel, in the course of his argument, is not a reversible error.

In bank. Appeal from superior court, Yolo county.

Harding & Going and *F. C. Baker*, for appellant.

E. C. Marshall, Atty. Gen., and *C. B. Darwin*, for respondent.

McKEE, J. The defendant in this action was convicted of embezzlement. He appeals from the judgment and an order denying his motion for a new trial. The motion for a new trial was made upon the grounds that the verdict was against the evidence and contrary to law, and that the court, against the objections and exceptions of the defendant, erred in matters of law at the trial, and in its instructions to the jury. As laid in the information, the charge is that on the twelfth of December, 1883, the defendant was "agent and servant" of Carl Haneke, and in that capacity received for his principal, in trust for him, the sum of \$2,102.60, lawful money of the United States, which afterwards, on the fifteenth of August, 1884, in violation of his trust, he fraudulently and feloniously converted, appropriated, and embezzled.

Upon the first ground—that the verdict was against evidence and contrary to law—it is contended that there was no evidence establishing, or tending to establish, the allegation, as laid in the information, that the money charged to have been embezzled came into the hands of the defendant by virtue of his trust as the servant and agent of Haneke. But admittedly, at the time of the transactions upon which the charge was founded, the defendant was a practicing attorney at law in the town of Woodland, in Yolo county; and on the twelfth of December, 1883, he received from Isaac Quinn \$2,102.60 in payment of a promissory note and mortgage which Quinn had given to Carl Haneke as security for the payment of the purchase money due by him for a tract of land which he had beforehand purchased from Haneke; and upon receiving the money he gave Quinn a receipt for the same, worded as follows:

[illegible]

“Received of Isaac Quinn twenty-one hundred and two dollars, to be applied in payment of his note of March 26, 1881, to Carl Haneke.

"W. B. TREADWELL."

There is no question but that the money was received in payment of Quinn's note to Haneke, and if the defendant received it as the agent of Haneke, he, as an attorney at law, must have known that the law imposed upon him the duty of paying it over immediately to the person for whom he received it. But the evidence, without conflict, shows that he failed to inform Haneke of the payment of the note; that he concealed from him the fact of its payment; that he kept the money; and, as he confessed, used it for his own purposes. Upon those facts, if they were all the facts in the case, the verdict of embezzlement would be fully warranted.

But it was and is insisted that at the time the defendant received the money he was not, in fact or law, acting as the "agent and servant" of Haneke, and did not receive the money for him; but that he received it for a Mrs. Wise, to whom the note upon which the money was paid belonged, and that she authorized him to keep the money

for her. The evidence showed that Mrs. Wise was the daughter of Haneke, and it tended to show that she had advanced to her father the greater portion of the money for which the note collected by the defendant was given, and that her father, at a time when he was sick and expected to die, indorsed the note to her, so that she might receive and receipt for the moneys which were payable upon it; that she informed the defendant, as her father's agent for the collection of the note, of the indorsement, and communicated with him in that capacity. Admittedly, it was also proved that Haneke had retained and employed the defendant in the year 1880 to collect the principal and interest of a note and mortgage upon a tract of land which had been sold to Quinn, the maker of the note; that the land, at the time of the sale, was subject to a trust deed in the nature of a mortgage, to secure an indebtedness due by a former owner of the land to the Sacramento Bank; that Quinn bought and entered upon the land as purchaser, subject to the trust deed; and that while his note and mortgage were in the hands of defendant for collection, Quinn was unable to pay his own note, or the indebtedness to the bank, and the bank was about to sell the land under its trust deed unless payment of its demand was forthcoming. In that condition, Haneke, upon the advice and by the services of his attorney,—the defendant,—redeemed the land by paying the bank its demand. The bank reconveyed the land to him, and Quinn, by agreement with him, substituted for his note and mortgage a new note and mortgage trust deed, covering the principal sum of his old note and the amount of money which Haneke had paid for redemption. This substituted note was as follows:

"\$2,450. WOODLAND, YOLO Co., CAL., March 26, 1881.

"Three years after date, for value received, I promise to pay to the order of Carl Haneke, at the Bank of California, in the city and county of San Francisco, state of California, the sum of two thousand four hundred and fifty dollars in gold coin of the United States of America, with interest thereon, in like gold coin, at the rate of one per cent. per month from date until paid. Interest to be paid every three months, and if not so paid to be added to and become a part of the principal, and draw like interest; and in case said interest be not paid every three months, this note to be collectible at the option of the holder."

The new note and trust deed were delivered, and after the latter was recorded the old mortgage was released and returned to Quinn; but Haneke retained possession of the old note until Quinn paid a balance of interest due upon it, which was not carried into the new note. The redemption by Haneke and the novation by Quinn were brought about by the services of the defendant. He drafted and supervised the execution and delivery of all the papers required to clothe the transaction with the forms of law. For those services Haneke paid him on the day the transactions were closed, and that payment, it is insisted, ended the defendant's agency, or, as he expresses it in his testimony, given as a witness in his own behalf: "My employment

ceased on the day when the deed of trust was drawn, and it was so stated at the time to the parties."

No doubt, when a person is employed to render special services as agent for another, his agency ceases with performance of the services and payment of compensation therefor. Civil Code, § 2355. Between such persons there exists no longer the relation of principal and agent, unless there is an express understanding between them, or it may be implied from their subsequent acts and conduct that the person who acted in the original transactions upon the retainer and employment of the other continued to act in the same capacity in other matters arising out of the original transactions. Whether the defendant continued to act for Haneke after payment for his past services, in collecting for him the interest and principal of the new note, was therefore a question for the jury. Upon that question there was a conflict of evidence. The jury found against the defendant, and there was abundant evidence to sustain the verdict; for it was proved that both the old and the new notes of Quinn were left by Haneke in the hands of the defendant, with authority to collect the interest due upon the old, and to forward the new to the Bank of California to be deposited, where, upon payment by Quinn of the interest, or any part of the principal, as it became due, the moneys were to be forwarded on account of Haneke. Under that authority the defendant forwarded the new note, and the first installment of interest paid upon it, accompanied with a letter, as follows:

"WOODLAND, CAL., June 24, 1881.

"*Bank of California:* I herewith inclose note of Isaac Quinn, payable to order of Carl Haneke, (516 Filbert St., S. F.,) to be held by you for collection; also check for seventy-three dollars and fifty cents, payable to the order of Carl Haneke, forwarded by Mr. Quinn in payment of first installment of interest. I have notified Mr. Haneke of the forwarding of same. Please acknowledge receipt.

"Yours,

W. B. TREADWELL.

"Any communication for Mr. Quinn may be addressed to my care at Woodland, Cal."

And on the twenty-fourth of September, 1881, he collected the old note, and gave Quinn his receipt, as follows:

"\$62.18. WOODLAND, CAL., September 24, 1881.

"Received of Isaac Quinn, sixty-two dollars and eighteen cents, in full for balance due on promissory note, date of August 15, 1877, for \$2.450.

"CARL HENEKE.

"Per W. B. TREADWELL."

Thereafter, with one or two exceptions, when he requested another to act for him in his absence from Woodland, he continued to receive from Quinn, upon the new note, the interest as it became due, and also part of the principal, which he forwarded regularly to the Bank of California on account of Haneke; and this course of dealing was continued until the collection of the note in December, 1883. Admit-

tedly, at that time, the defendant was not acting as the agent or servant of Quinn. He himself testified: "I was not representing Mr. Quinn at all. I was never the agent of Mr. Quinn at any time in the world. I did not assume to be Quinn's agent in taking his money." And to the question, "How came you to take the money?" he answered: "I took it as the agent of Mrs. Wise." Whether the defendant took the money as the agent of Mrs. Wise or of Haneke was therefore squarely in issue.

To maintain the issue on his part the defendant gave in evidence a letter, of which the following is a copy:

"SAN FRANCISCO, March 27, 1883.

"*Mr. W. B. Treadwell*—DEAR SIR: During my father's recent dangerous illness he deemed it advisable to arrange business matters to his satisfaction. He therefore indorsed and assigned the promissory note of the trust deed to me, and consequently I shall sign all receipts for interest or money sent as payment on note hereafter; the trustees have been duly notified of the change. Will you have the kindness to inform Mr. Quinn of the fact, and request him, when he forwards interest again, to have the check at the bank made payable to me. Father is much better, but being over eighty years of age he does not feel able to have the cares of business thrust upon him.

"Hoping these few lines may find your family in good health, I remain,
"Yours, truly,
HARRIET A. WISE."

But in connection with that letter there was given evidence tending to prove that the note was made up of two sums, viz., \$1,650 and \$800, the first of which had been advanced by the daughter to her father to enable him to redeem the land, and the second was what Quinn owed her father on the land, on the old note, and mortgage; that with the interest of these two sums of money the daughter supported herself and father, for she was an invalid, and her father was very old and infirm; so that when he became disabled by sickness from going to the bank to get his interest as it was forwarded for him by the defendant, she undertook the business, and recognizing that the defendant was her father's attorney and agent for that purpose, she communicated with him in that capacity. The indorsement of the note, in the circumstances disclosed by her letter, did not have the effect of disturbing the legal relation between Haneke and the defendant, or of revoking any authority he had to receive and forward the money; and, in fact, he did receive and forward as usual all payments made on the note until the twelfth of December, 1883, when Quinn paid him in full the amount of principal and interest due upon the note.

As a witness in his own behalf, the defendant says in his evidence that Mrs. Wise knew that he had collected the note; that at her request he concealed the fact from her father, and agreed to keep possession of the money until such time as either of them could safely reinvest it so as to make it interest-bearing for her father's support; and that, in the mean time, he should continue to forward the interest as it would become due, so as to keep up the appearance of non-payment. But the evidence of his letters and conduct and acts dis-

proved such an arrangement. It is clearly deducible from his own testimony he knew that Mrs. Wise, notwithstanding the indorsement of the note, had given full control over it to her father after recovery from his sickness, and that she recognized the defendant as her father's attorney and agent for its collection. Admittedly, after defendant received the money, he never personally spoke to or saw Mrs. Wise. In March, 1884, she fell sick of an incurable disease, and was taken to the German Hospital in San Francisco, where she lingered until October of that year and died. He says in his testimony that he corresponded with her upon the subject of the money. Not a scrap of writing from her corroborating his statement was, however, produced. He claimed that her letters to him were lost, but neither was there found among the papers of Mrs. Wise, after her death, any letters from him.

Evidently, from his own testimony, he purposely concealed the payment of the note from Haneke and his daughter. Both were wholly ignorant of the fact, and when the first quarterly interest on the note for the year 1884 would have become due and payable if the note had not been paid, they became anxious about it, because it was not forwarded to the bank, and in their distress they got a lawyer to write about the interest to the defendant, who in reply wrote as follows:

"WOODLAND, April 7, 1884.

"A. Morgenthal, Esq.—DEAR SIR: Yours of the fifth inst. at hand. When I telegraphed to you the other day I supposed that I could see Mr. Quinn by Thursday, but I found that he was away and out of the reach of letters. I suppose he has made a mistake as to the date. I have sent the amount to-day to the Bank of California out of my own money, as I know Mr. Quinn is all right. Please present my compliments to Mrs. Wise and Mr. Haneke, and tell them I will look out for the matter myself hereafter.

"Truly yours, W. B. TREADWELL."

But the defendant did not forward the next quarterly interest which would have become due, and Haneke and his daughter caused a letter to be written to Quinn himself, threatening him to call in the principal of the note if he did not continue to pay the interest promptly; in answer to which Quinn wrote them in July, 1884, that he had paid the note in full to their attorney seven months before; and then, for the first time, the unspoken secret of the defendant was made known to Haneke and his daughter.

The evidence is overwhelming that Quinn, when he paid his moneys upon the note, acted with the defendant as the attorney and agent of Haneke for the purpose of receiving and forwarding them to Haneke. He so understood it from Haneke and the defendant himself. He knew nothing of the indorsement of the note to Mrs. Wise, for the defendant had not informed him. The defendant was therefore, when he received the money from Quinn, in fact the agent, or acting as the agent, of Haneke, and he is estopped in law from denying that he was the agent. "In reason," says Bishop, in his work

on Criminal Law, (section 397,) "whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. * * * * * When a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal asking for the thing: 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" See *Ex parte Hedley*, 31 Cal. 108. The law of the question is, as Lord MANSFIELD put it to a party to an action who attempted to deny the assumed authority under which he had done an act attended with fraud and falsehood: "No; it shall be as you represent it to be. No man shall set up his own iniquity as a defense any more than as a cause of action."

It is claimed, however, that the information does not support the conviction because "it charges that defendant was the 'agent and servant' of Haneke; that this money came into his hands 'by virtue of his trust as said servant and agent; and that the alleged conversion was not in the due and lawful execution of his trust as said agent and servant.'" The jury must have found that the money came into the hands of the defendant as agent in fact, or as the pretended agent, of Haneke, and therefore by virtue of the confidence reposed in him; and as in either position he is estopped from denying that he received the money in that capacity, the averment in the information that he received it as "servant and agent," or as "agent and servant," is not a defective or insufficient averment of the capacity in which the money was received. True, the words "agent" and "servant" are not wholly synonymous; both, however, relate to voluntary action under employment, and each expresses the idea of service. The service performable by a servant for his employer may be inferior in degree to work done by an agent for his principal. A servant is a worker for another under an express or implied employment; so also is an agent, only he works not only for, but in the place of, his principal. In the sense of service, an agent is the servant of his principal; therefore designating him in an information or indictment for embezzlement as agent and servant is not such a misnomer of his capacity as affects any of his substantial rights.

But that being so, it is insisted that Haneke, having indorsed and delivered the note to Mrs. Wise, had no property in the note, or the money paid upon it, which came into the hands of the defendant. All the circumstances in connection with the indorsement and delivery of the note to Mrs. Wise were with the jury, and whether Haneke had any property in it at the time the money was received upon it was a question of fact for their determination. The absolute indorsement of a promissory note does not relieve the indorser from liability upon it. He still has an interest in it to see that any agent of his authorized to collect and pay it over performs his duty; and if, after his indorsement, the indorsee gives him the possession and control of the note, to collect interest upon it for his benefit, or to otherwise

control it, that would be sufficient to sustain an averment of an ownership in an information for embezzlement. Any legally recognizable interest in property is sufficient for that purpose.

Taken as an entirety, the charge of the court to the jury laid down the law fully and fairly and favorably for the defendant. The third and ninth of the instructions asked by the defendant were not given, but the points presented in them were covered by 1, 2, and 4 of the instructions asked by defendant, and which were given at his request.

The second, seventh, and eighth of the instructions asked by the people, and given, were taken substantially from sections 8, 506, 956, Penal Code. As abstract propositions of law they were admitted to be correct; but it is contended they were inapplicable to the case, and tended to mislead the jury in considering their verdict. The offense charged was embezzlement, which, as defined by the Penal Code, is "the fraudulent appropriation of property by a person to whom it has been intrusted." Section 503, Pen. Code. An essential element in the offense is therefore a fraudulent intent, (Id. §§ 504-508;) and as instruction 2 related to what constituted embezzlement, and instruction 8 to the question of fraudulent intent in embezzlement, and both in substance contained the provisions of sections 506 and 508 of the Penal Code, it was proper for the court to give them to the jury as matter of law for their information. Id. § 1127.

The seventh instruction, copied from section 956 of the Penal Code, was not applicable, because there was no erroneous allegation as to the person injured. The information charged the embezzlement of the personal property of Carl Haneke. As to the offense itself, the name of the party injured, or the description of the property, there was no defective allegation. It was not necessary to specify in the information, or prove at the trial, the coin, number, or kind of money embezzled. Sections 956, 1131, Pen. Code. And as the allegations of the information were sufficient in respect to these things, there was no prejudicial error in reading, as an abstract proposition, the section of the Penal Code contained in the objectionable instruction. It did not affect any substantial right of the defendant. Id. §§ 1248, 1504.

The following instruction is also challenged: "A witness false in one part of his testimony is to be distrusted in other parts." This is substantially the language of subdivision 3, § 2061, Code Civil Proc., and is correct. But it is said to be erroneous because the word "willfully" was not inserted immediately before the word "false" in the instruction. The defendant did not ask for a modification in that regard; but the omission of the word did not affect the correctness of the proposition. In *People v. Sprague*, 53 Cal. 491, a like instruction was asked by the defendant in a criminal action. The trial court did not give the instruction as asked, but of its own motion inserted the word "willfully" immediately before the word "false," and with that

correction gave the instruction to the jury, against the defendant's objection and exception, and on appeal it was held that the insertion of the word "willfully" in the instruction did not change the effect of the instruction as offered. The instruction as given was therefore virtually the instruction offered. Upon the authority of that case, *People v. Hicks*, 53 Cal. 354, and *People v. Soto*, 59 Cal. 367, were also decided.

It is also objected that the court, against the objection and exception of defendant, refused to stop the attorney for the people from reading, in the course of his argument to the jury, extracts from "books of law and reports of judicial decisions on matters of law." In *People v. Anderson*, 44 Cal. 65, the practice of reading from law-books in an argument to a jury was considered as improper; but it was held not to be a reversible error, because it was a matter within the discretion of the trial court, and unreviewable by this court, except for an apparent abuse of discretion. The record shows that the act was permitted by the court as illustrative of the argument made to the jury, and that the court, in its charge to the jury, instructed them upon the subject as follows:

"You are the exclusive judges of the testimony, and also the credibility of the evidence, and it is the duty of the court to instruct you as to the law of the case, upon which you must act in arriving at your verdict in this case. There has been a great deal of law read to you by most of the attorneys in the case, but it is your duty to decide the case according to the law as it is given to you by the court, regardless of any law which has been read to you from the books by any of the counsel in the case."

There was no prejudicial error in admitting in evidence, for the purpose for which it was offered, the letter to Quinn, written for Haneke and his daughter by their attorney in San Francisco; nor was there any abuse of discretion in postponing the trial at the request of the people to procure the attendance of witnesses.

We find no reversible error in the record. Judgment and order affirmed.

We concur: MORRISON, C. J., and ROSS, MYRICK, and THORNTON, JJ.

69 Cal. 202

WEYLE v. SONOMA VAL. R. Co. and another. (No. 9,030.)

Filed March 30, 1886.

1. APPEAL—NOTICE—SUFFICIENCY.

The object of a notice of appeal is to impart the requisite information to the opposite party of his opponent's intention to appeal, and what specific judgment or order is appealed from, and if the notice is sufficiently explicit in these particulars, it should be declared sufficient.

2. SAME—ERRONEOUS DATE OF JUDGMENT IN NOTICE—EFFECT.

A mere clerical error as to the date of the judgment will not, of itself, mar the sufficiency of a notice of appeal.

3. SAME—EXCEPTION TAKEN AFTER 60 DAYS SUBSEQUENT TO JUDGMENT.

The exception that the decision in the case was not supported by the evidence cannot be entertained on an appeal from the final judgment when the

exception was not taken within 60 days from the rendition of such judgment. Code Civil Proc. 939.

4. NEW TRIAL—NOTICE—LACK OF PARTICULARITY AS TO FAILURE OF EVIDENCE.

A motion for a new trial, made upon the minutes of the court, and the ground taken therein that the finding and decision in the cause were not justified by the evidence, is not tenable, when the notice of such motion did not contain any specification of particulars wherein the evidence was alleged not to sustain the finding and decision.

5. REAL PROPERTY—LAND ABUTTING HIGHWAY—EXTENT OF OWNERSHIP—CENTER OF HIGHWAY.

By section 831, Civil Code, the owner of land bounded by a road or street is presumed to own to the center thereof, unless the contrary be shown.

6. SAME—ALLOWANCE OF RIGHT OF WAY—CONDITIONS—CALIFORNIA CONSTITUTION.

Section 14 of the constitution of California provides that private property cannot be taken or damaged for any public use, save upon compensation first made, etc.; and no right of way over a street is allowed for the use of any other than a municipal corporation, save upon compensation allowed by a jury; the procedure to accomplish which must be in accordance with section 1248, Code Civil Proc.

7. SAME—INTRUSION ON PRIVATE RIGHTS—EJECTMENT.

The owner of the fee in land, subject to the easement over the same for a public highway, may maintain ejectment for it against an intruder.

Department 2. Appeal from superior court, Sonoma county.

E. S. Lippitt, for appellants.

Geo. A. Johnston, for respondent.

FOOTE, C. The transcript in this cause, being very defective, was made intelligible by stipulation between counsel on both sides, and by a certificate of the clerk of the court below, filed in this court under rule 12. The respondent makes the point that the appeal is not well taken, and should not be considered, for the reason that the notice of appeal does not give the correct date of the entry of the judgment and order denying a new trial, from which the appeal is sought to be prosecuted. The object of such a notice is to impart the requisite information to the opposite party of his opponent's intention to appeal, and what specific judgment or order is appealed from, and if the notice is sufficiently explicit in these particulars it should be declared sufficient. The notice of appeal under consideration correctly states the title of the cause, and only fails of being sufficient in all other respects, as is admitted by the respondent, because it incorrectly gives the date at which the judgment and order appealed from were entered. It also appears by the record that there has been but one judgment or order of the kind appealed from entered in the cause. From this it would appear that the said notice ought not to be declared void, but the mistake of dates merely should be regarded in this case as a clerical misprision.

The exception that the decision in the case is not supported by the evidence we cannot review on the appeal from the final judgment, because the former was not taken within 60 days from the rendition of the latter. Section 939, Code Civil Proc. The motion for a new trial was made upon the minutes of the court, and the

ground taken therein that the finding and decision in the cause were not justified by the evidence is not tenable, and the motion was properly denied, as the notice of motion did not contain any specifications of particulars wherein the evidence was alleged not to sustain said findings and decision. Section 659, subd. 4, Code Civil Proc.; *Eddelbuttel v. Durrell*, 55 Cal. 277.

Appellants claim, further, that the court should have dismissed the action as to Mr. Donahue; that a demurrer filed to the complaint should have been sustained; and that the findings do not support the judgment. The action was ejectment, to recover from the defendants, the Sonoma Valley Railroad Company and Peter Donahue, the possession of the north half of Spain street, extending for 350 feet in front of and adjoining lot 27 and part of lot 28, in the town of Sonoma, in Sonoma county, California, subject only to the easement of the public to use it as a street. It is claimed that in the complaint it did not properly appear how Mr. Donahue was jointly or severally interested with the railroad company defendant in the acts complained of; that the complaint did not state facts sufficient to constitute a cause of action; and that it was uncertain in not making it to appear whether the plaintiff sued the defendants for obstructing a highway, or for damage to private property by reason of such obstruction. It is not doubtful for what purpose the suit was brought; it was to recover in ejectment the premises sued for, and damages for its unlawful withholding by the defendants. Mr. Donahue was properly joined as a party defendant as to all the acts complained of by the plaintiff, and there is nothing in the transcript which discloses any error on the part of the court in not dismissing the action as to him.

The complaint alleged ownership in fee by the plaintiff to the premises in controversy, and that while he was so seized and possessed he was ejected and ousted therefrom by the defendants, who have from that date, the thirty-first of January, 1882, withheld the possession thereof from him. Restitution of the premises and damages for its detention are prayed for. But the appellants contend that inasmuch as the plaintiff has alleged title and right of possession to the premises, subject to the easement of the public to the use thereof as a street, that he has mistaken his remedy; that, as against the defendants, a steam railroad corporation, and Peter Donahue, operating their road over the street, such an action will not lie, although perhaps one for damages might be maintained, as the injury was especial in its nature. And it is further urged by the defendants that as the public had the right to use the street in common with the plaintiff, that although the fee of it might be in him, the exclusive right of possession thereto had never been or could be.

There is no dispute about the fact that the plaintiff's lots were bounded by Spain street in the former pueblo, and are now bounded thereby in the present town of Sonoma. By section 831, Civil Code,

the owner of land bounded by a road or street is presumed to own to the center of the way unless the contrary be shown; and if it is described in a deed as so bounded, it will be considered as extending to the center of the street or road, unless a contrary intention is shown. Section 1112, Civil Code; section 2077, subs. 4-6, Code Civil Proc.; *Moody v. Palmer*, 50 Cal. 31; *Kittle v. Pfeiffer*, 22 Cal. 484; *Webber v. California & O. R. Co.*, 51 Cal. 425. And in *Coburn v. Ames*, 52 Cal. 385, it was held that the owner of the fee in land, subject to the easement over the same for a public highway, may maintain ejectment for it as against an intruder.

But the appellants allege that section 465, Civil Code, subd. 5, gives them the absolute right to use the street for the purpose of running their steam railroad over it; that section 470, Civil Code, only restricts such user in a case where it has not been granted by the city authorities over some street in its corporate limits; and that the town of Sonoma was not incorporated at the time the street was taken possession of by them, as shown by the complaint. The state constitution provides, however, that private property cannot be taken or damaged for any public use, save upon compensation first made, etc.; and no right of way over a street is allowed for the use of any other than a municipal corporation, save upon compensation ascertained by a jury, etc., (section 14, art. 1, Const. Cal.;) the procedure to accomplish which must be in accordance with section 1248, Code Civil Proc.

We cannot agree to the rightfulness of defendants' contention that a different rule should prevail with respect to the ownership of a street up to its center or thread, on which one's lot abuts, where sales of Sonoma pueblo lands have been made by the commissioners authorized so to do from sales of lands made by other persons. St. 1867-68, p. 578.

The demurrer was, we think, properly overruled. And the findings which, among other things, declare the plaintiff to be the owner of the fee and entitled to the possession of the lots on Spain street, in the town of Sonoma, and of the said street in front of said lots to its center, and that defendants took possession of said street unlawfully, and without any grant or permission from the board of supervisors of Sonoma county, and ejected and ousted plaintiff therefrom on January 31, 1882, and have so continued to do, support the judgment.

The judgment and order denying defendants a new trial should be affirmed.

We concur: BELCHER, C. C., and SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

HERTING v. SUPERIOR COURT. (No. 11,368.)

Filed March 31, 1886.

APPEAL FROM JUSTICE'S COURT—UNDERTAKING—JUSTIFICATION OF SURETIES.

On an appeal from a justice's court, if the sufficiency of the sureties on the undertaking on appeal is excepted to, and they fail to justify, the appellant cannot file a new undertaking with sureties in place of the former without giving to the adverse party the notice required by statute; (Code Civil Proc. Cal. § 978;) and if he does so, the appeal is not perfected, and the appellate court acquires no jurisdiction. On authority of *Wood v. Superior Court*, 7 Pac. Rep. 200.

Department 2. Application for writ of *certiorari* for the purpose of reviewing and annulling the proceedings of the superior court in taking jurisdiction of the cause of *Holt v. Herten* on appeal from the justices, and refusing to dismiss the same on motion. The motion to dismiss the appeal was based on the ground that the respondent had filed and served on appellant's attorney an exception to the sufficiency of sureties to the undertaking on appeal, and that a new undertaking had then been filed with a new surety thereto, but without notice of the justification of such surety to said undertaking being given to the respondent or his attorney.

B. F. Thomas and *A. R. Cotton*, for petitioner.

McNulta & Oglesby, for respondent.

BY THE COURT. On the authority of *Wood v. Superior Court*, 7 Pac. Rep. 200, it is ordered and adjudged that the proceedings of the superior court of Santa Barbara county in the action therein, entitled *Holt v. Herten*, on appeal from the justice's court, be, and the same hereby are, annulled.

SUPREME COURT OF CALIFORNIA.

69 Cal. 458

In re Estate of DAVIS, Deceased, v. STEPHENS, Ex'r. (No. 11,132.)

Filed April 27, 1886.

HOMESTEAD — SETTING APART HOMESTEAD TO SURVIVING WIFE OR CHILDREN.

Under the California Code of Procedure, § 1465, "upon the return of the inventory, or at any subsequent time during the administration of an estate, if no homestead has been selected, designated, and recorded, the court must, on its own motion, or on petition therefor, select, designate, set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, or, if there be no surviving husband or wife, then for the use of the minor children;" and when an application is made that a homestead be so set apart, the court has no discretion in the matter, but must grant the application; and the power or duty of the court in this respect is not limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside; the power of testamentary disposition of property being not paramount but subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

J. C. Bates, for appellant.

Fisher & Ames, for respondent.

BELCHER, C. C. Bridget Davis died, leaving a will and two minor children, but no husband. The will was admitted to probate, and an inventory of the property of the estate was duly returned by the executor to the court. From the inventory it appeared that the only property of the estate was a lot with a dwelling-house thereon in the city of San Francisco, which was appraised at the sum of \$850. Shortly after the inventory was filed, the executor presented to the court a petition setting forth, among other things, that the expenses of the last illness of deceased, the funeral charges, and expenses of administration had all been paid; that the lot was the separate property of deceased; and that the minor children were both residing in the dwelling-house on the lot, and were occupying the same as a homestead, and had no other home or property of their own; and praying that the said lot, together with the dwelling-house thereon, be set apart for the use, support, and benefit of the said children. To this petition one William Farmer, a brother of deceased, interposed a demurrer, and objected that the prayer of the petition ought not to be granted, because the deceased had provided in her will that all her property should be sold, and had bequeathed \$500 of the proceeds of the sale to him. The court overruled the objections, and by its decree set apart the lot, with the dwelling-house thereon, as a homestead for the use of, and as the property of, the two minor children. The appeal is by Farmer from this decree.

The Code of Civil Procedure provides that upon the return of the inventory, or at any subsequent time during the administration of an estate, if no homestead has been selected, designated, and recorded, the court must on its own motion, or on petition therefor, select, designate, set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, or, if there be no surviving husband or wife, then for the use of the minor children. Section 1465. When application is made that a homestead be set aside under this section the court has no discretion in the matter, but must grant the application. *Estate of Ballentine*, 45 Cal. 696. Nor is the power or duty of the court in this respect limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside. "The power of testamentary disposition of property, as conferred and defined by statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate." *Sulzberger v. Sulzberger*, 50 Cal. 385.

We see no error in the record and the decree should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(69 Cal. 454)

DOUGHERTY v. COFFIN. (No. 9,004.)

Filed April 27, 1886.

1. MUNICIPAL CORPORATIONS—SAN FRANCISCO—CONTRACT FOR STREET WORK—EXTENSION OF TIME.

Where, on a contract for street work in the city and county of San Francisco, the time for the completion of the work had expired without any extension of time being granted to the contractor, and thereafter the board of supervisors extended the time for the completion of the work, such extension was invalid, and not in the power of the board of supervisors.

2. SAME—ASSESSMENT FOR STREET WORK—APPEAL—ESTOPPEL.

In an action to enforce payment of a street assessment, the defendant is not estopped from questioning the validity of the assessment because the owners of the lots protested against an extension of time for the completion of the work after the time provided therefor had expired, and appealed from the assessment to the board of supervisors, where their appeal was dismissed. The assessment in such case was void, and the board of supervisors would have no power to validate it.

3. APPEAL—FINDINGS—EVIDENCE.

Findings held justified by the evidence.

4. SAME—IMMATERIAL ERRORS.

For harmless and immaterial errors judgments are never reversed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

J. C. Bates, for appellant.

McAllister & Bergin, for respondent.

BELCHER, C. C. This is an action to enforce payment of a street assessment for grading a portion of Mason street in the city and county of San Francisco. In the court below judgment was entered in favor of the defendant, and the appeal is by the plaintiff from the judgment and an order denying a new trial. It appears from the record that a contract to grade Mason street, from California to Sacramento street, was made and dated January 15, 1873, and the work was to be commenced within 6 days, and completed within 150 days, after its date. Four extensions of the time to complete the work, of 10 days each, were then granted by the board of supervisors, the last expiring July 23, 1873. The work was not completed, and nothing further appears to have been done till March 29, 1875, when a further extension of 645 days was granted. After this time had expired other extensions were granted in 1875, 1876, and 1877. The work was completed in January, 1877, and the assessment was made in April, 1877. In 1876 certain owners of lots affected, requested the board not to grant any further extension of time; and after the assessment was issued they appealed therefrom to the board, and claimed that it had been issued without authority of law, and was void.

1. That the board of supervisors had no power to grant the extension of 645 days, or any subsequent extension, is no longer an open question in this court. It is settled law that when that order was made the contract was dead, and the board had no power to call it back to life. *Beveridge v. Livingstone*, 54 Cal. 54; *Owens v. Heydenfeldt*, 6 Pac. Rep. 423; *Torrens v. Townsend*, Id.; *Fanning v. Schammel*, 9 Pac. Rep. 427.

2. The claim that the defendant is estopped from questioning the validity of the assessment because the owners of lots protested against the extension, and appealed from the assessment to the board, cannot be maintained. The assessment was void, and the board had no power to validate it. To avoid litigation and expense, the owners might properly ask the board to set aside the assessment, but we fail to see how an erroneous refusal to grant their application could create any estoppel against them. As well might it be said, if one against whom a void judgment had been entered should ask the court to set it aside, and his application should be denied, that he would afterwards be estopped from questioning the validity of the judgment. In *Mahoney v. Braverman*, 54 Cal. 565, it appeared that an appeal had been taken from the assessment, which had been dismissed upon the report of the city and county attorney, and it was held that the assessment was void because the work was not completed within the time specified in the contract, and that it was not made valid by the appeal.

3. Conceding that some of the findings are not justified by the evidence, still, the judgment cannot be reversed if finding No. 10 is

sustained. That finding covers the whole ground of failure to complete the work within the time limited in the contract, and the first four extensions which were properly made. There is no claim that finding No. 10 is not fully justified by the evidence, and the other findings are therefore immaterial. For harmless and immaterial errors, judgments are never reversed.

We find no error in the record, and the judgment and order should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DOUGHERTY v. FAIR. (Nos. 9,005, 9,006.)

Filed April 27, 1886.

JUDGMENTS AFFIRMED.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

J. C. Bates, for appellant.

McAllister & Bergin, for respondent.

BELCHER, C. C. These cases are in every material respect like *Dougherty v. Coffin*, *ante*, 672, which has just been decided. Upon the authority of that case the judgments and orders denying a new trial in these cases should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgments and orders are affirmed.

69 Cal. 255

LUX and others v. HAGGIN and others. (Nos. 8,587, 8,588.)

Filed April 26, 1886.

1. WATERS AND WATER-COURSES—RIPARIAN RIGHTS—PRIVATE CORPORATION DIVERTING WATER—COMPENSATION.

A private corporation cannot divert the waters of a water-course, and thereby deprive the riparian proprietors of all use of the same, without compensation, made or tendered, to such proprietors.

2. SAME—PROPERTY RIGHTS.

The owners of land by or through which a water-course naturally and usually flows have a right of property in the waters of the stream.

3. SAME—PUBLIC USE—COMPENSATION.

This property may be taken for a *public use*, just compensation being first made or paid into court.

4. SAME—SUPPLYING WATER TO FARMING NEIGHBORHOODS.

Water to supply "farming neighborhoods" is a public use; and it is for the legislature to determine whether, in the exercise of the power of eminent domain, it is necessary or expedient to provide further legal machinery for the appropriation (on due compensation) of private rights to the flow of running streams and the distribution of waters thereof to public uses.

5. CONSTITUTIONAL LAW—EMINENT DOMAIN—COMPENSATION.

One private person cannot take his property from another, either for the use of the taker or for an alleged public use, without any compensation paid or tendered. Const. art. 1, § 14.

6. WATERS AND WATER-COURSES—RIPARIAN OWNERS USING WATER FOR IRRIGATION.

Riparian owners may reasonably use water of the stream for purposes of irrigation.

7. APPEAL—ERROR—REJECTION OF EVIDENCE.

The court below erred in rejecting certain evidence offered by the appellants.

MORRISON, C. J., ROSS and MYRICK, JJ., dissent.

In bank. Appeal from superior court, county of Kern.

Stetson & Houghton and McAllister & Bergin, for appellants.

Louis T. Haggin; Garber, Thornton & Bishop, and Flournoy Mhoon, for respondents.

McKINSTRY, J. This action was commenced by Charles Lux, Henry Miller, James C. Crocker, and others, as plaintiffs, against James B. Haggin, and many individuals and corporations, as defendants. By dismissals and amendments, Lux, Miller, and Crocker became the only plaintiffs, and the Kern River Land & Canal Company the sole defendant. Since the amended complaint was filed the suit has been prosecuted to obtain a decree enjoining the defendant, the Kern River Land & Canal Company, from diverting waters of Kern river, which, it is alleged, had flowed down a water-course known as "Buena Vista Slough," through lands of the plaintiffs described in the complaint, and which, if not diverted, would have continued so to flow. Plaintiffs have appealed from a judgment in favor of the defendant, and from an order denying a new trial.

Before proceeding to decide what are the respective rights of riparian proprietors and appropriators of water, or to inquire into certain alleged errors of the court in rejecting evidence offered by the plaintiffs at the trial below, we propose to consider points made by respondent, which, if well taken, demanded an affirmance of the judgment, even though "the common law" as to riparian rights now prevails, or formerly prevailed, in this state.

1. *As the case was presented in the court below, the plaintiffs were not estopped from seeking relief by injunction by reason of their laches or delay.*

As a conclusion of law from certain facts found the court below declared "that the plaintiffs have been guilty of such laches and neglect as disentitle them to any relief in this action;" and it is insisted in this court, by counsel for respondent, "that plaintiffs have been guilty of such laches as disentitles them to any relief in equity."

First. There are estoppels *in pais*, as where a defendant is induced to act by the declarations or conduct of a plaintiff, which are a defense both at law and equity. Here we cannot discover the elements of such an estoppel. The defendant has acted with full knowledge of all the facts, and, as must be presumed, with full knowledge of the law controlling the rights of the parties. To constitute the estoppel the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Stockman v. Riverside L. & I. Co.*, 64 Cal. 57; *Morrill v. St. Anthony Falls W. P. Co.*, 26 Minn. 229; S. C. 2 N. W. Rep. 842. To constitute such an estoppel it must also be shown that the person sought to be estopped has made an admission or done an act *with the intention* of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon, or been influenced by, such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved. *Brown v. Bowen*, 30 N. Y. 519; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392. In the case before us the fact relied on as proving the estoppel is that plaintiffs had knowledge of the expensive canals and other works of defendant while they were in progress, and did not object to them. The bare fact that ditches, etc., were constructed with the knowledge of the plaintiffs, though at great expense, without objection by plaintiffs, is not sufficient to constitute [such] an estoppel. *Stockman v. Riverside L. & I. Co.*, *supra*.

Second. Where an express statute of limitations applies to a suit in equity, *mere delay* to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding. And when the defendant relies on mere delay and his own adverse use, the statutory period having expired, he must plead the statute. A party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer. *American Co. v. Bradford*, 27 Cal. 360. Appellants contend that they had five years after their cause of action accrued within which to bring this action. It may be conceded, however, for all the purposes of this case, that the Code of Civil Procedure limited them to four years. It has been repeatedly decided in this state that section 343 of the Code of Civil Procedure ("an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued") applies as well to suits in equity as to actions at law. The same effects, positive and negative, follow from section 343 as from other sections of the Code prescribing the periods within which actions *may* and *must* be commenced. With reference to other limitations, a party cannot be refused a hearing if he shall bring his action within the period named; and as to suits to which

section 343 is applicable, mere lapse of time, less than four years, is not ground for defense. Throughout the Code suits in equity are called "actions." Sections 346 and 347 expressly relate to certain suits in equity. Section 307 declares "there is but one form of civil action," etc. That section does not abolish the distinction recognized by the constitution between law and equity, but it indicates the legislative intent that the subsequent provisions of the code should be applicable to legal and equitable proceedings. The word "hereinbefore," in section 343, has never been held to limit its operation to actions at law, but it has often been held to the contrary.

Third. It is said that when a court of equity is asked to exercise its jurisdiction by means of injunction it will decline to intervene when there has been *laches*, although the statutory period of limitation has not expired. It would seem that the discretion of a court of equity in dismissing suits for unreasonable delay (in view of the facts appearing in each particular suit) was originally exercised, and has generally been employed, where there is no statute of limitations directly applicable, or where the statute has been held generally applicable by *analogy*, courts of equity reserving the power to recognize exceptions to the general rule; and, in exercising its prudent discretion in the last class of cases, the court, as the equities demanded, would sometimes dismiss a bill before the corresponding period at law had run, and sometimes entertain a cause long after the running of the time prescribed in the statute. Thus, the power to entertain, or to refuse to entertain, a cause was said to be exercised "independent of any statute of limitations."

Mr. Wood, in his work on Limitations, remarks: "It is generally held by our courts that, except in the single case of concurrent jurisdiction, [where the statute, like a statute in terms relating to suits in equity, operates *ex vigore suo*,] courts of equity may act by analogy or not, as the ends of justice and the strict equity of the case may require." Section 59. It was said by Lord CAMDEN: "From the beginning there has always been a limitation to suits in this court. * * * But as the court has no legislative authority, it could not properly define the time of bar by a positive rule,—to an hour, a minute, or a year. It was governed by circumstances." Sir THOMAS PLUMMER spoke thus of courts of equity: "They have refused relief to stale demands even when no statutory limitation existed," etc. *Cholmondeley v. Clinton*, 2 Jac. & W. 141. It is said by Mr. Daniell: "When there is no positive limitation the question whether the court will interfere or not depends upon whether, from the facts of the case, the court will infer acquiescence, confirmation, or release." 1 Ch. Pr. 560, 561. And Judge STORY says that, in cases where equity adopts the statutory rule by analogy, it will often treat the lapse of a less period as a presumptive bar, on the ground of discouraging stale claims or gross laches or unexplained acquiescence. Eq. Jur. 1920. The writer on Limitations already quoted says that where the claim

is purely equitable, and there is no express statute barring it, the rights of the party will be enforced without reference to any statute. Wood, Lim. § 59.

It might be claimed on principle that, inasmuch as the conduct of equity with respect to laches, etc., and the statute of limitations, are both based on *public policy*, designed to discourage stale demands, and to protect against possible loss of evidence, when the legislature—the peculiar exponent of the policy of the state—has spoken, (by adopting a positive rule of limitation expressly to suits in equity, in which lapse of time alone is the controlling condition,) the limitations applied by equity to cases not previously within the statute should be regarded as no longer existing or enforceable. It must be conceded, however, that the weight of authority is to the effect that, where the statute of limitations is directly applicable to a suit in equity, a court of chancery may properly refuse to grant relief by injunction when the plaintiff has assented to the acts complained of and their consequences; and that such assent may, in proper cases, be inferred from the plaintiff's *acquiescence* with full knowledge of all the facts. Further, the acquiescence, proving assent, may bar relief in equity, although it may not be accompanied by all the circumstances which would make it an estoppel at law.

Each of the words "delay," "laches," and "acquiescence" has its appropriate meaning. "Laches" would strictly seem to imply *neglect* to do that which ought to have been done; "acquiescence," a resting satisfied with or submission to an existing state of things. "Laches" (at least with other facts) may be evidence of "acquiescence," and "acquiescence" may be evidence of *consent*. In the decisions of the reported cases, however, "laches" has sometimes been employed as the equivalent of mere delay, and sometimes "laches" or "gross laches" as the equivalent of "acquiescence." It is therefore important to consider the context in connection with which either of these expressions has been used by a judge in order to ascertain in what sense it is employed.

Speaking of the distinction between "laches" and "acquiescence," Wood remarks:

"While the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. 'Laches' import a merely passive, while 'acquiescence' implies active, assent; and while, when there is no statutory limitation applicable to the case, courts of equity would discourage 'laches,' and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation, they will not anticipate it, *as they may when 'acquiescence' has existed*. 'Laches,' in fact, amount only to that inferior species of 'acquiescence' described in the following terms by Lord KINDERSLEY in *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 89: 'Mere "acquiescence" (if by "acquiescence" is to be understood only abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations.' " Lim. § 62.

In cases of concurrent jurisdiction, or where the statute is express, equity will sometimes refuse relief before the statute has run. "But," says the same writer, "this is only in rare and exceptional cases, where the party can be said to have *acquiesced* in the wrong of which he complains," (section 59;) and the same is said in effect in *Reed v. West*, 47 Tex. 240.

It may fairly be deduced from the authorities we have consulted that the acquiescence which will bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts. If a degree of acquiescence less than establishes such assent has been regarded in any decision, it will be seen that it has been treated merely as tending to prove some other fact which rendered it inequitable to grant a preventive order. We have tried to look at all the vast number of books referred to by counsel, and have not found any asserted doctrine which directly conflicts with what has just been said.

The granting or refusing a decree of specific performance of contracts for the purchase of lands, when there has been more or less delay, depends on principles somewhat different. *Green v. Covilaud*, 10 Cal. 317; *Delavan v. Duncan*, 49 N. Y. 485. When the purchaser has not complied with his contract he must show why. He must account for his failure in a reasonable manner,—must make out a clear case, and show that the relief he asks is equitable. He comes into court with an admission that he has not done all he agreed to do. *Finch v. Parker*, 49 N. Y. 1. See, also, *Kirby v. Jacobs*, 13 B. Mon. 435; *Weber v. Marshall*, 19 Cal. 447. Nor will equity decree specific performance of a contract when its terms and conditions are uncertain or indefinite. *Harnett v. Yeilding*, 2 Schoales & L. 552.

In *Ferson v. Sanger*, Davies, 264, WARE, D. J., held that the plaintiff was too late in seeking *damages* in equity for an alleged fraud in the sale of land. Some of the cases cited relate to applications for a "preliminary" injunction, where, the equities being doubtful, the preliminary order was denied. *Society v. Holsman*, 5 N. J. Eq. 126; *Attorney General v. Sheffield G. C. Co.*, 3 De Gex, M. & G. 304. In the last case Sir Knight BRUCE observed: "What is now done is not to be considered as deciding what will be done at the hearing of this cause, when possibly an injunction may be granted." And the lord chancellor, CRANWORTH, added he was not prepared to say it would be discreet for the court to interfere "interlocutorily" before the fact had been established, one way or the other, by a trial. Afterwards, when the application came before the chancellor, he denied it on the ground that the plaintiff would be subjected to no serious injury by reason of the temporary obstruction of a street by a gas company.

And so in *Great Western Ry. Co. v. Oxford, W. & W. Ry. Co.*, 3 De Gex, M. & G. 341, Sir Knight BRUCE commences by saying: "It is not now to be determined what order or decree it will be proper to make if these cases shall be before the court for hearing. We are now dealing with interlocutory motions only."

A learned writer on injunctions says: "While delay may not amount to acquiescence in the wrong for which complainant seeks redress, it may yet suffice to prevent his obtaining relief by injunction." High, § 7. In support of this view he refers to *Attorney General v. Sheffield G. C. Co.*, *supra*, and to *Dulin v. Caldwell*, 28 Ga. 117. But the Georgia case was an attempt to enjoin referees from making an award on the ground that the plaintiff (plaintiff also in the cause referred) had been defrauded by reason of the fact that the adverse party, in the cause before the referees, had not fully answered. The chancellor said the plaintiff ought to have made himself acquainted with the contents of the answers, and ought to have excepted to them if insufficient. He had had his day in court.

Wood v. Sutcliffe, 2 Sim. (N. S.) 163, was a suit by a manufacturer to enjoin the owner of dyeing works above from fouling the water. The plaintiff had stood by for nearly five years while the defendant was constructing and using his works. Before defendant commenced to turn his dye-stuffs into the stream the sewage of a dense population had rendered the water unfit for plaintiff's purposes, who had in fact ceased to use it. The fouling of the water was an incident to the occupation of the large population, of which (said the chancellor) the plaintiff could not complain. He therefore suffered no injury from the acts of the defendant, and by his long acquiescence had assented to them.

One cannot read the case of *Wicks v. Hunt*, Johns. 372, without perceiving that it did not turn on mere delay or imperfect acquiescence. The complainant had a complete remedy at law, and the court said the English chancery interfered, notwithstanding the existence of a plain legal remedy, *only* "by granting an injunction to prevent irreparable damage before a trial, or on a bill of peace after one or more trials at law." Then there were grave doubts whether the plaintiff had suffered any injury; and Wood, V. C., said: "Under these circumstances it is impossible to interfere until the right has been *tried*, whatever the mode of trying it may be." And the judge said: "If there was no injury (as was contended) from such floods as occurred during the two and a half years of the plaintiff's delay, a serious question might arise on the merits how far the possibility of an injury once in twenty or thirty years would justify the court in interfering with defendant's works."

Equitable relief in many cases depends upon the discretion of the chancellor, and it is true, as said by Bispham, that the *laches* of the complainant is often "one of the most important elements" which is

taken into consideration. But laches, in the sense of delay only, is not important, except as it constitutes, with other circumstances, evidence of acquiescence.

Meredith v. Sayre, 32 N. J. Eq. 557, was not decided upon mere delay or laches, in the sense of delay. The complainants waited for a year after a tramway was completed on a street in front of their lots, and this fact was, in view of the circumstances, treated as evidence of acquiescence. The court said: "The property is in an unimproved part of the city. No inconvenience of any account is inflicted on the plaintiffs by the obstruction," etc.

In the two cases last cited, as in *Wood v. Sutcliffe*, *supra*, and other cases, it will appear, on examination, that the fact that the plaintiff had suffered, and would probably suffer, but slight injury, as compared with that to which the defendant would be subjected if the injunction was granted, (or the fact that it remained doubtful whether the plaintiff would suffer injury of any account,) was considered, with the delay, in reaching the conclusion that *acquiescence* was proved. It is perhaps more probable that one will assent to a slight or temporary, than to a grave, serious, and permanent injury.

In *Chesapeake & O. R. Co. v. Bobbett*, 5 W. Va. 138, a bill to enjoin a diversion of waters was held to be insufficient, because it neither alleged the insolvency of the defendant, nor set forth facts showing that a judgment for damages would not be ample redress; and in *Hough v. Doylestown*, 4 Brewst. 333, it is said that injunction will not issue "if the injury be doubtful, eventful, or contingent."

Varney v. Pope, 60 Me. 192, decides that injunction to restrain a nuisance cannot be resorted to unless the right of the complainant has been settled at law, or long enjoyed, or the defendant's acts will result in irreparable injury; *Hieskell v. Gross*, 7 Phila. 317, that equity will not relieve by injunction, where the right is disputed, until a trial at law, unless the injury is irreparable, and the necessity urgent, and there is no adequate remedy at law.

Creighton v. Evans, 53 Cal. 55, was an action at law to recover damages for a diversion. The plaintiff was a riparian proprietor, and, as the defendant was not, the court held that, in the absence of proof of damages, the plaintiff was entitled to a verdict for nominal damages.

In *Basey v. Gallagher*, 20 Wall. 670, no question was involved as to delay, laches, or acquiescence; nor was there such a question in *Atchison v. Peterson*, Id. 507, which was an issue as between appropriators on the public lands. The supreme court of the United States there said:

"Whether a court of equity will interfere by injunction will depend upon the extent and character of the injury alleged, whether it is irremediable in its nature, whether an action at law will afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

Sprague v. Steere, 1 R. I. 247, holds that *acquiescence* may be a bar to the court's interference by injunction. The cases therein considered are to the same effect.

The order was refused in *Bridson v. Benecke*, 12 Beav. 1, because the complainant had not proceeded with due celerity to establish his right at law.

In *Slade v. Sullivan*, 17 Cal. 105, the supreme court refused to reverse the decree of the district court dismissing a bill to enjoin miners from working a ravine a short distance in front of the plaintiff's improvements on the public lands, holding that some of the damage anticipated by the plaintiff was very slight, and the rest "a mere matter of speculation."

Cotching v. Basset, 32 Law J. Ch. 286, was an extinguishment of an easement by assent.

In *Birmingham C. Co. v. Lloyd*, 18 Ves. 515, the plaintiffs sought to restrain the defendants from draining water from their own coal mine. The legal rights of the respective parties were disputed. Lord ELDON refused an interlocutory order for an injunction until the plaintiffs' right to damages had been established at law.

In *Parrott v. Palmer*, 3 Mylne & K. 632, chancery refused to enjoin, in the face of long-continued acquiescence in the act of defendants and its consequent injuries, but turned the complainant over to his action at law.

Maxwell v. Hogg and *Hogg v. Maxwell* were cross-applications for an injunction order by rival promoters or publishers of magazines, both to be called the "Belgravia." Each was refused the order under circumstances which justified the action of the court. 2 Ch. App. 319.

It appeared in *Bassett v. Salisbury Manuf'g Co.*, 47 N. H. 426, that while the injury done to a small portion of the plaintiff's land (caused by increasing the height of defendants' dam) was *trifling*, the defendants had expended \$850,000 in enlarging their works so that the additional water-power could be put in requisition. Under these circumstances it was held that the fact that the plaintiff stood by for seven or eight years without objection was sufficient evidence of acquiescence to prevent an intervention by injunction.

Grey v. Ohio & P. R. Co., 1 Grant, Cas. 412, was a bill to restrain the defendant from using its railroad across the *common* in Allegheny City. LEWIS, J., said:

"The property taken is hardly of any appreciable value; the right of complainant is at least doubtful. His *acquiescence* until the road was completed renders it impossible to grant the relief applied for without doing irreparable injury to the defendant, while no benefit would be conferred on the complainant which he could not obtain by an action at law."

Two of the judges dissented, and the injunction was refused "on an equal division."

In *Dann v. Spurrier*, 7 Ves. Jr. 235, Lord ELDON remarked:

"I fully subscribe to the doctrine that this court will not permit a man knowingly, though but passively, to encourage another to lay out money *under an erroneous opinion of title*; and the circumstance of looking on is in many cases as strong as terms of encouragement. Still it must be put upon the party to prove that case *by strong and cogent evidence*, leaving *no reasonable doubt* that he acted upon that sort of encouragement."

Mr. Wait observes (6 Act. & Def. 281) that while a court of equity will restrain a party in the use of water in a manner injurious to another, yet the court will not exercise the summary authority "where the right is doubtful, or the facts are not definitely ascertained." This need not be disputed. He adds: "A complainant who asks the court to restrain by injunction must make a strong *prima facie* case in support of the title he asserts, and show that he has been guilty of *no delay* in applying for the interposition of the court." In support of the whole of this statement he cites *Bliss v. Kennedy*, 43 Ill. 67; *Burnham v. Kempton*, 44 N. H. 78; *Shields v. Arndt*, 3 N. J. Eq. 234. In *Bliss v. Kennedy*, however, the court, after saying that, by the law of Illinois, the right of a riparian proprietor must ordinarily be established *at law* before equity will interfere by injunction, holds that equity will restrain until a decision at law, only where the plaintiff has not been guilty of *improper* delay in bringing his action; and the court observes: "We do not think such a case has been made out by the complainants. They do not allege in their bill that they have commenced, or are about to commence, legal proceedings to establish their right, but call upon a court of chancery to establish it in the first instance." The case in 44 N. H. only holds that equity will not take jurisdiction when the parties have a plain and perfect remedy at law, and have neglected to seek it; and the case in Green, that where the right is doubtful it should usually first be established at law. Mr. Wait also says that equity will refuse to interfere "when the damage is not serious," or when it appears that the renewal of the water-course will still leave it impossible for the party claiming it to derive any benefit from it. "But," he adds, "if the injuries by diversion are continuous, *or the right to continue them is set up and persisted in* by the defendant, a court of equity, if the facts be properly established, will interfere by injunction effectually to protect the complainants; and, if the diversion of water complained of is a violation of the plaintiff's right, and may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, *there is no more fit case* for the interposition of a court of equity, by way of injunction, to restrain the defendant from such injurious act." 6 Act. & Def. 282.

In *Nosser v. Seeley*, 10 Neb. 460, S. C. 6 N. W. Rep. 755, the plaintiff "solicited employment" in the work he afterwards sought to enjoin. This was strong evidence of assent.

The supreme court of Michigan said: "Except in very clear cases it is better to leave the parties to their legal remedy in the recovery of damages." *Hoxsie v. Hoxsie*, 38 Mich. 77.

Parke v. Kilham, 8 Cal. 77, was an action at law to recover certain water and damages, tried by a jury, who rendered a general verdict. The court held that an instruction in the following terms was "substantially correct:"

"That if those from and through whom the plaintiffs claim had the prior right to the waters, and they stood by and saw those from whom the defendant derives his title to the ditch, and the right to the waters of the creek, appropriate the water of the creek, at great expenditure of money and labor, under the mistaken idea that the defendant's vendors were obtaining the first appropriation and did not inform them of the mistake, they, (plaintiffs' vendors,) and the plaintiffs who claim under them, are estopped from setting up their prior right at this time."

In the light of the subsequent decisions it can scarcely be claimed that the facts recited in the instruction constituted an equitable estoppel which could be relied on as a defense at law. It may be that the defendant had the better right. In fact, the defendant's grantors seem to have appropriated the water before the plaintiffs' grantors even "located" the mining claim. It does not appear that the plaintiffs' predecessors ever took actual possession of the mining claim; and even if the "location" of the claim preceded the defendant's appropriation, it does not appear that the manner of the location was such as that defendant's grantors were bound to take notice of it. But, whatever the facts, we cannot assent to the proposition, apparently recognized by the court, that the mere silence of plaintiff's grantors, disconnected from other circumstances in evidence, created an estoppel at law.

In *Edwards v. Allouez M. Co.*, 38 Mich. 46, the court said: "The writ is not *ex debito justitiæ* for any injury threatened or done, but the granting of it must always rest in sound discretion, governed by the nature of the case;" and, as the injury threatened to the plaintiff was small, for which damages at law would be full compensation, the injunction was refused.

Traphagen v. Mayor, etc., 29 N. J. Eq. 208, was a case where the city authorities had already opened a street. The plaintiffs had permitted the authorities to oust them, (without seeking to recover the possession at law,) and to expend a large amount of public funds. The vice-chancellor said the complainants "had encouraged or sanctioned" the action of the public authorities, and "by laches, if not acquiescence," had lost the right to have the use of the street forbidden.

Demarest v. Hardham, 34 N. J. Eq. 469, was a bill to enjoin the use of a steam-engine by a book-binder in an adjoining building. The vice-chancellor refused a general injunction, but enjoined the defendant from operating his engine so as to produce a vibration in plaintiff's building, etc. He said an injunction to restrain a lawful business should never be granted, except a plaintiff shows an invasion of a clear legal right which cannot adequately be redressed by damages; but remarked: "Equity takes cognizance of a nuisance

which is permanent in its character, or which produces a constantly recurring grievance, *more readily than any other.*"

The supreme court of the United States has said that a bill for a private nuisance should show that the plaintiff is without adequate legal remedy; but that equity will interfere by injunction where the injury is irreparable, or from its continuance must occasion a constantly recurring grievance; and to justify an injunction until a trial at law can be had, no improper delay in resorting to a court of law must be shown; three years or more of delay precluding a party from relief in equity *until he has vindicated his right at law.* *Parker v. Woollen Co.*, 2 Black, 545.

Brown v. Carolina Cent. Ry. Co.: The injury to plaintiff was trifling, and susceptible of adequate compensation in damages. 83 N. C. 128.

Fuller v. Inhabitants: A case of acquiescence. The application was to restrain the appropriation of money alleged to have been collected by a town under an illegal tax levy. 1 Allen, 166.

Del Monte, etc., Co. v. Pond M. Co.: An appeal from an order refusing to dissolve a preliminary injunction. 23 Cal. 84.

Royal Bank v. Grand Junction R. & D. Co.: The facts are very complicated. While the terms "laches" and "unreasonable delay" are employed with reference to the conduct of the plaintiff, the case shows that these expressions are used to denote an acquiescence or assent, which the plaintiff afterwards sought to withdraw. 125 Mass. 490.

Brown v. County of Buena Vista: A bill by the county to enjoin the collection of a judgment against it. The supervisors of the county made two several tax levies for the payment of the judgment after they were expressly notified of its existence, and for what it was recovered. 95 U. S. 157.

Godden v. Kimmell: CLIFFORD, J., said: "Where there has been gross laches, and an unexplained acquiescence in the operation of an adverse right, courts of equity frequently treat the lapse of time, even for a shorter period than that specified in the statute of limitations, as a presumptive bar to the claim." 99 U. S. 201.

Blanchard v. Doering: Clear case of acquiescence. 23 Wis. 203, 204.

Sheldon v. Rockwell: "The plaintiff, by his silence and acquiescence, [for more than 19 years, during most of which time the acts done by defendants were protected and fostered by express statute,] has invited and encouraged the defendants to expend their money," etc. 9 Wis. 161.

Angell says: "No single proprietor, *without consent*, has the right to use the flow of the water in such manner as will be to the prejudice of any other." *Water-courses*, § 340.

In *Cobb v. Smith*, 16 Wis. 696, the court holds that an acquiescence by the plaintiffs of several years in the flowing of their lands was

such evidence of assent as would authorize the refusal of an injunction. "If the plaintiffs have suffered damage, they have their common-law remedy."

"When a person *acquiesces*, * * * a court of equity will not interfere by injunction, but his remedy at law remains." Wood, Nuis. § 360.

Estcourt v. Estcourt: Bill to enjoin the use of a trade-mark. The "hop essence" was an article used by brewers only. The plaintiff waited seven months after advertisement of defendant asserting its rights, and then brought suit. He was unable to show that a single brewer had been misled,—a circumstance on which Lord CAIRNS lays some stress. But there was a conclusive reason why equity should not interfere. The "hop essence" was introduced, recommended, and sold to enable brewers to supply to the public a liquid which they might represent as being made of pure hops, when it was not in fact so made. The chancellor said: "It is not the province of the court to protect speculations of this kind." L. R. 10 Ch. App. 276.

Wendell v. Van Rensselaer: A case of complete estoppel. 1 Johns. Ch. 344.

In *Ware v. Regent's C. Co.* 3 De Gex & J. 230, the plaintiff's lands had been temporarily flooded, but there was no threatened future injury. The weight which may possibly be given to mere delay is suggested by the remark of the chancellor, who said that although the delay did not amount to *absolute proof of acquiescence*, yet "it was calculated to throw considerable doubt upon the *reality of the plaintiff's injury*."

Goodin v. Cincinnati & W. C. Co.: Held, in effect, that one who permits "a public railroad to be constructed over his land" cannot, after large expenditures made on the faith of his apparent *acquiescence*, enjoin its use. There remains only the right of compensation. 18 Ohio St. 169.

Wiggin v. Mayor, etc.: An attempt to enjoin the collection of a local assessment for improving a street in New York city. Held, after the report of the commissioners of assessment was approved by the supreme court, (in accordance with the statute,) equity would not interfere to correct their estimates. Further, if the proceedings of the common council were *void*, a sale of the complainant's property would not cast a cloud on his title. 9 Paige, 24.

The master of the rolls said that *acquiescence* in the erection of noxious works, while they produce little injury, does not warrant the subsequent enlargement of them to an extent productive of great damage. *Bankart v. Houghton*, 27 Beav. 425.

Mr. Spence writes: "The court of chancery will therefore, in many cases, refuse to give its aid in favor of an equitable claim, though a less period than the corresponding statutory period shall have elapsed, if the length of time and *circumstances of the case* shall require the application of that principle." Eq. Jur. 61.

In re Lord: "For the peace of society, equity will refuse to interfere when there has been gross neglect in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." 78 N. Y. 112.

Gaunt v. Fynney: The court refused injunction when a trifling, though continuous, trespass had been submitted to for six years, but left the plaintiffs to their rights at law. 8 Ch. App. 14.

Fullwood v. Fullwood: The chancellor said: "Mere lapse of time, unaccompanied by anything else, has just as much effect, and no more, in barring an injunction, as it has in barring an action for deceit." "In saying this I do not shut my eyes to the possible existence of a purely equitable defense, such as acquiescence," etc. 9 Ch. Div. 176.

In *Burden v. Stein*, 27 Ala. 104, it was held: (1) A riparian proprietor may enjoin in equity without first establishing his right at law; (2) that while in cases where the plaintiff's right is not clear until established at law equity will refuse to enjoin if it is shown that he has been guilty of improper delay, the principle has no application where his right is clear, and of such a character as entitles him to ask for the interference of equity without resorting to law in the first instance.

Thomas v. Woodman: The only injury complained of by plaintiff was an offensive odor arising from the decay of grass accumulating in the bed of a stream near his premises. The plaintiff knew the "full consequences" for two years before applying for relief. 23 Kan. 217.

In *Corning v. Troy I. & N. Factory*, 40 N. Y. 191, the court of appeals was divided. The judges agreed, however, that equity will interfere, by mandatory injunction, to compel the restoration of running water to its natural channel; and that, *since the Code*, it is not necessary that plaintiff's right should be first established at law. A minority of the judges thought the circumstances, in view of the great loss and injury to the defendant, the slight advantage to be gained to the plaintiff by a restoration of the water, the *assent* of plaintiff's grantor to the building of permanent and expensive works during the lease, and the delay of the plaintiff after the expiration of the lease, rendered the issuing of an injunction improper. The majority held these conditions did not deprive the plaintiff of his right to equitable relief.

In *Corning v. Troy I. & N. Factory*, 39 Barb. 312, the court said: "In order to estop the owner of a water-right, in equity, from enforcing his right on the ground of his knowledge of and acquiescence in the making of expenditures and improvements thereon by another, the *consent and agreement* of such owner thereto ought to be established by the clearest and most satisfactory evidence." This statement is said to be a mere *dictum*, but it appears to us to be substantially a correct exposition of the rule. In the light of the authorities,

it seems clear that the acquiescence of the plaintiff, which will deprive him of his right to appeal to equity, must be such as proves his intelligent assent.

It may be that delay in seeking relief may tend, in some appreciable degree, to strengthen the probability that plaintiff has assented to a slight injury, or tend, in connection with the other evidence, to show that he has suffered no real injury, as suggested in *Ware v. Regent's C. Co.*, *supra*. But, in every case, the question returns, has the plaintiff assented to the acts of the defendant? We see no error in the statement (*Corning v. Troy I. & N. Factory*, *supra*) that the "consent and agreement" of the plaintiff must appear. It perhaps adds no force to this statement to say that the consent ought to be established by "the clearest and most satisfactory" evidence, although similar language was used by Lord ELDON. *Dann v. Spurrier*, *supra*.

Under our Codes the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied; but, if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability.

In considering the question whether, in the case at bar, the plaintiffs assented to the acts of the defendant, and the injuries caused by those acts, we are bound to assume that the waters of Kern river, in their natural course, ordinarily flow to the lands described in the complaint, or to a considerable part of them; because there was a substantial conflict in the evidence as to that matter, and the court below erred in rejecting certain testimony bearing on that issue. We must also assume that plaintiffs were the owners or entitled to the possession of such lands when the defendant's alleged right to appropriate the waters began; because, if the certificates hereinafter spoken of had been admitted in evidence, the certificates of purchase would have proved the right of exclusive possession. Moreover, we must assume that the injury to the plaintiffs was of the character and extent which the evidence tended to prove; because, if any injuries flowed to plaintiffs from defendant's acts, there was no conflict as to the nature of those injuries.

The injury to the plaintiffs, so far as it had already accrued, was, *perhaps*, such as could have been compensated in money damages. But even if this should be conceded, the defendant has asserted its

right to continue its diversions, and throughout these proceedings has persisted in that assertion. The entire injury, already accrued and future, is irremediable at law, since a judgment for damages would not constitute complete and adequate redress, within the meaning of the decisions. We cannot so hold, in view of the nature and extent of the injuries, unless we hold that the riparian proprietor can never ask for an injunction when future diversions of waters are threatened; and the adjudications to the contrary are very numerous. So to hold would be to cast upon the plaintiffs the burden of bringing and maintaining a multiplicity of suits at law. The continuation of the diversions must result in constantly renewed grievances, and might result in the acquisition of an adverse right by the defendant, and while the defendant has expended very large sums of money, the evidence tends to prove that neither the injury already inflicted on the plaintiffs, nor that to be anticipated, is slight or trivial, but that it is great and substantial. Under these circumstances we must decline to hold that, by their omission to bring this action sooner than it was brought, (with actual or presumed knowledge of the things done by the defendant,) the plaintiffs are shown to have acquiesced in the defendant's diversion of the water, and the consequences thereof, in such manner as that the assertion of their rights in this action is to be treated as an attempt to ignore or to recede from a previous assent.

A finding of unreasonable laches often assumes the existence at one time of a cause of action. But the facts found by the court below, on which is based the conclusion of laches, do not show assent, unless the plaintiffs must be held to have assented because they ought to have ascertained that the necessary consequences of the projected works of the defendant would be to deprive them of water which naturally flowed to their lands, or unless the delay to sue after the water ceased to flow, as a consequence of defendant's works, was, under all the circumstances, evidence of assent. The facts from which the conclusion of laches and neglect is drawn, if sustained by the evidence, are sustained only by evidence of silence on the part of the plaintiffs with knowledge, proved or presumed, from the notoriety of the acts and claims of defendant.

The inherent difficulty of anticipating, in the fall of 1875, when "a small quantity of water" was used by the defendant, what would be the results of the completed canal, or when a considerable progress should be made in its construction, is a sufficient answer to the suggestion that the plaintiffs should then have known those results. If, immediately after the work done in 1875, the plaintiffs had applied for an injunction, would a court of equity have granted it upon facts which would have shown a possible or contingent serious injury? It would have been obligatory on the plaintiffs, at least, to establish clearly that the threatened acts, if consummated, would result in grave injury to them; and in view of the many streams in that region, the various currents of some of them, and the other natural

features of the country, it would have been extremely difficult, if not impossible, to prove that such injury would follow. And, although the court found that the defendant continuously prosecuted its works, it does not appear from the findings how far those works were extended, or what were their consequences, at any point of time before the plaintiffs began to suffer the real, serious, and substantial injuries of which they complain.

The conclusion of law cannot be treated as a finding of fact. It is called a "conclusion of law" in the decision, and is in the form of a proposition of law,—“such laches and neglect as disentitle the plaintiffs,” etc. It does not respond to facts pleaded, nor is it a direct finding of the fact of assent. But, if it were a finding of fact, the evidence does not sustain it. The evidence, although it may be circumstantial, must affirmatively *prove* the assent. It is urged, however, that the defendant was not bound to plead, nor (since the findings need respond only to the material issues made by the pleadings) was the court bound to find the plaintiffs' consent, or the laches or acquiescence which would prove consent; that the matter of laches or neglect or acquiescence arises out of the *evidence*; and that a court of equity may and ought, *sua sponte*, to deny relief where an appeal is made to its discretionary power of granting or refusing an injunction, when there has been unreasonable delay (which, in view of the circumstances, shows assent) in seeking its preventive process. If all this were conceded, the question would become an original one in this court, and the rule (if it were applicable otherwise) that this court will not interfere to set aside a finding when there is a substantial conflict in the evidence would not be applicable. As an original question the evidence sent here does not prove assent. We are convinced that if the question were submitted to a jury upon that evidence a verdict of assent could not be upheld.

2. *The plaintiffs are not estopped from maintaining this action by reason of their assent to and approval of certain acts of a third person, —the Kern Valley Water Company.*

The next question is cognate to the one just discussed. It arises on certain findings from which, respondent contends, it appears plaintiffs lost their right to complain of any diversion of water before the commencement of this action.

The court below found—

“That the waters of Kern river do not, and never did, naturally and usually flow to, through, along, by, over, or upon the said lands of plaintiffs, or any part thereof; and that, until the year 1876, whatever of the water of Kern river flowed to or reached the said lands, or any part thereof, was from the unusual and extraordinary overflow of said river, or of Kern and Buena Vista lakes, or from the percolation and seepage in these findings mentioned.

“That in December, 1875, one Souther commenced, and in January, 1876, completed, a dam across Buena Vista slough, at a point designated on the map hereto annexed as ‘Cole’s Crossing,’ on or about section five, (5,) township thirty-one (31) south, range twenty-five (25) east, Mount Diablo base and me-

ridian, and south of where the waters of New river enter Buena Vista slough, and thereby, at said point, checked the natural flow of the waters of said river through said slough into Buena Vista and Kern lakes; and caused the waters there flowing to take a northward course, and away from the said lakes; that in March, 1876, the pressure of the waters against said dam broke through the same and said river resumed its natural flow to Buena Vista and Kern lakes; that during the said interval of its flow northward, the waters of said New river flowed along said Buena Vista slough and the adjacent country to and over Buena Vista swamp.

"That in the fall of 1876 certain parties commenced the construction of two certain canals, which are correctly laid down on the map hereto annexed, and marked respectively 'East Side Canal' and 'Kern Valley Water Company's Canal.' The said 'East Side Canal' commences on section fourteen, (14,) township thirty (30) south, range twenty-four (24) east, and extends thence some three (3) miles north, on the eastern side of the said Buena Vista swamp, and does not touch any of said lands of the plaintiffs. The other canal, heading on section fourteen, (14,) township thirty (30) south, range twenty-four (24) east, as at present constructed, extends northward some twenty-four miles, is one hundred and twenty feet wide on the bottom, one hundred and forty feet wide on the top, and ten feet deep, with a fall of one foot per mile, and capable of carrying more than twelve hundred cubic feet of flowing water per second, and terminates at a point outside of said lands of plaintiffs.

"That in June, 1877, the Kern Valley Water Company, a corporation organized and existing under the laws of California for the purpose of acquiring canals and water-rights in said county of Kern and elsewhere within this state, to be used or disposed of for irrigation, transportation, domestic, mechanical, and other purposes, took possession and control of said canals, and thenceforth continued the construction thereof northward towards the lake known as 'Tulare Lake,' designated on said map; that, in the fall of the year 1877, the said Kern Valley Water Company reconstructed the said dam at Cole's crossing, and, in connection therewith, constructed a levee extending westward to the bluffs on high ground, and running eastward from said dam about one and one-quarter miles, as shown on said map, thereby preventing the waters of Kern river from flowing to Buena Vista lake and turning the same northward to their said two canals; that at the head of said canals, and in conjunction therewith, the said Kern Valley Water Company, in 1877, constructed a certain other dam and levee, extending completely across the said Buena Vista swamp, as shown on said map, and thereby completely obstructed and prevented the natural flow of any water into, through, or over said swamp northward of said last-mentioned levee, and appropriated and took possession and control of all the waters reaching said levee, and turned the same into the said canals; that the said dam and levee last mentioned are some distance southward from the southernmost part of the said lands of the plaintiffs, and from and after their construction no water has naturally flowed, or could naturally flow, beyond the head of said canals, or to or upon the said lands of the plaintiffs, or any part thereof.

"That the construction of the canals, dams, and levees described in the preceding finding was undertaken and prosecuted *with the knowledge, consent, and approval of the plaintiffs*; that the levee last described in said preceding finding was constructed for the purpose of diverting all the water reaching said levee into the said canals, and such levee does entirely obstruct, and since its construction has obstructed, the natural flow of any water northward in said Buena Vista swamp, beyond said levee, and diverts the same into said canals, and that the plaintiffs, at and before the time of the commencement of the construction of the said levee, knew of the purposes thereof, and approved the same, and knew of the beginning and prosecution of the con-

struction thereof, and consented to and approved of such construction; that said canals and levee were constructed at great expense, *and because of and in reliance upon the said approval and consent of the plaintiffs, and but for such approval and consent would not have been constructed.*"

The notice of appropriation of 74,000 inches of water was posted and filed for record by defendant's assignors May 4, 1875. Their subsequent acts (it may here be conceded) related back to the posting and filing of the notice. It may well be doubted whether the evidence sustains the finding that the plaintiffs consented to and approved of the canals and dams mentioned in the foregoing findings. We shall assume, however, that there was a substantial conflict in the evidence in that regard. The building of the two dams, and the assent of the plaintiffs thereto, as found by the court, intervened between the appropriation by defendant's assignors and the commencement of this action. The construction of the dam at Cole's crossing, with or without the plaintiffs' consent, is unimportant, (with reference to the question we are about to consider,) if the waters of Kern river have never naturally or usually flowed to their lands. The plaintiffs did not become riparian proprietors by reason of a diversion of the waters of Kern river towards their land, (caused by the dam at Cole's crossing,) with any right to complain of an appropriation made by the defendant, or its assignors *above* Cole's crossing, and *before* the dam was constructed at that place; and, on the other hand, if part of the waters of Kern river, in their usual and natural flow, reached the lands of plaintiffs, (and they were deprived of it by defendant,) it is immaterial that more water was turned in their direction by the dam at Cole's crossing.

It is said by appellants that since the court found the waters of Kern river never naturally and usually flowed to the lands of the plaintiffs, the findings last recited must be read as a finding that the levee near the head of the canals was built for the purpose of diverting, and did divert, into the canals of the Kern Valley Water Company, only the waters turned toward plaintiffs' lands by the dam at Cole's crossing, and the waters of extraordinary overflows. But as the court found that the levee last mentioned prevented the passage of *any* water to the northward thereof, the respondent is entitled to the benefit of the findings in the alternative; that is, as declaring that, even if the waters of Kern river, in their natural and usual flow, would reach the plaintiffs' lands, the plaintiffs had consented to the erection of a dam or levee by the Kern Valley Water Company which diverted all such waters from their lands.

Section 811 of the Civil Code provides that the servitude may be extinguished by the performance of any act by the owner of the servitude, or with his assent, upon either the dominant or servient tenement, which is inconsistent with its nature or exercise. This seems to be a recognition and statutory declaration of the rule which Prof. Washburn says has become well settled, that if the owner of a dom-

inant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it. Easem. & Serv. 560. The same writer says that, as forming the subject of property in connection with realty, water may be viewed in two lights,—one, as one of the elements of which an estate is composed; the other, as being valuable alone for its use, to be enjoyed in connection with the occupation of the soil. “In the latter sense it constitutes an incorporeal hereditament to which the term ‘easement’ is [has been] applied. Id. 207. The flow of the water to and over the riparian lands is not a mere easement, (*Stokoe v. Singers*, 8 El. & Bl. 36;) but the riparian right, while more than an easement, may be said to include the qualities of an easement.

In section 801 of the Civil Code, among “land burdens or servitudes upon land,” are enumerated “the right of receiving water from land,” and “the right of having water flow without diminution or disturbance of any kind,” which last includes the right to have a natural water-course flow, subject to such diminution as results necessarily from a reasonable use by a superior riparian proprietor. It has been held that when the lower proprietor licenses the upper to divert water which would flow to the lands of the licensor, and the licensee has executed the license, the licensor does not *grant* the servitude within the prohibition of the statute of frauds, but rather is estopped from asserting any right in it. It is not necessary to enter into that question. Whether the executed license would or would not be an executed *contract*, whether the transaction would or would not operate a transfer from the licensor to the licensee, section 811 of the Civil Code declares that the effect is to “extinguish” the servitude. The legislature had as much power to make this enactment as to pass a statute of frauds. The possession of the Kern Valley Water Company, at the points where water was taken, was perhaps some evidence of its riparian ownership. But if the act is to be done by the licensee, on a third person’s estate, and the license be executed, it cannot be revoked. Washb. Easem. 563.

Appellants claim that the evidence with respect to the consent of plaintiffs to the diversion by the Kern Valley Water Company was not admissible under the allegations of the answer, because defendant did not plead therein the facts establishing license and its execution. Counsel refer to *Humphreys v. McCall*, 9 Cal. 59, where it was held, in an action for damages for the diversion of water appropriated by plaintiffs on the public lands, the defendants having pleaded the general issue only, that it was not competent for the defendants to prove that a prior claim to the water existed in a third person, but that such defense should have been specially pleaded. That case turned on a priority of occupation, as between the plain-

tiffs and defendants, and even if a still earlier occupation, by a third person, had been pleaded, it would have constituted no defense to an action brought for a diversion of water appropriated by plaintiffs previous to any appropriation by the defendants, unless the defendants connected themselves with the third person, the first appropriator. In the case now before us it was for the plaintiffs to show that they were entitled to the flow of the stream, or of some part of it, when this action was commenced. If their right to the flow was legally extinguished prior to the commencement of the action, we cannot perceive why defendant was not entitled to prove the fact under the denials of the answer. If, therefore, the findings last above referred to are sustained by the evidence, or there is a substantial conflict in the evidence with respect to the matters set forth in those findings, the judgment and order must be affirmed.

It is to be observed that plaintiffs count upon their ownership of the banks of Buena Vista slough. If they licensed the Kern Valley Water Company permanently to divert the waters from the slough, and by expenditures on the part of the company the license was executed, plaintiffs cannot recover, whatever the purposes of the diversion, although these included a purpose to benefit the lands of plaintiffs by draining them, and the conduct of the water to a point below such lands, or even a purpose to irrigate the plaintiffs' lands through gates in the canals of the company at points separated from the channel of the slough; however it might be (supposing plaintiffs had counted on their ownership of the banks of one of the canals) if it appeared that all the stock of the Kern Valley Water Company was owned by the riparian proprietors below the places of diversion of water from the slough, so that the corporation might be treated as the mere instrumentality through which the riparian proprietors carried out a design, agreed upon among themselves, to change the channel of the slough in such manner as to provide more effectually for the irrigation of their lands. Here such facts do not appear from the findings or evidence. The corporation was a distinct entity in which the plaintiffs were in no way interested, except that there was evidence tending to prove that one (perhaps all) of them was a stockholder in it. Besides, as we have seen, the plaintiffs do not base their claim for relief on the statement in their bill of complaint that they are riparian proprietors on the new or artificial water-course. If, however, it should be conceded that all the plaintiffs consented to and approved of the construction by the Kern Valley Water Company of the dam or levee across the swamps immediately below the east side and Kern Valley Water Company's canals, this fact, of itself, would not entirely extinguish the rights of plaintiffs to the flow of the water-course, unless the dam, as built and consented to by plaintiffs, obstructed and prevented the natural flow of every portion of the water (except, perhaps, mere leakage) through Buena Vista slough to land of the plaintiffs.

The court below found that the levee made by the Kern Valley Water Company prevented "the natural flow of any water into, through, or over said swamp northward of said levee;" and that, after the construction of said levee or dam, "no water has naturally flowed, or could flow, northward, and beyond the head of said canals, to or upon said land of the plaintiffs, or any part thereof." But there was uncontradicted testimony that there was a head-gate in the dam or levee, at a place designated by the witnesses as the place where the levee crossed the slough, which was at times open, and through which, when open, water flowed in the slough. The court did not find the existence of the head-gate, and there is neither finding, nor definite and distinct evidence, from which can be ascertained what was the arrangement or agreement between the plaintiffs and the water company, if any, with reference to the control and management of the head-gate. The court found that the plaintiffs consented to the building of the dam, and found that, as built, the dam entirely obstructed the flow of the water.

It is urged by appellants that the very fact of the existence of the head-gate in the slough, unexplained, proves that plaintiffs retained a right to water flowing there. But it is enough if the facts proved do not affirmatively establish that the easement was entirely extinguished. The levee, as constructed, did not permanently and continuously stop the flow of all the water, and the license of plaintiffs was no broader than its execution. Although the defendant was not bound to *plead* a license given and executed prior to the commencement of the suit, the burden was on the defendant of *proving* that plaintiffs had assented to acts of the Kern Valley Water Company which permanently deprived them of all the water. It was by such assent only that they could estop themselves from claiming the benefit of any of the water.

It may be contended, on behalf of respondent, the presumption is that the gate built by the Kern Valley Water Company, as part of its work, was under the control of the company; and, in the absence of evidence of a reservation by plaintiffs of a right *to enter upon the possession* of the company and open the gate, or of a right to demand that the Kern Valley Water Company should open it whenever plaintiffs might choose to exercise the right, or open it at definite times, or for certain periods, the court below was justified in finding that plaintiffs consented to a permanent occlusion of all the waters; and that such finding included and implied a finding that the license was not limited or restricted. The question is not free from difficulty. It is apparent the court below considered the facts that the head-gate was there, that it was at times open, and that when open water flowed through it, as immaterial factors in the evidence on which it based its conclusion that the dam, as erected and assented to, entirely obstructed the flow of the stream. The court, in effect, held that it was for the plaintiffs to prove affirmatively the reservation of a right

to the flow at their option or at specified times. Doubtless the conclusion that plaintiffs licensed a diversion of all the waters was based in part upon the presumption (in the absence of evidence to the contrary) that it was intended the water company should have entire control of its own head-gate; but this, it is argued, is a presumption of fact which the court could properly indulge.

Suppose the single issue between these parties was whether the license was general, extending to all the waters, or was limited, the burden of showing its general character being on the defendant. In such case, it might be asked, would not the defendant have made out its case *prima facie*, at least, by proving the consent of the plaintiffs to the construction of the levee, although it was built with a gate through which waters might flow if it should be opened? Would the possible fact—not proved—that plaintiffs may have reserved the right to have the gate opened when they demanded it, or for a definite part of future time as time should pass, be considered as overcoming the presumption that the Kern Valley Water Company has the control of its own property. If so, it may be claimed, the case must constitute an exception to the general rule that the burden of proof is cast upon the opposite party when the party having the affirmative has established the issue on his part *prima facie*. But here the burden was on the defendant of proving that the right of the plaintiffs to the flow of all the water was extinguished. It would not have been sufficient that it was made to appear that plaintiffs had assented to a diversion of a portion of the waters, any more than it would have been sufficient to prove that plaintiffs had granted a portion of the waters. In either case the plaintiffs would not have lost nor parted with the right to be protected in the enjoyment of the waters they retained.

Until it was made to appear that plaintiffs had lost the right to the flow of any part of the stream, the presumption would be that they retained a right to all; and, in presence of the fact that the work they assented to did not actually deprive them of all the water, their right to the water which flowed through the gate, either continuously or at intervals, was not extinguished. To apply the presumption that every man has a right to control his own property for the benefit of the defendant alone, is to assume, not only that the gate belonged to the Kern Valley Water Company, but that the water also (or its exclusive use) which flowed through the gate belonged to that company, in entire disregard of the presumption that the plaintiffs retained every right to the flow of the stream which was not affirmatively shown to have been lost. Thus a disputable presumption (applicable to the use of the gate) would be made to overthrow a presumption applicable to the use of the water. The defendant could not establish that plaintiffs were estopped from asserting that they had a right to the flow of any part of the water—either *prima facie* or conclusively—except by proving facts which necessarily precluded the retention by plaintiffs of any part of it. The defendant could not rely upon a pre-

sumption drawn from facts which did not necessarily exclude a retention by plaintiffs of a right to the flow of some of the waters, in opposition to the legal proposition that plaintiffs had lost only the right which was affirmatively proved to have been extinguished. Of course, on a retrial of this cause the evidence may establish an extinguishment of the plaintiffs' rights—if they ever had any—to the flow of every portion of the waters of Buena Vista slough to their lands. On this appeal we confine ourselves to the findings and testimony in the transcript now here.

3. *While the argument ab inconvenienti should have its proper weight in ascertaining what the law is, there is no "public policy" which can empower the courts to disregard the law, or, because of an asserted benefit to many persons, (in itself doubtful,) to overthrow the settled law. This court has no power to legislate, especially none to legislate in such manner as to deprive citizens of their vested rights.*

The riparian owner's property in the water of a stream may (on payment of due compensation to him) be taken to supply "farming neighborhoods" with water.

In case further legislation shall be deemed expedient for the distribution of water to public uses, (the private right being paid for,) the validity of such further legislation is to be determined after its enactment, if its validity shall then be questioned.

The respondent contends that it is entirely immaterial what errors were committed by the court below upon the supposition that plaintiffs, as riparian proprietors, have some rights to the flow of the stream through their lands, since the plaintiffs have in fact no right to the use of the waters as against the defendant, which has appropriated them in accordance with the provisions of the Civil Code; and this, notwithstanding the statute of 1850, adopting the common law as "the rule of decision," and the section of the Civil Code providing that "the rights of riparian proprietors are not affected" by the provisions relating to appropriations of waters. Section 1422. This court has held that the property of a riparian owner in the waters flowing through his land may, upon due compensation to him, be condemned to the public use by proceedings initiated by a corporation organized to supply a town with water. *St. Helena W. Co. v. Forbes*, 62 Cal. 182. In the learned opinions of Justices Ross and MYRICK in that case the right of the riparian proprietor to the use of the water is designated "property;" an "incident of property in the land inseparably annexed to the soil," as part and parcel of it; "an incorporeal hereditament appertaining to the land." The main question in the case was whether the Code provided for a condemnation of that species of property to public uses. The question was answered in the affirmative. And it has been held in New York that the taking of a stream of water (on due compensation) for the supply of a town was a proper exercise of the power of eminent domain. *Gardner v. Newburgh*, 2 Johns. Ch. 162. On like principles the same property right may

be taken for any public use. In every case, however, the provisions of the statute, as to the mode and manner of conducting the condemnation proceedings, must be strictly pursued. Private property may be taken or damaged for public use, due compensation being made, or paid into court. Const. art. 1, § 14. But another provision of the supreme law is equally operative: "No person shall be deprived * * * of *property* without *due process of law*." Article 1, § 13. A legislative act declaring the necessity for taking the property for public use, or the judgment of a court that the necessity exists, when the statute puts the power in a court, is "the law of the land." Cooley, Const. Lim. 528.

Section 1001 of the Civil Code provides:

"*Any person* may, without further legislation, acquire private property for any uses specified in section 1238 of the Code of Civil Procedure, either by consent of the owner, or by proceedings had under the provisions of title 7, pt. 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, 1872."

And Judge COOLEY observes that either a corporation or individual may be made the agent of the state to prosecute proceedings for condemnation. The same writer says: "The question what is a public use is always a question of law. *Deference* will be paid to the legislative judgment, as expressed in enactments providing for the appropriation of property, but it will not be conclusive." Cooley, Const. Lim. 536. See, also, note. With respect to the subject in hand the judgment of the legislature of this state has been expressed. Among the public uses, in behalf of which the right of eminent domain may be exercised, are "canals, ditches, flumes, aqueducts, and pipes, for public transportation, and for supplying mines and farming neighborhoods with water." Code Civil Proc. 1238.

Chancellor KENT has written:

"*If the public interest can be in any way promoted* by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." 2 Comm. 340.

Upon this principle the power has been employed for many objects. Not only the direct agents of the government, but individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the *public benefit* derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or by individual enterprise. Cooley, Const. Lim.

532; citing Chancellor WALWORTH in *Beekman v. Railroad Co.*, 3 Paige, 45-73, and *Willson v. Blackbird, etc., Co.*, 2 Pet. 245. With reference to the phrase of Chancellor KENT, "where the public interest can in any way be promoted," COOLEY says: "It would not be entirely safe to apply it with much liberality." He adds that private property may not be taken for objects which may merely "tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste. * * *

The common law has never sanctioned an appropriation of property based on these considerations *alone*, and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. *The reason of the case*, and the settled practice of free governments, must be our guides in determining what is and what is not a public use; and that only can be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide." Now the drinking of water is everywhere spoken as a "natural," or at least primary, use. Yet, when water is entirely taken away from the riparian proprietor to supply a city or town, the use of it has never been limited to that which may be required merely for the support of the *lives* of the citizens; but the water thus appropriated to the "public use" may be consumed also for lavation, and for all other purposes to which the element is ordinarily applied; as for irrigating private plats or yards, and public squares and parks; the watering of the streets, etc. It would seem utterly impracticable to limit the uses to which the citizens or villagers may apply it, or to the quantity to be used by each, except by reference to the quantity introduced. In such cases the riparian proprietor may be deprived of its use for *primary* purposes, that it may be devoted to such as have generally been deemed secondary. Why, then, may he not be deprived of the water when the law-makers decide that its application elsewhere for irrigation is a public use?

It is the rule that where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the legislature, and the courts will not undertake to disturb its judgment in that regard. *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147. To this yielding to the legislative judgment there is but one exception; that is, when the property of the citizen is taken or sought to be taken for a use in *no sense* public; or, in the language of Chancellor WALWORTH, (*Varick v. Smith*, 5 Paige, 159,) "where there is no foundation for a pretense that the public is to be benefited thereby." *Consolidated C. Co. v. Central Pac. R. Co.* 51 Cal. 269. We are not prepared to say that the supply of water to "farming neighborhoods" for irrigation (and

the Code evidently means for irrigation) may not be for a public use. Indeed, in view of the climate and arid soil in parts of the state, (for this object climate and soil may properly be considered,) it is safe to say that the supply for such use may be that which the legislature has decided it to be,—a public use. The judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts.

It is apparent that in deciding whether a use was public the legislature was not limited by the mere *number* of persons to be immediately benefited as opposed to those from whom property is to be taken. It must happen that a public use (as of a particular wagon or railroad) will rarely be directly enjoyed by all the denizens of the state, or of a county or city, and rarely that all within the smallest political subdivision can, as a fact, immediately enjoy every public use. Nor need the enjoyment of a public use be *unconditional*. A citizen of a municipality to which water has been brought, by a person or corporation, which, as agent of the government, has exercised the power of eminent domain, can demand water only on payment of the established rate, and on compliance with reasonable rules and regulations. And while the court will hold the use private where it appears that the government or public *cannot* have any interest in it, the legislature, in determining the expediency of declaring a use public, may no doubt properly take into the consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived to the people at large from the dedication.

It may be that, under the physical conditions existing in some portions of the state, irrigation is not, theoretically, a "natural want," in the sense that living creatures cannot exist without it; but its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, from the use of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use; therefore a public use. The words "farming neighborhoods" are somewhat indefinite; the idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course "farming neighborhood" implies more than one farm; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other—relatively to the surrounding settlers—as to make what in popular parlance is known as a "farming neighborhood." A very exact definition of the word is not, however, of paramount importance. The main purpose of the statutes is to provide a mode by which the state, or its agent, may conduct water to arable lands where irrigation is a necessity, on payment of due compensation to those from whom the water is diverted.

The same agent of the state may take water to more than one farming neighborhood. It must always be borne in mind that under the Codes no man, or set of men, can take another's property for his own *exclusive* use. . . . Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood or farming neighborhoods, to which he conducts it, the consumers being required to pay reasonable rates, and being subjected to reasonable regulations; and whether the quantity sought to be condemned is reasonably necessary to supply the public use in a neighborhood or neighborhoods must be determined by the court in which the proceedings are brought for condemnation of the private right.

In proceedings brought to secure the appropriation of private property to a public use, as in all other legal proceedings, a pretense cannot be set up as a fact,—a *sham* for a reality. The facts, it must be presumed, will always be fairly determined in such particular case. Of course, in each case, the question whether the use to which by statute the water is to be devoted is a public use is a judicial question; but the rule is that the courts hold it to be such whenever the legislature has declared it to be public, unless it clearly appears that it is only private, and that the attempt to take it is therefore a violation of the constitution. . . . From what is said above no inference is to be drawn as to the exact limits, in every respect, of the legislative power to declare a use public. We are only called on to say that sections of the Codes which provide for taking water from riparian proprietors (on due compensation) to supply "farming neighborhoods" are constitutional and valid. Whether, in any supposable instance, the public has such interest in a use which can be directly enjoyed only by an individual for his profit, and without any concomitant duty from him to the public, as that the government may be justified in employing the eminent domain power for the use, as for a public use, is a question somewhat startling, but which is not involved in the decision of the present action. . . . In case further legislation shall be deemed expedient for the distribution of waters to public uses, we leave its validity to be determined after its enactment, if its invalidity shall then be asserted.

The Civil Code authorizes any person, for purposes useful to himself alone, or for the benefit of himself and others, to divert the waters of a stream, the rights of riparian proprietors *not being affected*. . . . The claim of respondent is that, under the provisions of the Code, any person may divert all the waters of a stream from the lower lands, conduct them to a distant place beyond the water shed, and, whatever the additional loss by seepage and evaporation caused by a change of the channel, apply them either to his own purposes or sell them to others, the only conditions being that he shall appropriate them in the *manner* prescribed by the Code, and that they shall be used for an object beneficial to somebody. Civil Code, 1411.

It may be intimated that the court should avoid too narrow a view of the important question involved. It may be suggested that judges in this state should rise to the appreciation of the fact that the physical conditions here existing require an "appropriator" to be authorized to deprive, without indemnification, all the lower riparian proprietors, however numerous, on the course of an innavigable stream, of every natural advantage conferred on their lands by the running water. A "public policy" has been appealed to which has not found its expression in the statutes of the state, but rests apparently on the political maxim, "the greatest good to the greatest number," on the claim that, by permitting such deprivation of the enjoyment of the stream by the riparian proprietors, more persons, or a larger extent of territory, will be benefited by the waters. The proposition is simply that, by imperative necessity, the right to take or appropriate water should be held paramount to every other right with which it may come in contact.

But the policy of the state is not *created* by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws. The contest here is between persons who, as in every other litigation, may be said indirectly to represent other persons, or classes of persons, having interests like those of the respective parties, since the decision in this case may establish a rule which shall determine the rights of other persons holding positions, relatively to each other, like those of the plaintiffs and defendant herein. Even if the greater number whom it is *assumed* will be benefited by making the interests of non-riparian takers or appropriators paramount shall also be assumed to constitute "the public," while riparian proprietors, however numerous, shall be treated merely as individuals having interests adverse to the public, this consideration, if it should ever have weight with judicial tribunals, should have weight only in very doubtful cases. As was said by LEWIS, C. J., in *Vansickle v. Haines*.

"That the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guaranteed to him by the law, and in sacrificing none, not even the most trivial, to further its own interests." 7 Nev. 259.

If the law is settled, we cannot override the established rule to secure some conjectual advantage to a greater number. If, however, we were permitted to do this, the inquiry would still remain whether the recognition of a doctrine of appropriation (such as is contended for by respondent) would secure the greatest good to the greatest number. Observe, if that be the true rule, the appropriator does not

necessarily act as the agent of the state, employing the power of eminent domain for the benefit of the public, but by his appropriation makes the running water his own, subject only to the trust that he shall employ it for some useful purpose. It would hardly be contended that while he continues to use it for a useful purpose, a statute would be valid which should take it from him, without indemnification, under a pretext of regulating the "common use" of the water more profitably, or of providing for its distribution so as to benefit a greater number of persons. He would have a vested right to the use of the water, although the riparian proprietors would have none. If, indeed, one who has appropriated the water of a stream since the adoption of the present constitution has appropriated it "for sale, rental, or distribution" to others, the rates he may charge consumers must be fixed by local authority. Const. art. 14, § 1. But if he shall consume the water himself, one may thus, for his own benefit, arbitrarily deprive many of an advantage which, whether technically private property or not, is of great value, and thus secure to himself that which, by every definition, is a species of private property *in him*. Riparian lands are irrigated naturally by the waters percolating through the soil and dissolving its fertilizing properties. This is sufficiently apparant from the consequences which ordinarily follow from the continual cessation of the flow of a stream. If, in accordance with the law, such lands may be deprived of the natural irrigation, without compensation to the owners, we must so hold; but we fail to discover the principles of "public policy" which are of themselves of paramount authority, and demand that the law shall be so declared. In our opinion, it does not require a prophetic vision to anticipate that the adoption of the rule, so-called, of "appropriation," would result, in time, in a monopoly of all the waters of the state by comparatively few individuals, or combinations of individuals, controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those *from whom they had taken it away*, as well as to others. Whether the fact that the power of fixing rates would be in the supervisors, etc., would be a sufficient guaranty against overcharges would remain to be tested by experience. Whatever the rule laid down, a monopoly or concentration of the waters in a few hands may occur in the future. But surely it is not requiring too much to demand that the owners of lands shall be compensated for the natural advantages of which they are to be deprived. It is admitted that a single riparian proprietor would stand on the same footing as one not such. But the concession would still leave the rule in force: "First come, first served."

It has been assumed that there is no medium between the rule contended for and what *has been said to be* the rule of the common law, which requires that the stream shall flow "undiminished in quantity" past the lands of all the riparian proprietors, and it has sometimes been gravely argued that, unless the doctrine of appropriation

shall prevail, the owner of lands near the mouth of a stream may not only fail to use the waters himself, but will have power to refuse to permit any other person to employ them. We have already said that the right to the water of the riparian proprietor may be taken for a public use, on due compensation to such proprietor; and it will be noted (since the defendant is not a riparian proprietor, unless made such by the mere fact of its appropriation) that the exigencies of the present case do not imperatively demand that we shall here determine the respective rights of riparian owners as between themselves. But even if the defendant is to be treated as a riparian proprietor with reference to the specific tract in which is the head of its canal, we entertain no doubt, upon principles of the *common law* as applied to the conditions here existing, that each riparian proprietor is entitled to a reasonable use of the water for irrigation. This statement has its bearing on the alleged public policy which, it is claimed, should control when the alternative is presented between "appropriation" and the non-use for irrigation, or like purposes, by any person. What is a reasonable use by a riparian occupant—reference being had to the use required by the others—must depend upon the circumstances of each particular case. This cause was not tried on the theory that defendant was a riparian owner. There is no pretense that the water diverted was necessary for, or was used for, the reasonable irrigation of the specific tract at the head of defendant's canal.

Counsel do not seem to agree as to the nature and pervading force of the "public policy" relied on. While, on the one hand, it has been suggested that policy demands the recognition of the doctrine of "appropriation," so called, (a doctrine which would give to the prior appropriator the right to divert, without compensation, all the waters flowing to inferior riparian owners,) throughout the state, counsel, appearing as *amici curiæ*, urge that different public policies obtain in different portions of the state. In view of this assumed fact, it is said, it should be held that the streams in the more arid portions of California may be entirely diverted by the prior appropriator, as against those below, and that the common-law rights of riparian proprietors should prevail in the regions in which the climate more nearly resembles that of other states where the common-law rule is enforced. The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor, the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated. No precise line of separation between the regions so characterized is pointed out, and the attempted classification is itself somewhat uncertain and indefi-

nite. It would seem there could be no doubt that the law, *derived from the same sources*, is the same everywhere in California. Were the theory of counsel accepted, would the courts take judicial notice of the physical conditions, in an undefined district, which would compel the adoption of one rule rather than the other? or would the matter be submitted to the trial court or a jury upon evidence to be determined as a question of fact? If the theory were accepted, parties to a litigation would be subjected to one or another *law*, as it might be deemed by court or jury, in the particular case, that it was for the interest of the neighborhood (or large "region," as the case might be) that the rights of the parties should be settled by the one law or the other. Perhaps, too, the law with respect to appropriators and bank-owners on the same stream would vary with the changing seasons. And if the issue as to the applicability of one law or another were submitted as a question of fact, two different laws might obtain and determine the rights of parties in different suits, as the evidence adduced with respect to physical conditions of the "region" should bring home to the minds of the triers one conviction or another. Certainly, a judgment in a particular case (if the question would be one of fact) would not be binding upon all the residents of the region, nor determine what law prevailed therein. We can conceive of no "public policy" which should compel us to abandon the rights of the citizen to the whim or caprice, or to the deliberate and honest judgment, of the arbiter in each separate case. Whatever is the general law bearing on the subject, it is the same everywhere within the limits of the state. It is for the court to apply, or to direct a jury to apply, the appropriate rule to the facts proved by the evidence bearing upon the issues made by the pleadings; but neither court nor jury can say that it is expedient to declare that a law shall be operative in one portion of the state which differs from the law in other portions, or to decide that there is no general law bearing on the subject.

4. *By the law of Mexico the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use.*

We have been warned lest in approaching the subject we shall assume that, *in the very nature of things*, running waters are inseparably connected with the riparian lands. It may be conceded that if riparian owners have any right in the waters (or in the lands themselves) it is such as is created or recognized by the law of the land. It is at least equally true, however, that every inhabitant of a state or district does not possess a potential right, inherent in his habitation, to divert so much of the waters of a stream as he may have occasion to employ. The whole matter depends upon the law of the country, written or unwritten.

Counsel for respondent announce the proposition:

"The fundamental principle upon which all the laws of the former governments of this territory upon this subject [waters and their uses] were based will

be found to be that the flowing waters of the streams and rivers of the country *were dedicated to the common use of the inhabitants*, subject to that legislative control, which is the equivalent of the exercise of that legislative power which we know as the 'police power' of the state."

We understand this to mean that "the inhabitants" of the territory, or, at least, the occupants of lands in each valley or water-shed capable of irrigation from a stream flowing in it, had, under the Mexican law, a vested interest in the common use for irrigation and like purposes to which the waters were "dedicated," which could not be taken away by the legislative power; that the dedication continues to the present hour; that the state of California has no power to restrict the use to riparian proprietors; that the statute of 1850, adopting the common law "as the rule of decision," is not to be construed as an attempt so to restrict the use, and if it must be thus construed, it is invalid to that extent, since the power of the state is limited to the mere *regulation* of the common use. In support of the proposition above recited, counsel refer to *New Orleans v. U. S.*, 10 Pet. 662. In the year 1717 a charter was issued by the king of France to a corporation styled the Western Company, whereby were granted to the company the lands, coasts, harbors, and islands in Louisiana. Under its auspices the ground where the city of New Orleans now stands was selected as the place for the principal settlement of the province. In 1724 and 1728 maps of the town were made, on which a space on the margin of the Mississippi was designated as a "quay." This space was continually used for the purposes to which it was devoted. These, with other circumstances, were held proof of a dedication to the public, in *New Orleans v. U. S.* The case is in accord with established principles, both of the civil and common law.

It may be conceded that when, under the former government, property was *dedicated* to the public use, either by a private person or the nation, the people comprising the public and their successors acquired a vested interest of which they cannot arbitrarily be deprived, to the extent of the common use to which the property was dedicated. But it would seem to be difficult to derive the right to the exclusive use of the whole or portions of the waters of a stream from their dedication to the common use of all. We shall see that the laws of Mexico authorized the diversion of waters for the exclusive benefit of corporations and individuals, under some circumstances. The provisions of our Civil Code authorize such diversions for exclusive use. It cannot be successfully argued that laws authorizing such exclusive appropriations are less an infringement of the "common use" to which rivers were devoted than a law limiting the use of the waters to riparian proprietors.

And this leads to an inquiry as to the nature of the common use of running waters under the Mexican law. In the Institutes of Justinian it is declared concerning things: "They are the property of some one or no one,"—"vel in nostro patrimonio vel extra nostrum patrimonium."

"Some are, by natural right, common to all; some are public; some are of corporate bodies, [cities—*municipia*]; and some belong to no one. Many are the property of individuals, acquired in divers ways," etc. Liber 2, tit. 1. "The things which, by natural law, are common to all, are these: air, running water, [*aqua profluens*], the sea, and, as a consequence, the shores of the sea." Id. § 1. "*Flumina autem omnia et portus publica sunt.*" Id. § 2. The Roman law distinguished between "*res communes*" and "*res publicæ*." The sea was included among the former, the rivers among the latter. Halleck, Int. Law, 147, notes. All perennial rivers were public. Dig. 43, 12, 3. Such rivers were of the class of things "*publico usui destinata*," like ports and roads. Moyle, Ed. Inst., 184, note.

The same distinction is recognized by Spanish writers; "*bienes comunes*" being those which, not being as to property of any, pertain to all as to their use,—as the air, rain, water, the sea, and its beaches; "*bienes públicos*," those which, as to property, pertain to a people or nation, and, as to their use, to all the individuals of the territory, [or district,]—such as rivers, shores, ports, and public roads. Escriche. See, also, the word "*cosa*." In Febrero, Novísimo, *cosas comunes* are defined as those "*qui sirven a los hombres y demas vivientes, como el aire, el agua llovediza, el mar y sus riberas.*" T. 1, lib. 2, tit. 1. Both writers cite law 3, tit. 28, pt. 3. In Hall's version of the law referred to there are included in the things belonging as to property to none, and as to use to all living creatures, "air, rain, water, the sea, and its shores." Hall, Mex. Law, 447. This is probably a mistake of the printer. The words of the law are, *el ayre, e el mar e las aguas de la lluvia*." Lord DENMAN remarks that Fleta, enumerating "*res communes*," omits "*aqua profluens*." *Mason v. Hill*, 5 Barn. & Adol. 23. By the Mexican law the property in rivers pertained to the nation; the use, to the inhabitants. The nature of this use will be considered hereafter.

The modern doctrine as to the sea-shores, even in countries where the civil law prevails, seems to be that they belong to the state. *Pollard's Lessee v. Hagan*, 3 How. 212. It has been suggested that the claim of ownership by the English crown to the ocean beaches is the remnant of the broader claim once asserted to the narrow seas adjoining the British islands. Ang. Water-courses. But the modern doctrine which attaches to the sovereignty the property in the sea-shores seems to be derived from Celsus. Dig. 4, 3, 8, 3; Moyle, Inst. 183. By the Mexican law the shores of the sea include the space covered by the flux and reflux of the waters at their greatest altitude, whether in winter or summer. Escriche calls the "*playa*" "*la ribera del mar*," and remarks: "The laws of the Partidas place the '*playa*' among the common things which all men can use, but it cannot be intended to treat it as independent of the nation to which it may pertain." And, under the head "*Ribera*," he says: "The shores of the sea pertain as to property to the nation of whose territory they are a

part, and as to use to all," etc. It is unnecessary, however, here to declare whether by the Mexican law the ocean beaches were *proprietatis nullius*, or pertained as to property to the nation.

Whatever the common use to which rivers, harbors, and public roads were subjected, the enjoyment of such use would exclude the notion of an exclusive use or occupation which must interfere with a like use by others. "*Communis omnium est harum rerum usus ad quem natura comparatæ sunt, tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione usus ille promiscuus non læditur.*" The common use of rivers would seem to be such as all could enjoy who had access to them as rivers. Vinnius says: "*Unicuique licit in flumine publico navigare et piscari;*" and adds, with respect to running water generally: "*Aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*" Cited by Lord DENMAN in *Mason v. Hill*, 5 Barn. & Adol. 1. In *Mason v. Hill* the learned judge speaks of a distinction mentioned by the civilians between a river and its waters; the former being, as it were, a perpetual body, and under the dominion of those in whose territory it is contained; the latter continually changing, and incapable, "while it is there," of becoming the subject of property. He adds: "It seems that the Roman law considered running water not as a *bonum vacans*, in which any might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only."

The common use of the waters, it would seem, existed only while they continued to flow in, and constituted a portion of, the river; but under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals. The oceans, "*propter immensitatem,*" may be used to their fullest benefit "without any exclusive appropriation," and such appropriation is not necessary for the purposes of society, or of advantage to mankind. "Moreover, the use of the sea may be said to be matter of necessity to all those nations who have any part of their territories bounded by it; and as no nation can possibly assert that it is unable to enjoy the fullest use of the sea without the exclusion of others, so no nation can have any just ground for excluding others from an advantage which all may enjoy, together with equally full utility to each. This legal doctrine is thus admirably summed up by a German civilian: 'The great sea is a thing the use of which is inexhaustible, consequently, as no one can acquire the dominion of things the utility of which is unbounded and inexhaustible, no one (even were it possible in fact) can subject the great sea to his dominion without violating natural law; and the same must be understood of several nations, who cannot, for the same reasons, divide the dominion of the great

seas among them. Consequently no nation can, without infringement of natural law, subject to its dominion the great sea.' " Bowyer, Comm. Mod. Civil Law, 64; citing the Pandects, Grotius, Pufendorf, Bynkershock, Wolf, Just. Gent.

The same writer says:

"Both Grotius and Pufendorf deduce the appropriation of things which must probably have been common to all men, from the very constitution and organic rules and necessities of the social state, as well as from the objects for the furtherance of which that state is intended. But it follows from the same principles that those things, the exclusive appropriation of which, either to a portion of mankind or to certain individuals and purposes, is unnecessary for the objects of the social state, (that is, for the furtherance of the welfare of mankind,) must remain by natural law common to all men. Thus air and light cannot be brought under the power of any one person. Upon these principles, running waters are held by the Roman *juris consulti* to be common to all men. But it also follows that this decision does not apply to waters the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain purpose; as water included in a pipe or other vessel for certain uses. The common right to the use of running water, therefore, applies only to those cases where the quantity of water *is so great* that its entire exclusive appropriation is not necessary, having regard to the general objects of the institution of property. Gro. Droit de la Guerre, Puf. Droit de la Nature." Bowyer, Comm. 61.

"Thus, running water is capable, indeed, of a qualified appropriation as property, but subject to a common right by natural law, *where it is capable of being fully enjoyed without exclusive possession.*" Id. 62.

Vinnius, in his commentary on the institution above referred to, says those things are common which by nature are devoted to the use of all, and which in "*nullius adhuc ditionem aut dominium pervenerunt*;" which seems to imply that some things hitherto common may become the property of an individual. And this is true with reference to things the ultimate property of which is in the state, the use of which is common until the exigencies of the social state require that they shall be subject to the exclusive use of individuals. Inasmuch, however, as the property is in the nation, such exclusive use can be acquired only with the nation's consent.

By the Mexican Civil Code of 1870 it is provided: "The property in waters which pertains to the state does not prejudice the rights which corporations or private individuals may have acquired over them by legitimate title, according to what is established in the special laws respecting public property. The exercise of 'property' in waters is subject to what is provided in the following articles." Article 1066. In Guerra's ElCodigo Civil, in Forma Didactica, the word "private" is inserted after the word "property," so as to make the last sentence of the article read: "*Elejercicio de la propiedad privada de las aguas, esta sujeto,*" etc. If, as is suggested by counsel, the presumption is that the provisions of the Code are declaratory of the pre-existing law, the right which could be acquired under the laws to the separate use of the portions of a stream constituted an exclusive usufruct of the nature of private property, which did not

and could not co-exist with a common use of such waters by all. As we have seen, running water is capable of appropriation as private property, independent of any common use, where the quantity of water is so small as to be incapable of being fully enjoyed without exclusive possession. The exclusive appropriation is put in opposition to the common use. Bowyer, Comm. *supra*. Article 789 of the Civil Code defines private property: "All things the dominion of which pertain legally to private persons, and those which cannot be used without the consent of the owner, are private property."

The Mexican government prohibited any diversion or obstruction of the waters of a river by riparian proprietors or others, which should interfere with navigation. Escribiche says: "*No puede ningun particular hacer en los rios ni en sus riberas casa o otro edificio que embarace la navegacion, * * * porque la utilidad de todos los hombres no se ha de impedir por la de uno solo,*" etc. It has been said that rivers may be used for purposes of navigation, not only by the denizens of the land where they are found, but by strangers, unless some municipal ordinance, law, or custom confines their use to a certain class of persons. Febrero. This, of course, implies that the sovereign may limit the right of navigation to particular classes. "Notwithstanding the banks of rivers are as to dominion or ownership of those whose lands adjoin, all navigators may use them, by tying their vessels to the trees growing there, landing their merchandise thereon," etc. Gen. Halleck says that, by the Roman law, the right to navigate rivers carried with it the right to moor ships to the banks. Int. Law, *supra*.

Thus, it was the policy of Mexico to foster and protect navigation. The rivers naturally adapted to the passage of water-craft were devoted to the common use for purposes of navigation. It would seem to be in the power of the sovereign (except so far as the power is limited by the constitution of government) to authorize such diversions as shall interfere with navigation. It was never doubted that an act of parliament would operate to extinguish any public right to passage. Woolr. Waters, 289. While, however, a river remained a navigable river, the navigation was, by the civil law, common to all, unless the privilege was limited to a class. Interference with the appropriate common use of innavigable rivers was not thus absolutely prohibited by the Mexican law. The common use of the waters of such rivers by all who could legally gain access to them continued only while the waters legally flowed in their natural channel, and the power of determining whether the public good—the purposes for which the social state exists—demands that the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals remained in the sovereign. Whether the power is an incident to the ultimate domain or right of disposing of the property of the state, or is to be referred to some other source or principle, the Mexican government employed the power of permitting

the diversion of waters from innavigable rivers by those not riparian proprietors upon such terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. It had *power* to do this, even if the consequence should be the entire deprivation of the common use.

It may be said that the Mexican laws which provided for such concessions to individuals or corporations did not provide for *grants* to such persons, but were themselves a recognition of a right in all to a use of the waters. But a system which provided for the mode of acquisition of private, separate, and exclusive rights, by individuals or corporations, cannot be said to be merely in regulation of a common use. The common right of passage over a public road, or of navigation of a river, may be regulated by laws which facilitate the general enjoyment of the common use. But under pretense of exercising the common use, where it exists, no one can interfere with its enjoyment by others. Article 803 of the Code of 1870—except, perhaps, with reference to some of the penalties prescribed declaratory of the pre-existing law—provides: "Those who obstruct the common use of public property are subject to the established penalties, to pay all damage and injury caused, and to suffer the loss of the works they shall have made." Those who appropriated and diverted the waters of an innavigable river in accordance with the laws, obstructed *pro tanto* its common use. Nevertheless they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use.

No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or *municipality* to deprive him of it without indemnification. It may be conceded that one who had acquired the right to the exclusive use of a portion of the waters of a river under the Mexican *regime* could not be deprived of his right by a law of California. But can it be said that all the inhabitants of the state, or of a valley through which a stream flows, have such a vested right in the use of the waters which some of them (on performance of the conditions prescribed by Mexican law) might have appropriated, but never did appropriate?—this on the theory that the waters had been dedicated to the common use of all? It would be a dedication never accepted by those to whom it was made, and a dedication to a common use which could never be enjoyed in common.

Those who had not appropriated waters in the mode prescribed had no right or property in the water or its use of which they would be deprived by subsequent legislation conferring the use of the waters on riparian proprietors alone; and it would seem very clear that those who actually appropriated water, in compliance with the conditions prescribed, acquired a proprietary interest of which they could not be deprived,—at least while they continued its use,—except on sufficient indemnification. It cannot be presumed that, under a constitution which declares, in as distinct terms as does our own, that private property shall not be taken, except on due compensation, the legislature attempted to authorize an arbitrary deprivation of property rights acquired by expenditures invited by the laws themselves. At common law, if a navigable river should happen to change its course the right of navigation extends wheresoever the channel should run, (Woolr. 288;) and by the Civil Code of 1870 rivers and their beds [*alveos*] are declared to be public property of common use, (section 802.) But the property of the nation in the space subjacent to the river ceases when that space ceases to be the bed. "When a river varies its course, the owners of the fields or estates newly covered by the waters lose the space which the river occupies, and the riparian proprietor of the abandoned *bed* acquires the part in front of his land to the middle of the bed," etc. Civil Code 1870, art. 897. See, also, Escheriche, "*Aguas*" and "*Rio*." "The islands which are formed in rivers not navigable or floatable belong to the proprietors of both banks proportionably with the extension of the front of each estate along the river, drawing a dividing line through the middle of the bed." Article 900. Thus, the property of the nation is in the *river* and its bed, while it is the bed of the river; the common use continues while the water is the water of a river. But a private right to the exclusive use of the waters could be acquired, under the Mexican law, by *prescription*, or on compliance with the established conditions; and the general property of the nation in running waters did not prejudice such special private rights.

Conceding the provisions of the Civil Codes of 1870 and 1884 to be declaratory of the law as it existed when California was ceded to the United States, they do not confer nor recognize any inherent vested right, enforceable in the courts, in others than riparian proprietors, to the use of any portion of the waters of a stream, nor any right, except as to those who actually appropriate waters in the manner and on the conditions prescribed by the laws. It may be that the Mexican system implies a recognition of an imperfect obligation or moral duty on the part of the government to provide for the distribution of the waters in such manner as to encourage the settlement of the country, develop manufactures, and benefit agriculture. In this view, it would seem that the laws were inspired with a liberal spirit, and were well calculated to advance those objects.

By the Codes the owner of an estate in which there is a natural

spring may use or dispose of its waters, subject only to condemnation for public use on compensation to the owner. Article 1056, Code 1870. Such was the law previously,—the spring was his as part of his land. Eseriche, "*Aguas*." By article 1066 of the same Code the property of the state does not prejudice the rights over waters acquired by individuals or corporations, "by *legitimate title*, according to what is established *by the special laws*." That article declares that the exercise of private property in waters is subject to what is provided in articles 1067, 1068, and 1069. The first two of these prohibit any diversion which shall interfere with navigation. Article 1069 declares:

"The owner [*el propietario*] of water, *whatever may be his title*, cannot impede the use [*el abasto*] that may be necessary for the *persons or cattle* of a possession or rural estate, nor oppose the construction of indispensable works to satisfy this necessity in the manner least injurious to the owner, but he shall have a right to indemnification," [*"por los perjuicios que por tal motivo se le causen."* Guerra,] "save that the inhabitants shall have acquired the use of the water by prescription, or other legal title."

Article 966 of the Code of 1884 is a substitute for articles 1067, 1068, and 1069 of the Code of 1870. In that article it is said: "He who, in conformity with the preceding article, [he who has acquired a private property to waters, by legitimate title, according to what is established in the special laws,] may be using the waters of a river, cannot impede," etc. Article 1073 of the Code of 1870 is:

"Every one who wishes to use the water of which he can dispose has a right to cause it to pass through intermediate grounds, with the obligation of indemnifying their owners, as well also as those who own the lower lands on or through which the waters may filter or fall,"— [*"Asi como tambien a los de las predias inferiores sobre que se filtren o caigan las aguas."*]

We understand the last class to be those whose lands are injured by the water after it has been diverted. The article treats of a legal servitude which, without agreement or prescription, but simply as a consequence of the respective positions of the estates, (article 1056,) is imposed on lands situated between the river and the tract or place to which the water is conducted. It does not purport to give the absolute right, without regard to the conditions provided by laws, or administrative regulations under the laws, to divert waters of a river by one separated from it by other lands, nor define the mode by which rights thus to divert may be gained.

The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing to the common lands, and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo; but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the *pobladores*, the irrigable lands, and the mills and manufactories, within the general limits,

was vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers.

A translation of the plan of Pitic is annexed to Dwinelle's Colonial History of San Francisco, *addendum* No. 7. The original is not before us. Whether the plan of Pitic is or is not a scheme in all respects applicable to every pueblo created after the date, November 14, 1789, (as is claimed by counsel,) it may be conceded the provisions therein contained were, in substance, those having force in the pueblos established in California while it was part of the territory of Mexico. The plan authorized a commissioner, after the measurement of the exterior lines of the four leagues, to set apart the *ejidos*, *proprios*, etc., and to distribute the remaining lands to the settlers in separate tracts. The nineteenth and twentieth sections of the plan read:

"Sec. 19. The advantage of irrigation being the principal means of fertilizing the lands, and the most conducive to the increase of the settlement, the commissioner shall take particular care to distribute the waters so that all the land that may be irrigable might partake of them, especially at the seasons of spring and summer, when they are most necessary to the cultivated land in order to insure the crops, for which purpose, availing himself of skillful or intelligent persons, he shall divide the territory into districts [*partidos*] or hereditaments, marking out to each one a trench or ditch, starting from the main source, with the quantity of water which might be regulated as sufficient for its irrigation, at the said periods and at the other seasons of the year that they may need them; by which means each settler shall know the trench or ditch by which his hereditament shall be irrigated, and that he cannot and shall not have the power to take the water of another, nor in a greater quantity than that which may fall to his share; for which purpose, and that it may not increase in injury to the owners situated on the land beyond or still lower, it shall be proper for the trenches or partitions to be constructed in the main ditch made of lime and stone, at the cost of the settlers themselves.

"Sec. 20. In order that these [the settlers] might enjoy with equity and justice the benefit of the waters in proportion to the need of their respective crops, there shall be named annually by the ayuntamiento one alcalde [or mandador] for each trench, to whose charge shall fall the care of distributing them in the estates [*heredades*] comprised in the '*partido*' or hereditament, which shall be irrigated by them in proportion to their need for this benefit, designating, by a list which he shall make out, the hours of day and night at which each owner [*heredado*] shall irrigate his lands sown with grain; and, in order that by the carelessness or indolence of the owners [*duenos*] those [the lands] that may need them shall not remain without irrigation, nor the crops be lost, whereby, independent of the private injury, may also result that of the public and community, produced by the want of provisions and supplies, it shall also come within the duty of the alcalde or mandador for each trench to have a servant [*peon*] or day laborer, knowing the hour of the day or night designated for the irrigation of each tract of land or corn-field, who, in default of its owner, shall take care to irrigate it; the just price of his labor, which shall be caused to be paid to him by the owner of the land or estate [*heredad*] irrigated, to be thereafter regulated by the commissioner or by the justice."

In *Hart v. Burnett*, 15 Cal. 530, it was held that the pueblo had a "certain right or title" to the lands within its general limits, notwithstanding the fact that the Mexican government retained the power

to make grants within those limits; that the pueblo authorities were more than mere agents of the government to dispose of the lands as public lands, but the pueblo itself had a vested interest in the lands, and that the portions of such lands not set aside or dedicated to common uses, or for special purposes, could be gran'ed in lots by the municipal officers to private persons, in full ownership; that the city of San Francisco succeeded to the right or title of the pueblo, and that the municipal lands to which it thus succeeded were held in trust for the public use of the city, and were not subject to seizure and sale under execution issued on a judgment against the city; that the property and trusts were public and municipal in their nature, were within the supervision and control of the state sovereignty, and the federal government had no such supervision or control; that the act of the state legislature of March, 1858, confirming the so-called "Van Ness Ordinance," was a legal and proper exercise of this sovereign power.

By analogy, and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or "a certain right or title" in their use, in trust, to be distributed to the common lands, and the lands originally set apart to the settlers, or subsequently granted by the municipal authorities. It may be conceded that such authorities were not authorized to make concessions to individuals of the perpetual and exclusive use of portions of the waters, without reference to the needs of the other inhabitants, or that such concessions would be an abuse of the trust. But they had a species of right or title in the waters and their use, subject to the public trust of continuously distributing the use in just proportion. The trust is within the supervision and control of the state. Thus, the legislature has provided for the mode and manner in which shall be exercised the trust of distributing the waters by the city, the successor of the pueblo of *Los Angeles*. The inhabitants of the former pueblo, who were using water when this territory was transferred to the United States, had not acquired a vested right to any particular quantity of water; and the occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water, and at such times, as accords with the laws regulating the public and municipal trust. Each pueblo was *quasi* a public corporation. By the scheme of the Mexican law it was treated as an entity or person, having a right as such, and, by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while, as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred.

Escriche deduces from law 8, tit. 28, and law 18, tit. 32, *partida* 3, and from writers basing their opinion on those laws and the Roman laws, that any inhabitant of a pueblo through which passed an innavigable river might extract a part of its waters, and construct an

acequia, in order to irrigate his land, or to run his mill, provided he could do so "without prejudice to the common use or destiny which the pueblo shall have given the waters; with the understanding that if the *acequia* shall cross the land of another, or the crown lands, or the land common to the inhabitants of the pueblo, a license from the private owner, or from the king, or from the town council, is indispensable." ["*Bajo el supuesto de que si la acequia hubiese de atravesar suelo ajeno, realengo o concejil,*" etc.] Escriche, "*Acequia.*"

Thus, by virtue of the laws, each person having land within the pueblos was permitted to conduct water to it, (obtaining the consent of the owners of the lands between his and the river,) provided, by so doing, he did not violate the municipal ordinances giving destination or distributive use to the waters. By its terms this permission was accorded only to the inhabitants of the pueblo, and could be acted on only in such manner as should not interfere with municipal ordinances.

After speaking of springs rising in a man's land, which are his property, Escriche says:

"Waters belong to the public which are not and cannot [thus?] be private property. Such are the waters of rivers which, by themselves, or by accession with others, pursue their course to the ocean. They may be navigable or not navigable. If navigable, no one can avail himself of the waters so as to embarrass or hinder navigation. If not navigable, the owners of the lands through which they pass may use the waters thereof for the utility of their farms or industry, *without prejudice to the common use or destiny which the pueblos on their course shall have given them*, and with the modifications provided in the laws, orders, and, decrees which are spoken of under the word '*acequia.*' ['*Aguas,*' *de las aguas que pertenecen al publico.*]"

And in treating of "waters which pass by the side or through an estate," the same writer says:

"The use of waters of which no one can avail himself without a license from the authority is to be regulated [*debe arreglarse*] by municipal ordinances, or by the usages and customs of the country, [*los usos y costumbres*,—general and long-continued practices, which have acquired the force of law;] but, in default of ordinances and customs, equity and the interests of agriculture dictate the following rules."

He proceeds:

"The waters of fountains and springs are the property of the owners of the lands on which they rise; * * * but as they go out from thence they become running waters, [*agua profluens*,] and pertain like common things [*cosas comunes*] to the first who occupies them, so far as he has need of them. The first who can occupy them are the owners of the estates which they bathe or cross."

He then treats of the rights of riparian proprietors to the use of the waters as between themselves.

From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the waters; and, *semble*, that the pueblos had a preference

or prior right to consume the waters, even as against an upper riparian proprietor. The common use here spoken of is the use for the benefit of the community or inhabitants of the pueblo, whose interests as a whole were to be considered in the distribution of the waters by the officers of the pueblo. Plan of Pitic, § 20. It is not necessary here to decide that the pueblos had the preference above suggested; nor is it necessary here to speak of the relative rights of two or more municipalities on the same stream. In such case (whatever the standard by which were to be determined the relative rights of the pueblos respectively as to quantity of water) it would seem clear that the municipal regulations of each, with respect to the application and distribution of water, would be of force only within its own boundaries. But there could be no municipal ordinance of a pueblo regulating or distributing the waters of a stream among its inhabitants, or other persons, until a pueblo was established. We take notice that no pueblo existed on the water-course (if any there be) which is the subject of the present controversy. No portion of its waters were therefore dedicated or devoted to the use of the inhabitants of a pueblo by virtue of the laws giving to pueblos the power of distributing waters.

Turning now to the "laws, orders, and decrees," under the word "*Acequia*," to which we are referred by Escriche. In the instructions of May 15, 1788, to corregidores (magistrates with a species of supervision over matters political and economical in pueblos and districts) and superior (appointed) *alcaldos*, they were directed, in order to promote the utility of the fields by the use of all the water that could be applied for their benefit, to adopt measures for the construction of *acequias* from the rivers, draining them in the parts most convenient, *without prejudice to their course and to the lower districts*, and taking care also to discover subterranean waters in order to use them, "as well as for flour-mills, fulling-mills, and other necessary and convenient machinery for grinding," etc. Nov. Recopilacion, T. 3, tit. 11, lib. 7, law 27, § 48; Hall, Mex. Law, § 1402. By the royal decree of the thirty-first of August, 1819, favors were extended to *ayuntamientos*, communities, companies, and individuals who, "with the previous corresponding permission of the government," should construct at their own cost ditches or canals for new irrigations, taking water from rivers which afford *an abundant supply*, or carry much water, (*caudalosos*,) collecting at one place the waters of the *arroyos* or springs, or conducting them from the bosom of a high mountain, etc. The favors extended by the decree are enumerated by Escriche, and consisted in the main of remission of *tithes*, *first fruits*, etc. It is doubtful whether this decree was in force when California passed from under the sway of the Mexican rule. But, if so, Escriche adds: "Notwithstanding what has been said, no individual or corporation can withdraw from their source, or on their course, the waters of springs or rivers that from ancient times have irrigated other lands lower down, which cannot be despoiled," etc.

The last statement is based by the author upon the royal order of 1834, which, as is suggested, was never operative in Mexico. Upon principles recognized by the Mexican law, however, no one could be deprived of a right to the use acquired by *prescription* to waters actually employed by him, and it would appear, also, by the Mexican Code, no owner of water, "whatever his title," can entirely deprive of water a lower estate. Besides, the decree permitted the construction of ditches for "new irrigations," and speaks of rivers carrying great *quantities* of water. We are not prepared to say but that even where the *common law* prevails, provision may be made for the storing and distribution of waters, the result of extraordinary floods caused by the melting of the snows, or long-continued and heavy rains in the mountains or near the source of a river, since such an extraordinary freshet would not be the ordinary flow of the stream. However this may be, water could not be diverted, under the decree referred to, by an *ayuntamiento*, community, company, or individual, not a riparian proprietor, without "the previous corresponding permission of the government."

Thus, the waters of innavigable rivers, while they continued such, were subject to the common use of all who could legally gain access to them for purposes necessary to the support of life, but the Mexican government possessed the power of retaining the waters in their natural channel, or of conceding the exclusive use of portions of them to individuals or corporations, upon such terms and conditions, and with such limitations, as it saw fit to establish by law. The respondent here is not the successor in interest of an individual or corporation which acquired a property in the exclusive use of waters by compliance with the conditions prescribed by the laws of Mexico, or in accordance with municipal ordinances or regulations, or under any custom of the country. No city or pueblo existed on the alleged stream, and at the trial hereof no evidence was given of any special or general custom with respect to the particular stream, or with respect to all rivers in California. No general custom existed. Moreover, if it had ever existed, it would have continued only until abrogated by legislation.

It has sometimes been claimed that, by the modern civil law, the proprietor of land in which is the source of a stream may capture and absolutely control the waters, even after they have flowed beyond his boundaries in a natural stream. But Lord KINGSDOWN, in *Miner v. Gilmour*, 12 Moore, P. C. 131, said it did not appear that, as to riparian rights, any material distinction exists between the French law (prior to the Code Napoleon) and the English law. Sir JAMES COLVILLE refused to admit that, by the Dutch-Roman law, which governs in the Cape of Good Hope colony, the riparian right of a lower proprietor would not attach upon water which followed, in a known and definite channel, beyond the boundaries of the land within which its fountain arose. *Van Breda v. Silberbaur*, L. R. 3 P. C. 94.

In a very late case before the privy council, on appeal from the supreme court of the Cape of Good Hope, it was said to be *probable* that, by the Dutch-Roman law, the dominion of the owner of the source of a stream was subject to the rights which the English law recognizes in riparian proprietors to water flowing in a known and definite channel. *Commissioners of Hoek v. Hugo*, L. R. 10 App. 345.

5. *Upon the admission of California into the Union this state became vested with all the rights, sovereignty, and jurisdiction in and over navigable waters, and the soils under them, which were possessed by the original states after the adoption of the constitution of the United States.*

Since the admission of California into the Union the public lands of the United States (except such as have been reserved or purchased for forts, navy-yards, public buildings, etc.) are held as are the lands of private persons, except that they cannot be taxed by the state, nor can the primary disposition of them be interfered with.

Between the transfer of California to the United States, by the treaty of Guadalupe Hidalgo, and the admission of this state into the Union, no territorial government was here established. The purely municipal law of Mexico continued in force within this territory until modified or entirely changed by appropriate authority. By the treaty the public property of Mexico passed to the United States. It would seem that the latter accepted the cession of the property and sovereign rights in trust, (arising out of the very nature of our government,) to hold for the state or states which might be subsequently formed out of the territory. Whether so or not, California was admitted into the Union "upon an equal footing" with the original 13 states, and from that date she became seized of all the rights of sovereignty, jurisdiction, and eminent domain which those states possessed. When the revolution took place the people of each state became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, subject only to the rights since surrendered by the constitution to the general government. *Martin v. Waddell*, 16 Pet. 410. The navigable waters, and the soils under them, were not granted to the United States by any of the original states, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. *Pollard's Lessee v. Hagan*, 3 How. 212. The lands of the United States (not reserved or purchased for fortifications, etc.) are held, since the admission of the state into the Union, as are held the lands of private persons, with the exception that they are not taxable, by reason of the contract to that effect. Of course the state cannot interfere with the primary disposition of such lands by their owners. September 9, 1850, the act of congress was approved admitting the state of California into the Union "on an equal footing with the original states in all respects whatever," with the conditions that the state should

never interfere with the primary disposal of the public lands within its limits, nor tax them, and that the navigable rivers should be public highways as to citizens of all the states. 9 St. at Large, 453.

6. *Since, if not before, the admission of California into the Union, the United States has been the owner of all innavigable streams on the public lands of the United States within our borders, and of their banks and beds.*

A grant of public land of the United States carries with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title.

The original states only retained property in the navigable rivers, (subject to their free navigation by the citizens of all the states,) and the subjacent soils, because, by the common law, which prevailed in those states, innavigable streams were private, and their beds the property of riparian proprietors. By the Mexican law, however, innavigable streams were public property. It might be claimed that, as this property of the Mexican nation in non-navigable rivers and their beds was an incident to the sovereignty, it became vested in the state of California when the state was admitted into the Union. If this were admitted, it would follow that the United States has had no property in innavigable streams, their beds, and waters, and all attempts to deraign a title from the United States to waters appropriated on public lands, under the act of congress of 1866, or otherwise, must fail.

It may be maintained, at least plausibly, that the admission of California into the Union "on an equal footing with the original states" of itself operated an immediate transfer of the property in the innavigable rivers to the federal government, so that the property of the state was momentary. However this may be, on the thirteenth of April, 1850, the legislature of California had passed an act "adopting the common law," which reads: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state." St. 1850, p. 219. The validity of the acts of the first legislature of California, or of rights acquired under them even prior to the admission of the state, has never been questioned. Certainly, when constitutional, those acts became valid, and in operation for every purpose, from the date of the admission of the state into the Union.

It is urged that the statute quoted was designed and intended simply to furnish a *rule of decision* for the courts as to rights vested under other laws. We have endeavored to show that during the Mexican rule "all the inhabitants" of the territory did not acquire a vested right to the use of all the waters by virtue of their dedication to common use. If such right had vested, the peculiar language of the

statute would not have affected the question. If there is any ambiguity arising out of the use of the words "rule of decision" in the body of the act, we can refer to its title,—“An act adopting the common law.” And reading the act,—“the common law of England is hereby adopted,” etc.,—the act did not and could not operate to divest property rights previously acquired by private persons, nor any right of common use fixed by previous dedication. But while vested right could not be taken away, yet if the innavigable rivers and their beds belong to the state when admitted into the Union, the state could grant or surrender them to the riparian proprietors, of whom the United States was one. Giving full force to the proposition that a grant by the state should be construed more strongly against the grantee, we think, in view of the purpose of the act, (to adopt the appropriate rules of the common law as determinative rules when not in conflict with the constitutions and statutes,) and of the subsequent judicial history of the state, the act of April 13, 1850, should now be held to have operated (at least from the admission into the Union) a transfer or surrender, to all riparian proprietors, of the property of the state, if any she had, in innavigable streams, and the soils below them.

It has often been held by this court and its predecessors that a grant of a tract of land bounded by a river or creek not navigable, conveys the land to the thread of the stream; and from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California as the owner of innavigable streams and their beds; and, since the act of congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.

If the United States since the treaty with Mexico has been the owner of the innavigable streams and their beds, (in trust for the state, or absolutely,) or has been the owner thereof as a consequence of the act admitting the state into the Union, or of the state act of 1850, or as a consequence of both those statutes taken together, the same is true as to other riparian proprietors; at least since the date of the

first-named act. They have been recognized as such owners by our courts. Prior and subsequent to the enactments of the Civil Code with respect to appropriations of water, the rights to the use of water by private riparian proprietors, as between themselves, have repeatedly been judicially determined by reference to the common-law rules on the subject, which, as is said by counsel, differ somewhat from those of the Mexican law. And if the United States since the date of the admission of the state has been the owner of the innavigable streams on its lands, and of the subjacent soils, grants of its lands must be held to carry with them the appropriate common-law use of the waters of the innavigable streams thereon, except where the flowing waters have been *reserved* from the grant. To hold otherwise would be to hold, not only that the lands of the United States are not taxable, and that the primary disposal of them is beyond state interference, but that the United States, as a riparian owner within the state, has other and different rights than other riparian owners, including its own grantees.

The government of the United States has the absolute and perfect title to its lands. *U. S. v. Gear*, 3 How. 120; *Jourdan v. Barrett*, 4 How. 185; *U. S. v. Hughes*, 11 How. 568; *Irvine v. Marshall*, 20 How. 561; *Bagnell v. Broderick*, 13 Pet. 450; *U. S. v. Gratiot*, 14 Pet. 526. Unless, therefore, running waters are reserved, they pass by grant or patent of the United States. It was so held in *Vansickle v. Haines*, *supra*. The supreme court of Nevada cite *Cook v. Foster*, 2 Gilman, 652, *Wilcoxon v. McGhee*, 12 Ill. 381, and *Colvin v. Burnet*, 2 Hill, 620; and quote with approval the language of Mr. Angell, who says:

"The only mode by which a right of property in a water-course above tide-water can be withheld from a person who receives a grant of the land is by a reservation directly expressed or clearly implied to such effect. If the intention of the grantor is not to convey any interest in the water, he can exclude it by the insertion in the instrument of conveyance of proper words for the purpose of doing so; but in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance." 7 Nev. 266.

Whatever may be the weight, as authority, of *Vansickle v. Haines* in other respects, the statement that the grantee or patentee acquires from the United States—the absolute and unqualified owner of the public lands—common-law rights in the waters flowing through the land granted (except where the waters, or a portion of them, are reserved) has never been disputed.

7. *The state of California became the owner of the swamp lands, described in the complaint herein, on the twenty-eighth day of September, 1850.*

The state of California having been admitted into the Union on the ninth day of September, 1850, on the twenty-eighth of the same September the congress passed an act "to enable the state of Arkansas and other states to reclaim the swamp and overflowed lands within their limits," which reads:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that, to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, *and the same are hereby*, granted to said state.

"Sec. 2. That it shall be the duty of the secretary of the interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state of Arkansas, and, at the request of said governor, cause a patent to be issued to the state therefor; and on that patent the fee-simple to said lands shall vest in the said state of Arkansas, subject to the disposal of the legislature thereof: provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. That in making out a list and plats of the land aforesaid all legal subdivisions the greater part of which is 'wet and unfit for cultivation' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. That the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." 9 St. at Large, 519.

The lands claimed by the plaintiffs herein are admittedly swamp and overflowed, and no point was made by defendant that the lands had not been duly listed to the state prior to the certificates of purchase offered in evidence. Even if it had been made to appear that the lands had not been listed, the fact that they are swamp and overflowed would have shown that the state acquired a present vested right in them as of the date of the act of congress of September 28, 1850. *Railroad Co. v. Smith*, 9 Wall. 95. It is true that case turned in part on the language of the grant to the railroad company, which reserved lands "previously sold or disposed of." See *Railroad Co. v. Fremont Co.*, 9 Wall. 89. But the case clearly recognizes the act of 1850 as a grant to the state *in præsenti* of the lands which should subsequently be listed as swamp and overflowed by the secretary of the interior, or which should be proved to be such.

In the subsequent case (*French v. Fyan*, 93 U. S. 173) it was expressly said that nothing was decided in conflict with *Railroad Co. v. Smith*; the supreme court saying that in the opinion in the last-named case there is the strongest implication that if the secretary had made "an adverse decision" the evidence that the land there in controversy was in fact swamp and overflowed should have been rejected. In *French v. Fyan* it was held that the determination of the secretary that certain land was swamp and overflowed, and the patent issued thereon, were conclusive of the fact, and that the opposing party could not be permitted to prove that the land was *not* swamp land. Further, that the patent—the evidence that the land described in it had been identified as swamp and overflowed—related back and

gave certainty to the title of the date of the grant. The supreme court of the United States said: "This court has decided more than once that the swamp-land act was a grant *in presenti*, by which the title to those lands passed at once to the state in which they lay." The certificate or listing of the secretary, like the formal patent, relates back to the date of the act granting the lands. And so when the character of the land appears from the evidence identifying it as swamp and overflowed, it is established that the title to the particular land was vested in the state September 28, 1850, the date of the act granting all the swamp and overflowed lands. But such evidence that the land is swamp and overflowed is admissible in ejectment *only* where the secretary of the interior has failed to act, and is not admissible to overcome the effect of a patent issued to a settler under the pre-emption laws. *Ehrhardt v. Hogaboom*, 115 U. S. 67; S. C. 5 Sup. Ct. Rep. 1157. The state, then, had the title to the lands described in the complaint herein from the date of the act referred to until the sale of the same to the plaintiffs or their assignors.

NOTE. We have deemed it unnecessary to consider (under a separate head) the suggestion, either that there cannot be a water-course through swamp land, or that the defendant was empowered to drain the plaintiffs' lands for them, and, in doing so, to divert a flowing stream from the lands of plaintiffs, and from all the lands lying on the stream above or below the plaintiffs' lands. The state took the swamp lands with the political obligation to reclaim them after they were sold. It may be doubted whether the implied promise on the part of the state to apply the proceeds of sales of such lands exclusively to their reclamation was legally a *condition subsequent*, the failure to perform which would authorize a forfeiture of the grant. That, however, would be a question between the United States and the state,—a controversy in which the defendant here would have no interest. The state's grantee of swamp lands takes the full title, subject to the power of the state to reclaim the land, and for that object to impose and collect assessments upon it; subject, also, (perhaps,) to a forfeiture of his own and the state's title, in a proceeding inaugurated by the United States, if the land should not be reclaimed by the state. It may be added there are very grave doubts whether, upon a fair interpretation of the state statutes providing for reclamation, the barring of the flow of a regular and defined stream from the lands below, not swamp, is contemplated, or whether the state would have power, by any statute, to authorize such a proceeding. The statute seems to have in view levees along the sides of water-courses, and not across them.

8. *It has never been held by the supreme court of the United States, or by the supreme court of this state, that an appropriation of water on the public lands of the United States (made after the act of congress of July 26, 1866, or the amendatory act of 1870) gave to the appropriator the right to the water appropriated as against a grantee of ripa-*

rian lands, under a grant made or issued prior to the act of 1866, except in a case where the water so subsequently appropriated was reserved by the terms of such grant.

Since, as before, September 28, 1850, the United States has been the owner of lands in California, with power to dispose of the same in such manner, and on such terms and conditions, (not interfering with vested rights derived from the United States,) as it deemed proper. But neither the legislation of congress with respect to the disposition of the public lands, nor its apparent acquiescence in the appropriation by individuals of waters thereon, *subsequent* to the act of September, 1850, granting the swamp lands to the state, can affect the title of the state to lands and waters granted by that act. Neither the supreme court of the United States, nor the supreme court of California, has ever held in opposition to this view.

In *Vansickle v. Haines* the plaintiff had diverted one-fourth of the water of Daggett creek in the year 1857. He made the diversion at a point then on the public land, but which, in 1864, was patented by the United States to the defendant, Haines. In 1865 Vansickle obtained a patent for his own land, where he used the water. In 1867 Haines constructed a wood flume on his land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. The supreme court of Nevada held that the plaintiff, by his appropriation of water *prior* to the date of defendant's patent, acquired no right which could affect that grant; and that while the act of congress of July, 1866, protected those who at that time were diverting waters from its natural channels on the public lands; and while all patents issued or titles acquired from the United States since that date are obtained subject to the rights of water by appropriation existing at that time,—yet, with respect to patents for riparian lands issued *before the act of congress*, the patentee had already acquired the right to the flow of the water, with which congress could not interfere.

In *Broder v. Water Co.*, 101 U. S. 274, it appeared: In the year 1853 the defendant completed a canal, through which it had continuously conducted waters and distributed them for mining, agricultural, and other uses; that a portion of the land through which the canal ran was included in the land granted to the Pacific Railroad (under whom plaintiff claimed) by the act of July 2, 1864; that the plaintiff also claimed as a pre-emptor, the inception of his claim as such being a declaratory statement filed August 6, 1866. The court held that the plaintiff was not entitled to have the canal running through his land abated as a nuisance by reason of his pre-emption right, because previous to the initiation of proceedings to secure pre-emption, on the twenty-sixth of July, 1866, (14 St. at Large, 251,) congress had enacted a statute, the ninth section of which contained the declaration "that wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other

purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed." The court also held that the plaintiff was not entitled to relief under his deraignment of title from the railroad company, because the grant to the company of July 2, 1864, contained the following reservation:

"Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other *lawful claim*, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist."

In the opinion of the court the section of the act of 1866 above quoted "was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one," and that the claim of the defendant to the right of way was such a "lawful claim" as was unaffected by the grant to the railroad company made before the act of 1866 was passed.

Broder v. Water Co. may appear to be in conflict with *Vansickle v. Haines*. But is there any real conflict? It will be observed that the *Broder Case* turned (so far as the plaintiff's title from the railroad company was concerned) on the reservation clause in the act constituting the grant to the company, and the court held that "a lawful claim," within the meaning of the reservation in the act of 1864, was "any honest claim evidenced by improvements and other acts of possession." The construction given to the language of the reservation, of course, implies that those who appropriated lands or waters on the public lands, prior to the acts of 1864 or 1866, had not been treated by the government in those acts as mere trespassers, but as there by license. It does not imply that they had acquired any title which could be asserted against the United States or its grantees, except so far as their occupations of land or water were protected and reserved to them by acts of congress.

In *Broder v. Water Co.* the claim of the appropriator was recognized in the grant to the railroad company, and prior to the initiation by the plaintiff of proceedings to secure a pre-emption. In the case at bar the grant of the lands to the state (containing no reservation of the waters of flowing streams, express or to be implied from its terms) was made nearly 30 years before the first appropriation of water by the defendant, which was *after* the act of congress of July, 1866, and the amendatory act of 1870. Copp, Min. Dec. 1873-74, 296.

In *Osgood v. Water Co.*, 56 Cal. 571, it was held that where a person acquired a right, by appropriation, to water upon the public lands of the United States, *before* the issuance of a patent to another for

lands through which the stream ran, the patentee's rights were, "by express statutory enactment, subject to the rights of the appropriator." The court cited the amendatory act of congress above referred to, the seventeenth section of which reads:

"That all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory."

At the trial of *Osgood v. Water Co.* in the lower court the plaintiff testified that he filed his declaratory statement as a pre-emptor, June 18, 1868, but the court found that defendant's appropriation was prior to that date. There is nothing in that case which precludes us from holding that a pre-emption claim relates to the pre-emption certificate, so as to give the pre-emptor the better right as against an appropriation of water made after the certificate is given to the pre-emptor. The late Prof. Pomeroy, in one of a series of able articles published in the *West Coast Reporter*, questions whether the occupant of public lands, with the qualifications of a pre-emptor, can be deprived of the flow of the stream by an appropriator who commences the acts leading to appropriation after the occupation of the other begins. It is not necessary to consider this proposition in the present case. Two of the members of this court dissented from the conclusion reached in *Osgood v. Water Co.*, on the ground that the waters had not in fact been appropriated in accordance with the local rules or regulations, or with the rulings of the courts. See 2 *Pac. C. Law J.* 322.

Both *Broder v. Water Co.* and *Osgood v. Water Co.* are (by strongest implication) authority for the statement that one who acquired a title to riparian lands from the United States prior to the act of July 26, 1866, could not (in the absence of reservation in his grant) be deprived of his common-law rights to the flow of the stream by one who appropriated its waters after the passage of that act.

Much stress is laid by counsel on the language used in *Broder v. Water Co.*, *supra*, with reference to the clause in the act of 1866, that water-rights recognized or acknowledged by the local customs, etc., "shall be maintained and protected," "was rather a recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." But this language is to be interpreted in view of the context. The language cannot be construed as a recognition by the court of vested rights in appropriators of water, created by mere appropriation and independent of statute. The case proceeds on the assumption that neither the plaintiff nor the defendant had any rights except such as were granted or recognized by acts of congress. It holds that appropriators of water from streams on (or flowing to) the lands granted by the act of 1864 were "recognized" or admitted to have rights which were protected by that

act, because the act by its terms reserved from the grant to the railroad company every "lawful claim;" that one who had been permitted to divert water from those lands had a claim which was not in itself unlawful; and that the reservation included "*every honest claim evidenced by acts of possession.*" There is no statement in the opinion in *Broder v. Water Co.*, that except for the reservation found in the act of 1864, and the provision in the act of 1866, the defendant would have any right to the water as against the grantees named in the act first named, or their successors in interest. The court holds that Broder acquired no right by virtue of his pre-emption, because his proceedings to secure it were begun after the act of 1866, which recognized the prior appropriation of the water as being a right in the appropriator, and that Broder acquired no right under the railroad grant, because the water previously appropriated was reserved in that grant.

9. *The rights of the state under the grant of September 28, 1850, do not depend upon, nor are they limited by, the decisions of the state courts with respect to controversies upon the public lands of the United States. Those decisions do not enter into, nor operate upon, the subsequent legislation of congress in such manner as to require that the legislation (or its affirmance of rights recognized by the state courts as existing between occupants upon the public lands of the United States) must be construed as an attempt to deprive the state of its vested rights.*

If the decisions mentioned can be referred to for any purpose, semble, that the occupant of a tract of riparian land (arable or grazing) on the public domain is by such decisions presumed to have received a grant of the flowing water, to the extent of the common-law right to the use of such water as it flows through the land.

And if the doctrine as to adverse claims upon the public lands, as declared by these decisions, be extended to lands granted to the state, it cannot affect the title or estate of grantees of the state, the water not being reserved in the grant, or in the legislation authorizing the grant. The doctrine is applicable alone to actions in which both parties claim only by possession.

It is insisted that the "doctrine of appropriation" is not, and never was, applicable to public lands, state or United States, in California. It may be conceded that while lands continue public lands, and in controversies between occupants of land or water thereon, the common-law doctrine of riparian rights has no application. But where one or both of the parties claim under a grant from the United States, (the absolute owner, whose grant includes all the incidents of the land, and every part of it,) it is difficult to see how a *policy* of the state, or a general practice, or rulings of the state court with reference to adverse occupants on public lands, can be relied on as limiting the effect of grants of the United States, without asserting that the state, or people of the state, may interfere with "the primary disposal of the public lands."

It has been urged that the courts of this state should adopt the doctrine of *appropriation* as it is accepted in Colorado; but, if it be conceded that the Colorado decisions can be sustained on any legal principle, the legal conditions here are different. The sixth and seventh sections of article 16 of the constitution of that state read:

"Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right, as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

"Sec. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation."

In *Coffin v. Left-hand Co.*, 6 Colo. 447, *Schilling v. Rominger*, 4 Colo. 102, is referred to apparently as authority for the statement that, in the absence of express statute to the contrary, the first appropriator of a natural stream has the better right, as against a subsequent patentee of the lands below. But *Schilling v. Rominger*, was a contest between appropriators of land and water on the public lands, none of whom had any title other than possession. In *Coffin v. Left-hand Co.*, both the appropriation of the water and the patent to the riparian land preceded the act of congress of 1866, and of course the adoption of the state constitution in 1876. The appropriation of the water was prior to the patent. So far as the decision does not depend upon the statutes of the territory of Colorado it is in conflict with *Vansickle v. Haines*; the learned court being of the opinion that the Nevada case was overruled by *Broder v. Water Co.* But as we have seen (*supra*) in *Broder v. Water Co.* it was held that in the grant of lands to the railroad company the water was reserved for the benefit of the prior appropriator. And even if the case last mentioned could be held to have decided that the right acquired by one who appropriated water on the public lands *prior* to a grant to another of land over which the stream would flow (made before the act of 1866) was a vested right, protected, although not mentioned nor referred to, in the grant, still there is nothing in that case which would give preference to an appropriation of water made, as in the case at bar, long after the grant of the land.

If, by the act of congress admitting Colorado into the Union, with a constitution containing the provisions above recited, the United States could abandon the primary disposal of its lands to the extent that not only every subsequent, but every prior, grant of land would be subject to an appropriation of water made prior to the grant, this would not affect the question as applied to the facts of the case now

before us, since our constitution does not contain provisions like those in the constitution of Colorado, and here the grant of the land preceded the appropriation; and so if the United States is bound by the territorial statutes, as construed by the supreme court of Colorado. In *Coffin v. Left-hand Co.* the appropriator was given the preference, by virtue of certain statutes of the territory of Colorado, passed in 1861, 1862, and 1864. It may be that in interpreting these statutes the court was somewhat influenced by the general proposition already laid down or assumed in its opinion, that, in the absence of express statute, the prior appropriator of water had the better right as against all the world. But the territorial statutes were so construed *as to give the right* to the prior appropriator. It would seem clear, however, that the rights of parties who claimed title under grant from the United States of parts of the public domain must be determined by reference to laws of the United States relating to the disposition of its domain; and this fact is recognized by the supreme court of Colorado, which appeals to *Broder v. Water Co.* as supporting its interpretation of those laws.

It may be suggested, however, that the rulings of the courts of California with reference to possessory rights on the public mineral lands enter into, and in some manner limit, the effect of grants of land by the government of the United States, made, as is assumed, under statutes enacted in view of the local law, and of the varying rules and regulations of mining districts. The statutes passed long afterwards cannot affect rights acquired by the state by virtue of a grant made in 1850, nor can the subsequent *policy* of the United States (which is supposed to be indicated by a failure, by express laws, to prohibit the occupation of portions of its lands for mining, etc., and by the omission of the executive officers to attempt to remove miners and other occupants by force) be held to affect the rights acquired by the state through the grant of 1850.

The law of California, with reference to priority of possession on the public lands, has been so long established that we are apt to forget the whole system was built upon a presumption entertained by the courts of a permission from the United States to occupy. It was said by HEYDENFELDT, J., in 1856:

"One of the favorite and much-indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men's differences, a presumption is often indulged where the fact presumed cannot have existed. In support of this proposition I will refer to a few eminent authorities. * * * In these cases presumptions were indulged against the truth,—presumptions of acts of parliament and grants from the crown. It is true the basis of the presumption was length of time, but the reason of it was to settle disputes, and to quiet the possession. If, then, lapse of time requires a court to raise presumptions, other circumstances which are equally potent and persuasive must have the like effect for the purposes of the desired end; for lapse of time is but a circumstance or fact which calls out the principle, and is not the principle itself. Every judge is bound to know the history, and the leading traits which enter into the history, of the country

where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must therefore know that this state has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little as yet has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously from a period anterior to the organization of the state government to the present time. Upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes, and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses: and, indeed, have done, in the various enterprises of life, all that is useful and necessary in the high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands, and the government of the state within whose sovereign jurisdiction they exist. In the face of these notorious facts the government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the state. The state government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them, in some instances, and recognized them in all. Now can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the presumption of a grant of right, arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both. Possession gives title only by presumption. Then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed." *Conger v. Weaver*, 6 Cal. 556, 557.

Both the right to appropriate water on the public lands, and that of the occupant of portions of such lands, are derived from the implied consent of the owner, and, as between the appropriator of land or water, the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority. *Irwin v. Phillips*, 5 Cal. 140. Since the United States, the owner of the land and water, is presumed to have permitted the appropriation of both the one and the other, as between themselves the prior possessor must prevail. None of the early cases intimate that the occupant of land bordering on a stream was presumed to have any less rights in the usufruct of the water than the absolute owner of the land so situated, or that the presumption in his favor was limited to the land, without the water, except where the water had been already appropriated.

It was said by Chief Justice MURRAY, in *Crandall v. Woods*, 8 Cal. 143:

"If the rule laid down in *Irwin v. Phillips* is correct as to the location of mining claims and water ditches for mining purposes, and *priority* is to de-

termine the rights of the respective parties, it is difficult to see why the rule should not apply to all other cases where land or water had been appropriated. The simple question was that as between persons appropriating the same land, or land and water both, as the case might be, that the subsequent appropriator takes subject to the rights of the former. But an appropriation of land carries with it the water on the land, or a usufruct in the water; for in such cases the party does not appropriate the water, but the land covered with water. If the owners of the mining claim, in the case of *Irwin v. Phillips*, had first located along the bed of the stream, they would have been entitled, as riparian proprietors, to the free and uninterrupted use of the water, without any other or direct act of appropriation of the water as contradistinguished from the soil. If such is the case, why would not the defendant, who has appropriated land over which a natural stream flowed, be held to have appropriated the water of such stream, as an incident to the soil, as against those who subsequently attempt to divert it from its natural channels for their own purposes. One who locates upon public lands with a view of appropriating them to his own use becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and the fact is established that he acquired his right subsequent to those of others, then, as both rest for their foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule *qui prior est in tempore potior est in jure* must apply."

The learned judge then proceeds to speak of the alleged evil consequences of the rule he had laid down, saying:

"Let us examine the effect of such a rule for a moment, and see if the consequences which the respondent predicts, viz., the destruction of the use and value of ditch property in the mines, will necessarily flow from it. A. has located mining claims along the bed of a stream, before any water ditch or flume has been constructed; will any one doubt that he should have the free use of the water, as against subsequent locators of either mining claims or canals? Or, suppose he had located a farm, and the water passing through his land was necessary for the purposes of irrigation, is not this purpose just as legitimate as using the water for mining? It may or may not be equally as profitable, but irrigation for agricultural purposes is sometimes necessary to supply natural wants, while gold is not a natural, but an artificial, want, or a mere stimulant to trade and commerce. If it is understood that the location of land carries with it all the incidents belonging to the soil, those who construct water ditches will do so with reference to the appropriations of the public domain that have been previously made, and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators." Id. 143, 144.

Crandall v. Woods very distinctly decides that as between an occupant of riparian land (part of the public lands of the United States) and a subsequent appropriator of the waters of the stream the former may assert the riparian right. It is claimed, however, that so far as that case decides that the riparian occupant may, under such circumstances, assert a right to the flow of the water beyond the extent to which he has actually appropriated the same for irrigation or other

useful purpose, it has been reversed in later adjudications, if not expressly, yet by necessary implication.

In some of the subsequent California cases, where the riparian owner claimed in his pleading, and relied at the trial, on an actual prior appropriation of water, the court confined its inquiry to the existence or non-existence of the facts alleged.

Thus, in *McDonald v. Bear River*, 13 Cal. 220, one of the parties, although in possession of a tract through which the water-course ran, claimed an actual prior appropriation of water for turning his mill. It may be observed, however, that, at the common law, the extent of the mill-owner's right might depend in part on the actual erection and size of his dam, etc.; and, since the exercise of the particular right might depend on affirmative acts, the case of water for a mill might differ perhaps in its nature, or extent rather, from that of the riparian owner whose lands are naturally irrigated by the flow.

American Co. v. Bradford, 27 Cal. 360, was an action at law for damages, in which the plaintiff claimed as an appropriator of water through a ditch. The defendants answered that long prior to the location of plaintiff's ditch and dam they had located and worked in the creek certain mining claims, whereby they became entitled to the use and possession of the waters of the creek, or so much thereof as might become necessary for their mining claims, *as prior appropriators of the water*. Moreover, the general verdict in favor of the plaintiff included a finding that the mining claims were not located and worked prior to the plaintiff's appropriation.

In *Yankee Jim Co. v. Crary*, 25 Cal. 504, it was said that the use of a water-course on the public mineral lands may be held, granted, abandoned, or lost by the same means as a right of the same character *issuing out of lands to which a private title exists*.

In *Hill v. King*, 8 Cal. 336, and *Bear River, etc., v. New York Min. Co.* Id. 329, it was held that where the constructor of a ditch had diverted water he could not complain of the muddying of it by the working of a mine above. To permit this, the court said, would be practically to deprive the miner of the use of the water in his business; and any injury from the incidental fouling of the water was *damnum absque injuria*.

But in *Hill v. Smith*, 27 Cal. 476, where water was appropriated through a ditch, and a mining claim was afterwards worked above, it was decided that the miner had no right to work his claim in such manner as to mingle mud and sediment with the water so as to fill up the ditch and reservoirs, and thus to lessen their capacity, and increase the expense of cleaning them out; that the prior appropriator of the water was entitled to its use and enjoyment *for the purposes for which he claimed it*.

Pope v. Kinman, 54 Cal. 3, was an action to quiet title to the flow of a stream, the plaintiff being the owner of riparian lands by grant from Mexico. Held, that the plaintiff had an interest in the living

stream which flowed over his land, called the "riparian right;" and that the defendant, by mere diversion, could not deprive him of that interest or usufruct.

Zimmer v. San Luis W. Co., 57 Cal. 221, not only recognizes the riparian right, the land not being public land, but holds that a recital in a deed that the grantee is about to divert the waters of a certain creek, (which flows through the grantor's land,) and to appropriate the same, followed by a grant of a right of way to conduct water over the land of the grantor, does not estop the grantor from denying the right of the grantee to divert the water.

As we understand *Ferrea v. Knipe*, 28 Cal. 340, the appellant made the claim that the doctrine of "appropriation," applicable to controversies on the public lands, was also the controlling doctrine in a suit between private owners on the same stream. The court held that the common-law rule obtained, and that the inferior riparian proprietor was entitled to the natural flow, undiminished, except by the use of the superior proprietor for domestic purposes and reasonable irrigation.

So far as the cases cited relate to the adverse claims of possessors of land or water on the public lands, no one of them, by its terms or by necessary implication, overrules *Crandall v. Woods*. It is intimated, however, that that case should now be overruled as not in harmony with the reasons which induced the courts to adopt the rule giving the preference to the prior possessor. It is said that the right acquired, with great expenditure of money and labor, by the ditch-owner, *ought not* to be restricted by the occupant of a tract of arable or grazing land. The suggestion repeatedly returns that the amount of money invested by the respective parties should have its influence in determining their rights, or at least in fixing the rule by which their rights are to be determined. The same suggestion (that the amounts expended under the implied license of the United States should control in fixing the rule of right) was urged in the *Debris Cases*, but seems to have received little consideration in the courts of the state, or of the United States. In the case of an occupant of land, as in the case of an appropriator of water, the decisions are based on the presumption that the United States has made a grant which in fact it has not made. The effect of the presumed grant of land over which water flowed was logically ascertained (in *Crandall v. Woods*) by reference to the principles of the common law, according to which every part of the land, and all its incidents, passed by the grant. If we were prepared to say that *Crandall v. Woods* was wrongly decided, still, there is good reason why, if wrongly decided, it ought not to be overruled in this case. The rulings of the state courts, with reference to controversies on the public lands while they remain such, cannot of themselves operate to deprive the state of the benefit of the grant of the waters of streams flowing over the land granted by the act of September 28, 1850; nor operate upon subsequent legislation of

the congress of the United States, so that such legislation shall retroact and deprive the state of its vested rights. If the decisions referred to are applicable to lands belonging to the state, yet, since they are applicable only to controversies between adverse claimants to the possession, they do not limit the right or title of the grantees of the state. The title of the state's grantees depends upon the state laws providing for the disposition of its lands.

10. *The common law as to the riparian right was not abrogated by certain statutes of the state applicable to a district of country within which is included the county of Kern, nor was the state estopped by such statutes from asserting its right to the flow of a natural stream from that district to and over the lands granted to the state by the act of congress of 1850.*

From what has been said it appears that the respondent has not derived from the *United States* a right to divert the water of a flowing stream from the lands granted to the state in 1850, or from the premises of a grantee of the state to a portion of those lands. It is in order to inquire whether the state itself has authorized such diversion.

It is claimed that, so far as the territory comprised within Kern county is concerned, the common-law doctrine of riparian rights, if it ever existed, does not exist, but has been repealed, and the law of "appropriation" adopted, by certain statutes. The county of Kern was created by the act of April 2, 1866, which took effect June 2, 1866. It was formed of portions of Tulare and Los Angeles counties. On the fifteenth day of May, 1854, an act was passed (St. 1854, p. 76) providing for the election in each township of certain counties (including Tulare and Los Angeles) of a board of three "water commissioners" and an overseer. The commissioners were to examine streams, and apportion their waters "among the inhabitants of their district," on petition to lay out and construct ditches, etc. The overseers were to execute the orders of the commissioners, superintend works directed by them, and see that the water was kept clear and the ditches in repair. Section 14 of the act provided: "No person or persons shall divert the waters of any river, creek, or stream from its natural channel to the detriment of any other person or persons located below them on any such stream." February 19, 1857, April 28, 1860, and again, February 21, 1861, the act of May 15, 1854, was amended, but not so as to affect any question involved in the present case. St. 1857, p. 29; St. 1860, p. 335; St. 1861, p. 31. The second, third, and fourteenth sections of the act of May, 1854, were amended by the act of April 10, 1862. St. 1862, p. 235. The second section, as amended, provided that the supervisors, instead of the county judge, should order the election of the commissioners, etc. The third section gave the commissioners power to determine what water-courses ought "to be appropriated to the public use," to apportion the water, etc. And the fourteenth section, as amended, (the third section of the amendatory act,) declared:

"No person or persons shall divert the waters of any river, creek, or stream from its natural channel, *to the detriment of any other person or persons located below them on any such stream*, unless previous compensation be ascertained and paid therefor, under the provisions of this act, or under the provisions of other laws of this state, *authorizing the taking of private property for public uses.*"

It would be difficult to invent a combination of words which would more explicitly recognize a property to the flow of the stream in the riparian owners below the point of diversion.

The statute of 1854 and the amendments authorized (or attempted to authorize) the commissioners to decide whether a water-course should be condemned or "appropriated" to the public use, and to divert and apportion the waters of the stream so appropriated. Evidently, by the persons who are not to be detrimented without compensation, is meant the inferior riparian proprietors, whose property in the waters may be taken for the "public use" on payment of due compensation, according to the laws of the state "authorizing the taking of *private property* for public uses." If not they, whom else? The scheme, if valid, necessarily excludes any diversion at all by a private person of waters of a stream "appropriated to the public use" by the commissioners, and any diversion or appropriation through ditches other than those made under the direction of the commissioners. The persons, then, who are prohibited from diverting water to the injury of those below, except on due compensation, are the commissioners, and those acting under command of the commissioners. Nor can it be said that everybody else might be made to suffer detriment without compensation by diversion of water by the commissioners, except only those persons who had "appropriated" waters of the stream prior to the act of 1854, and who continued to use the same. If the intention had been to protect, or rather to recognize, the rights of that class only, (if any such class existed,) we cannot but believe that the purpose would have been expressed in appropriate language. The language of the provision is sweeping, and while, perhaps, broad enough to include non-riparian proprietors who had diverted water prior to the act, is peculiarly applicable, and certainly includes those who had acquired the title to riparian lands prior to a diversion, and also includes prior riparian occupants,—*"no person or persons shall divert,"* etc. The term "location" has been very generally applied to occupations of portions of the public domain, while diverters of waters have been called, and throughout the elaborate briefs of counsel herein are called, "appropriators." The amendatory statute not only recognizes the riparian rights of those in possession of lands through which the stream "appropriated to public use" may pass, but is a legislative construction of the words (if any such construction were needed) found in the fourteenth section of the original act of 1854,—*"to the detriment of any person or persons located below them on such stream."*

The act of April 4, 1864, (St. 1863-64, p. 375,) provided for the election of three water commissioners in the county of Tulare, etc. It also contains the clause: "No person or persons shall divert the waters of any river or stream from its natural channel to the detriment of any person or persons located below them on the same stream." Section 10. March 20, 1866, certain sections of the act of 1864 were amended. St. 1865-66, p. 313. By the amendments the water commissioners and overseers were shorn of their powers and duties. For the first time water "companies," and the "president or authorized agents" of such, are spoken of. The commissioners were no longer required, upon the petition of "those interested," to lay out ditches and apportion the water "among the persons using the same," in proportion to the amount of land "each person may wish to irrigate;" no longer empowered to levy a labor tax on such persons; and no longer required or permitted to publish a schedule of the number of hours during which each of such persons should be entitled to use water. Their duty was simplified, and was limited to the appointment, as overseer of a ditch, of *the person designated by the owners of such ditch*. The services of the commissioners, instead of being paid for, as provided in the act of 1864, out of a tax collected of those supplied in proportion to the quantity of water used by each, were to be compensated "by the parties requiring their services." Section 4. And, in this connection, it may be remarked, it was prudently provided: "No ditch shall hereafter be taken out of any stream, in the waters of which different persons have an interest, without leave of said commissioners." And by the amendments (sections 3, 4) the *overseers* no longer had the duty imposed upon them of examining ditches, or of estimating the labor necessary to put them in repair, or of reporting the same to the commissioners, together with the capacity of the ditches, and the quantity of ground irrigated by each, or of ascertaining that the water was used as apportioned, and that the required labor was properly expended. Instead of all this, the overseers were simply to execute the orders of the persons employing them, by whom they were to be paid "such compensation as may be agreed upon."

Thus, by the amendatory act, the commissioners and overseers became the mere agents of the owners of ditches, or of "companies." For section 5 of the act of 1864 was substituted matter foreign to the original section, the substituted matter being:

"Each overseer shall, every three months, (each counting from the date of his appointment,) make up a statement in writing of the number of days that he has been engaged in the discharge of his duties, together with the amount due him as compensation therefor; and, upon the approval of the same by the *president or authorized agent of the company employing him*, shall apportion the same to the different members of such company *pro rata*, in proportion to the interest of each therein; and thereupon shall have the right of action against each owner in the ditch for which he is overseer for the amount so apportioned to such owner." St. 1865-66, p. 313.

And by section 6 of the act of 1866 (amending section 7 of the act of 1864) it is provided:

"Whenever a majority in interest of the owners in any ditch company, or their authorized agent, shall deem it necessary to repair, *enlarge, or extend* their ditch, they shall cause a notice, either written or verbal, to be served upon each owner therein, specifying a time to commence work thereon; and any owner therein neglecting or refusing to perform his proportion of such labor, or pay his proportion of the cost thereof, shall forfeit his right to the use of any water from such ditch until such time as he pays the same to the person or persons performing his proportion of such labor, together with 10 per cent. per month thereon additional. The number of hours constituting a day's labor, and the value thereof, shall be determined by the respective water-ditch companies in the rules and regulations they may severally adopt," etc. St. 1865-66, p. 314.

The act of 1864, then, as amended by the act of 1866, declares the law which, as claimed by counsel, has been substituted for the common law. But the act as amended (if it be conceded to be valid) does not adopt any general rule of appropriation. It seems to have been studiously prepared in the interest of the companies then existing, with a proviso that the commissioners—employed and paid by those of such companies as might choose to employ them—*may permit* new ditches to be dug. If the act of 1866 is in force, it should at least be made to appear that the defendant has acquired rights under it. If the act could be construed as declaring the assent of the state to the diversions of water then existing, or to such diversions as might subsequently be made with the consent of the commissioners named in the act, the assent of the state was limited to such diversions. It nowhere appears that the respondent obtained the consent of the commissioners to the construction of its works; and, as we have seen, the act expressly prohibits any new ditch or canal "without leave of said commissioners." Section 2, subd. 3. Sections 7 and 8 relate to the internal management of the companies or corporations, the obligations of its members to each, and the mode of enforcing them. The rest of the act provides for the discharge of functions by the commissioners and overseers as servants of the companies.

The intent of the legislature to change the previous law as to riparian rights, or to estop the state and its grantees from asserting them, ought to be made to appear distinctly. But the saving clause of section 10 of the act of 1864 was not repealed by the act of 1866, and that section prohibits any diversion to the detriment of those located below on the stream. Moreover, section 10 of the act of 1864 is almost precisely like section 14 of the act of 1854 and the first clause of section 3 of the act of 1862; and the first clause of section 3 of the act of 1862 is interpreted legislatively, by the last clause of the same section, as intended to protect the lower riparian proprietor, except that his property right in the water might be condemned, on due compensation, "under the provisions of the laws of this state au-

thorizing the taking of private property for public uses." St. 1862, p. 235.

The omission of the last clause of the sentence in the subsequent laws is not to be construed as a withdrawal of all protection from the riparian owners, (among whom might be other persons than the state,) but rather as indicating an intention to make that protection absolute. It is to be presumed that in amending the section the members of the legislature were influenced rather by a doubt of the validity or propriety of its last clause than by an intent arbitrarily to take from the riparian proprietors a valuable right, or to deprive a whole class of a right they had previously enjoyed; and the omission should thus be construed, even if it might be held, as matter of law, that the deprivation of the right could not constitutionally be enforced against those who had already located on the stream when the statutes were passed. In ascertaining the meaning of the law we find that the protection accorded was clearly intended to apply to locations already made when each of the statutes was passed, and to locations which should be made prior to any subsequent appropriation.

11. *Section 1422 of the Civil Code ("the rights of riparian proprietors are not affected by the provisions of this title") is protective, not only of riparian rights existing when the Code was adopted, but also of the riparian rights of those who acquired a title to land from the state after the adoption of the Code, and before an appropriation of water in accordance with the Code provisions.*

Neither a grantee of the United States, nor the grantee of a private person, who was a riparian owner when the Code was adopted, need rely for protection on section 1422. Such persons are protected by constitutional principles.

The state might have reserved from her grants of land the waters flowing through them for the benefit of those who should subsequently appropriate the waters; but the state has not made such reservation.

The water-rights of the state, as riparian owner, are not reserved to the state by section 1422, because (wherever the state has not already parted with its right to those who have acquired from her a legal or equitable title to riparian lands) the provisions of the Code confer the state's right to the flow on those appropriating water in the manner prescribed by the Code.

It is contended by respondent that the Civil Code gives to it a right to the water superior to that of the riparian proprietor below; that, as against an appropriator under the Code, one who has acquired a title to lands from the state (subsequently to the Code, although prior to the water appropriation) has no right in or to any of the water.

Title 8, pt. 4, div. 2, Civil Code, reads:

"Sec. 1410. The right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation.

"Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

"Sec. 1412. The person entitled to the use may change the place of diversion; if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

"Sec. 1413. The water appropriated may be turned into the channel of another stream, and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

"Sec. 1414. As between appropriators, the one first in time is the first in right.

"Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein: (1) That he claims the water there flowing to the extent of [giving the number] inches, measured under a 4-inch pressure. (2) The purposes for which he claims it, and the place of intended use. (3) The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"Sec. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

"Sec. 1417. By 'completion' is meant conducting the waters to the place of intended use.

"Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

"Sec. 1419. A failure to comply with such rules deprives the claimant of the rights to the use of the water as against a subsequent claimant who complies therewith.

"Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

"Sec. 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title.

"Sec. 1422. *The rights of riparian proprietors are not affected by the provisions of this title.*"

The fourth section of the Civil Code declares that the rule that statutes in derogation of the common law shall be strictly construed has no application to the Code. And it is added: "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

Counsel for respondent contend that section 1410 of the Civil Code promulgates a general law declaring the doctrine of appropriation to be the law of the land, and argue that, if it be admitted, the legislature could not divest the owner of the banks of a water-course of his riparian rights; the doctrine of appropriation was adopted as the general law, applicable to all public lands of the state and of the United States from the point of time when section 1410 was enacted; and, it is said, the whole purpose of section 1422—"the rights of

riparian proprietors *are not affected* by the provisions of this title"—is subverted by saving rights *then* vested. It is urged that the words "rights of riparian proprietors" are used either in a generic sense, as indicating that principle of law known generally as the doctrine of riparian rights, or else they are used in the more limited sense of private rights of individuals who then (when the Code was enacted) owned lands on the banks of streams whose source was on, or which flowed over, public lands; that it is too self-evident for serious question that the words cannot have been used in the more enlarged sense; for, give them that interpretation, and you have, in the same statutory enactment, a declaration of two diametrically antagonistic principles,—the doctrine of appropriation and the doctrine of riparian rights,—doctrines which cannot co-exist. But, it is said, giving the words the other and more restricted interpretation, each and all parts of the statute harmonize one with the other, and the declaration of section *four* is respected; that the law of the state being appropriation, its grant of the land, made after the Code enactment, carries with it no right to the water; for since such right can only be derived from some existing law, and the Code has abrogated or repealed the law of riparian rights, (except to the extent of preserving those then existing,) there is no law under which the right to the water as part and portion of the title granted can arise.

As stated above, it is claimed by respondent that by the provisions of the Civil Code the doctrine of appropriation was adopted as the general law of the state, applicable to all *public lands* of the state and the United States, from the time section 1410 was enacted. But section 1410 is not limited in its application to the *public lands*. Subject to the saving or reservation clause of section 1422,—whatever that section may mean,—section 1410 declares the law applicable throughout the state. It seems to be admitted that (conceding the rights of riparian proprietors to be measured by the common law) riparian rights already vested were not taken away by section 1410, and could not be taken away, except for the public use and on due compensation. It must follow, independent of section 1422, that a purchaser from one who was a riparian owner when the Code provisions took effect, by purchase made after the Code enactments, would acquire all the estate and property of his vendor. Otherwise, private property would be taken without due process of law, since arbitrarily to deprive the owner of property of all capacity to sell it is to deprive him *pro tanto* of its benefits. "The right of acquiring, possessing, and protecting property is inalienable." "No man shall be deprived of his property without due process of law." Const. 1849, art. 1, §§ 2-8; Const. 1879, art. 1, § 14. The provisions of the constitution are intended effectually and completely to protect substantial rights, and cannot be frittered away by indirect legislation. And, as we have seen, one who since the acts of congress of 1866 and 1870 receives a grant of a portion of the public lands of the United

States, without special or implied reservation, takes subject only to appropriations of water made or initiated *prior* to his grant. Let us suppose, after the adoption of the Code, but before any appropriation of the water flowing to the tract granted, a grant or patent for land to be issued by the United States. Could section 1410 be held to divest the grantee of his right in the flow of the stream? True, he has accepted his grant in the presence of the state statute. But the United States has undertaken to clothe him with the title to the land, with the appropriate use of the water as part of the land. Would not a state law which, in advance of the grant, should attempt to take from the grantee the flow of the stream, acquired from or sought to be conveyed by the United States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the "primary disposal" of the public lands?

We do not find it necessary to say that the prospective provisions of the Code would violate the obligation of a contract; but when the state is prohibited from interfering with the primary disposal of the public lands of the United States there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents. The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in the water flowing to, or in the trees on, or the mines beneath, the surface, but others of our citizens shall have the privilege of removing all these things, is to say that hereafter the United States shall not sell the water, wood, or ores.

It would seem, then, that the only persons who can find it necessary to resort to section 1422 of the Civil Code as the protection of their right to the flow of running waters are the state, (as the owner of lands granted to it by the United States,) and grantees from the state, unless it be where the adverse parties are merely occupants of land and water, respectively, on the public lands of the United States or of the state. While the common law has been in force, not only has the right of eminent domain been in the state, but the state has been the direct owner of the swamp and overflowed, as well as of other, lands derived by grant from the general government. The state legislature has had power not only to dispose of the lands and waters so held separately, as a private person may dispose of his own, but has had power to authorize the diversion of waters from such lands, either by private persons, the owners of lands above, or by private persons on public lands of the United States lying above. From the date of such general authorization a grantee of land from the state would take subject to appropriations of water actually made, and, if the statutes were broad enough, and operated a reservation of waters in favor of appropriations which might afterwards be made, would take subject to subsequent appropriations.

But the statutes of the state cannot properly be construed as reserving from grants of state land the use of the waters flowing thereon, for the benefit of those who shall subsequently take or appropriate them either on or off the state lands. The state has granted the waters running to its own lands by authorizing the diversion of waters from its lands, and, doubtless, such grantees acquire the state property in the waters, whenever the state has a property in the waters at the time of the grant. But can it be said that, from the date of the Code, the state reserved its waters in trust for those who should afterwards appropriate them? Our attention has been called to no provision of the laws providing for the disposition of the state lands which contemplates such reservation; and we see nothing in the law authorizing appropriations of water which can reasonably bear such interpretation. We must look for the definition of "riparian rights"—protected by section 1422—to the *common law*, which (when not in conflict with or repugnant to the constitution and state statutes) had been the law of the state for more than 20 years. The section which provides "the rights of *riparian proprietors* are not affected by the provisions of this title" declares, in effect, that those appropriating water under the previous sections shall not acquire the right to deprive of the flow of the stream those who shall have obtained from the state a title to, or right of possession in, riparian lands, before proceedings leading to appropriation shall be taken. Such is the meaning of the words employed.

The right to the use of the waters as part of the land once vested in its private grantee, the state has no power to divest him of the right except on due compensation. It is for those who claim that, since the Code enactments, riparian rights have never vested in the state's grantees, to point to the statute which expressly so declares, or which, by necessary implication, operates a reservation of all the waters on the state lands for the benefit of subsequent appropriators. Such reservation cannot be assumed, nor be based on any doubtful interpretation of language. The use of the present tense—"the rights of riparian proprietors *are* not affected"—is not sufficient to justify a finding of a reservation by the state of all its waters. It is difficult to believe that the section, so far as it applies to riparian lands not those of the state, is other than *declaratory* of the pre-existing law. It certainly was intended to be declaratory in so far as it announces the protection of all private persons who had acquired riparian rights from any source before the provisions of the Code went into operation, since (if the common-law right existed) such persons were protected independent of the section. We cannot presume that it was intended to limit the protection to those private persons who had then acquired riparian rights from the United States, (but not through the state,) or from Spain or Mexico, and to deprive the subsequent grantees of such of their riparian rights. The legislature had no power to deprive of their right to water the subsequent grantees or

successors of those private persons in whom the right had vested prior to the Code. The attempt would have been violative of constitutional principles. As the language of section 1422 will bear a reasonable interpretation which will render it applicable everywhere within the limits of the state, and to all classes of riparian proprietors, (without impinging upon the vested interests of any,) we ought not so to construe it as that, if enforced with respect to all, it would deprive any man of his constitutional right.

Our conclusion on this branch of the case is that section 1422 saves and protects the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the Code. If section 1422 of the Civil Code were interpreted as saving *all* riparian rights actually vested before the section took effect, the mere appropriator could acquire no rights to water by virtue of the provisions of the Code, but would be left to the enjoyment of such as he might secure by convention with the riparian proprietors. If all riparian rights existing when the section was adopted were preserved by section 1422, then, inasmuch as both the state and the United States were at that time riparian owners, the lands of neither government would be affected by the other sections relating to water-rights; nor, of course, would any subsequent grantee of either government be affected by those provisions.

It is contended by counsel for *appellants* that the rights of the state to the flow of the waters on her lands were not affected by the Code for the further reason that the Code provisions were intended merely to continue or supply a rule for deciding disputes "on the public lands of the United States." But we think it was the manifest purpose of the legislature—derivable from title 8, as a whole, read in view of the judicial and legislative history of the state—that the rule should be the same whether applied to mere occupants of the lands of the state or of the United States, and that the riparian rights of the state, as owner of lands, were not preserved by section 1422.

As we have seen, by resort to the presumption of a grant or license from the owner of the paramount title, our courts from an early day have determined controversies between occupants of waters, or of lands and waters, on the public domain of the United States, holding the prior possessor to have the better right; and, during its first session, the state legislature provided a mode by which one might acquire a constructive or statutory possession of a portion of the unsurveyed, and as yet unsalable, public lands of the United States, to be accepted by the courts as proving a right to the possession against all but the government. Act "prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," (St. 1850, pp. 20-23.) The validity of such acts, so far as they affect mere intruders on the public lands, or those entering

thereon with the tacit consent of the government, has not heretofore been questioned. The right of the prior occupant of the land or water on the public domain of the United States being recognized by the courts, it cannot be doubted that the legislature had power to establish or change a rule of evidence according to which the prior occupation is to be proved. With reference to appropriations of waters on public lands, for example, the legislature had power to require that the notice of appropriation should contain certain statements; that work should be commenced within a definite time, and be completed within a named period, etc. Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States. Nevertheless, while a body of land and the waters thereon shall remain a portion of the public lands of the United States, the rights of mere possessors, or asserted possessors, thereof will continue to be determined, as between themselves, by the law applicable to such controversies as the same was laid down by our courts previous to the Code enactments, except so far as it may have been modified by the provisions of the Code. The legislation of the state, (with reference to occupations on the public lands,) like the judicial decisions, is based on the presumption that the general government has permitted the occupation of water, or of land with the water thereon, as the case may be. But this (so far as the operation of the state law is concerned) necessarily excludes the United States, although a riparian owner when the Code was adopted, from the saving clause of section 1422.

The doctrine of presumption is enforced, however, not only on lands of the United States, but on lands of the state and of private persons. This has been the rule applied in every action of ejectment where the plaintiff has recovered on his prior possession. In such cases it has repeatedly been held that the defendant cannot be permitted to prove title in a third party unless he connects himself with it. The prior possessor is presumed to have acquired *that* title as against the mere intruder on his possession. In controversies upon the state lands the courts have not heretofore permitted the title of the state to be proved, by one not deraigning from the state, for the purpose of destroying the asserted right of the prior possessor. Even where a court should be called on to take judicial notice of the state title, and that no law had been passed for the disposition of the state lands, it would, in the interest of peace and good order, presume, "contrary to the fact,"—as was said by Mr Justice HEYDENFELDT,—not only that the prior possessor had entered and occupied with the consent of the state, but that he had acquired the state title.

Prior to the adoption of the Code there can be little doubt that in controversies between persons upon the lands of the state, as in like controversies upon lands of the United States, (where neither of the

parties had derived title from the government,) the doctrine of priority of appropriation of water alone, or of water as a part of land appropriated, would prevail. These considerations create a very strong presumption that the riparian rights of the state, as a landed proprietor, existing when the sections of the Code went into operation, were not intended to be reserved by section 1422. Inasmuch as the sections of the Code relating to water-rights (so far as they relate to appropriations of water on the public lands of the state, or of the United States) are in furtherance and recognition of the previous doctrine of the courts of the state, (according to which, as it would seem, the prior appropriator of land, and the water thereon, had the better right, as against the subsequent appropriator of the water alone,) it may be contended that section 1422 recognizes and reaffirms that part of the rule, and protects the riparian *occupant* on the public lands of the state from a subsequent appropriation of water on or above those lands. Either so, it may be argued, or section 1422 has no meaning or application when the controversy is between mere occupants on the public lands. But, however this might be, where both parties were mere possessors on public lands of the United States, the title 8 of the Civil Code, so far as it relates to waters flowing to the lands of the state, is more than an acknowledgment of the doctrine of prior appropriation on public lands. It is plainly a concession to those who may comply with its conditions, which operates as a grant of the servitude when the conditions are fully performed, relating back to the date of the commencement to perform. It is a concession, however, only of the rights to the water which the state shall not already have parted withal when the appropriation shall be made.

12. *The statute of April 13, 1850, adopts the common law of England, not the civil law, nor the "ancient common law" of the civilians, nor the Mexican law.*

In ascertaining the common law of England we may and should examine and weigh the reasoning of the decisions, not only of the English courts, but also of the courts of the United States, and of the several states, down to the present time. We are not limited to the consideration of the English decisions rendered prior to July 4, 1776.

The possessory rights of occupants of portions of the public lands, or of waters thereon, (recognized by the California courts,) are protected by the common law.

It must be assumed, as the cause is now presented, that the plaintiffs obtained from the state title to riparian lands prior to an appropriation of water flowing to those lands by the defendant; because, as we shall see, the court below erred in refusing to admit certain evidence bearing on that issue. Inasmuch, then, as the defendant here has acquired no right to the water by it appropriated, by reason of a reservation, express or implied, in the grant to the state, or in the conveyances to the plaintiffs, which it can assert against the plaintiffs; and as there is no "public policy" arising out of physical

conditions existing within our borders, or from the implied license to private persons to enter upon and occupy portions of the public lands, or the water thereon, while they remain such, which compels or authorizes us to disregard the general law, or which should control or modify the meaning which should otherwise be attributed to the statutes of the United States,—it follows that the defendant has no right to divert the water from the lands of the plaintiffs, unless that right exists under and by virtue of the *common law*, as the same was adopted in and by the act of April 13, 1850.

It is said by counsel for respondent that the common law adopted by the act of 1850 is the common law *as the same was administered prior to July 4, 1776*. *Throop v. Hatch*, 3 Abb. Pr. 23, is referred to as authority for this statement. But there the question was what was presumed to be the law of another state, in the absence of averment and proof with respect to it. It was held there was no presumption that the *statutes* of another state were the same as those of New York. It is held in California that, in the absence of evidence on the subject, it would be presumed that the statutes of another state are the same as ours. *Hickman v. Alpaugh*, 21 Cal. 225; *Marsters v. Lash*, 61 Cal. 624. In *Throop v. Hatch* the learned judge adds:

“It is well established that the common law is presumed to have originally existed in all the states of the Union, except, perhaps, those which had been, before becoming members of the Union, subject to another Code and system of laws; and it is a well-established presumption of law that things once proven to have existed in a particular condition continue in that condition until the contrary is established by evidence, either direct or presumptive.”

It was therefore ruled, it would be presumed, that the common law had not been changed by statutes of the state whose law was in question.

There is no suggestion (except, perhaps, in the mere statement of a question on page 25) that, in ascertaining the common law, the examination should be confined to decisions of the English or colonial courts rendered prior to the declaration of independence. In that very case many adjudications, made after that event, are cited; and it may be added that it is the uniform practice of the courts in this country to rely upon the reasoning of later decisions of the courts of England and Ireland, and of the courts of other American states, when the question is as to the rules of the common law applicable to the facts before them. It has sometimes been said that the English statutes, down to a period corresponding with the earliest settlement of the colonies in North America, are adopted as part of the common law. Of course, where a statute adopts the English statutes prior to a certain date or reign, and thus impliedly excludes others, the courts in the United States do not regard the statutes passed since the date or reign.

A different question from the foregoing is the question whether, in adopting “the common law of England,” the legislature adopted a

law derivable from the usages and customs of miners and other occupants of public lands. It is alleged, in effect, that the last was a different *law*, with reference to waters, from the common law as enforced in England and other states of the Union. If this were true, it certainly was not adopted by the statute. The substitution of what is now called "appropriation" for the English rule would not be a mere modification of the common law; and, strictly speaking, the common law is not *modified* by an application of its principles to new facts. It is quite certain that the alleged modification could not have been brought about by a general practice which could be upheld, upon the doctrine of license or grant, in accordance with the common law.

In entertaining "against the fact" the presumption that the occupants of land or water, on the public domain, had received grants from the paramount sources of title, the courts of California did not repeal or modify the common law; but, immediately after its adoption, they began to follow the common law in that regard. The English courts had frequently held that a grant from the crown would be presumed from lapse of time. The courts here had held that lapse of time was only a reason for the presumption, and that, upon common-law principles, it might be sustained on other facts. Upon this common-law presumption is based the whole fabric of the law which determines conflicting possessory rights on the public domain. The presumption has no place where either party has received a grant from the government; for a presumptive grant (except perhaps when based on lapse of time) can never be asserted against an actual grant.

By the act of 1850 the common-law presumption was adopted as part of the common law, as was also the application of the presumption, as subsequently held by the courts, since its subsequent reasonable application was implicitly comprised in the presumption itself. Thus, the principles of the common law fully protected the just possessory rights of occupants on the public lands. In adopting the common law, therefore, the legislature adopted the common law, and not some other and different law. "The customs, usages, and regulations of the bar or diggings" were afterwards, by express statute, declared to be admissible as evidence in "actions respecting mining claims." Pr. Act. 1861, § 621. It has always been held that local regulations, etc., accepted by the miners of a particular district, are binding only as to possessory rights within the district, and that they must be *proved* as a fact. When they have been proved, the courts have considered them only for the purpose of ascertaining the extent and boundaries of the alleged possessions of the respective parties to a litigation, and the priority of possessory right as between them; or for the purpose of ascertaining whether the right of action has been lost or abandoned by failure to work and occupy in the manner prescribed. When the priority, limits, and continuation of a possession have thus been ascertained, the courts have proceeded to apply the presumption of grant from the paramount source,—a presumption, we

repeat, sustainable on common-law principles. It is also true (where no special "mining laws" have been proved) that, in ascertaining the limits of a mining possession, the courts have said the same common-law principles are to be relied upon as those which regulate rights to the possession of agricultural lands, although the *indicia* of possession are not necessarily the same. *English v. Johnson*, 17 Cal. 107. The possession, in such case, may be proved by satisfactory evidence of notorious acts of occupation, reference being had to the nature of the lands, the uses to which they can be put, and to the general practices or customs of the region with respect to the occupation of lands of the particular character. But the possession, however proved, being established, the presumption of grant arises.

The act of 1850 adopts the common law of England; not the civil law; nor the *jus commune antiquum*, or Roman "law of nature" of some of the civil-law commentators, (*Brady v. Reese*, 51 Cal. 464, note;) nor the Mexican law; nor any hybrid system; and the expression "common law of England" designates the English common law as interpreted, as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. We cannot presume that the members of the legislature, even at that day, were utterly ignorant of the climate and soil of the country in which they lived; and there were included in their number many natives of California, who must be presumed to have represented the intelligence of a race which, for several generations, had been familiar with natural conditions here existing. The report of the proceedings of the legislature shows that there was a considerable minority in favor of the adoption of the civil law; and there are circumstances appearing from the proceedings tending to prove that the advantages of each system, as the fundamental law of the future, were discussed and fully considered. Under these circumstances, we must believe that if it had been intended to exclude the common law as to the riparian right the intention would have been expressed. Moreover, it is a well-established principle that when the legislature of this state has enacted a statute like one previously existing in other states, the courts here may look to the interpretation of such statute by the courts of the other states. *People v. Webb*, 38 Cal. 477; *People v. Coleman*, 4 Cal. 50; *Taylor v. Palmer*, 31 Cal. 254.

Whatever the law pre-existing the statute of 1850, it was then and there done away with, except as it agreed with the common law. The matter was settled, if the law-makers had power to settle it. And it was not the common law "as the same was administered" at a certain date that was adopted, but the common law. Indeed, the administration of the law in particular cases may be a very different thing from the law itself. [NOTE.—We give counsel for respondent the benefit of the last suggestion, to be applied, if applicable, to the present decision.] The statute adopts the common law of Eng-

land, except where inconsistent with the constitutions and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute. Looking at the whole array of adjudications, if we find a question has often been decided in one way,—the cases preceding the line of corroborative and conformable decisions being adverted to in them, analyzed, and held not necessarily conflictive,—the rule of the common law involved or presented in the question ought to be considered as *settled*. There is no pretense that the courts ever were infallible. It is sometimes held that a previous decision does not declare the law. Where the rule has become settled, it is not, as opposed to any former decision, a new rule, but must be held to have been the law from the beginning, because "right reason" has always been the prime element of the law. And in such case, if anything has been said in an earlier decision—which cannot be resolved into mere *dictum*, or as applicable to the peculiar facts—that apparently conflicts with the settled rule, it is considered to be an erroneous exposition of the law. Courts do not repeal former decisions; when they reverse them they hold they were never law.

The common law of England may be said to consist of a collection of principles found in the opinions of sages, or deduced from universal and immemorial usage, and receiving *progressively* the sanction of the courts. It was imported by our colonial ancestors, so far as it was applicable, and was sanctioned by royal charters. 1 Kent, Comm. 473. The best evidence of the common law is found in the decisions of the courts, contained in numerous volumes of reports, and in the treatises and digests of learned men, "which have been multiplying from the earliest periods of English history *down to the present time*." Id. There is no implied exception in the words "so far as applicable" which would exclude the common law from the colonial law, except, perhaps, when the question was *ab ovo*, and no principle of the common law could have appropriate bearing upon it. Since the Revolution the common law of England has, of course, been inapplicable in the particulars that it does not harmonize with the political conditions on this continent. Where it is in conflict with our constitution of government it is not part of our law, because the organic law is the supreme law. This would be the case if the statute were silent; and, as we have seen, the statute of 1850 does not adopt the common law so far as "it is repugnant to or inconsistent with the constitution of the United States, or the constitution and laws (statutes) of the state of California."

We know of no decisions which intimate that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law. To so hold would be an attempt to do that which, as

contended by counsel, could not be done with reference to the common use to which, as claimed, property was dedicated by the Mexican law. Such conditions may, perhaps, affect the mode of enjoyment of the common right of all the riparian proprietors on the same stream. Nor do we know of cases where the courts in the United States have undertaken to change the common law. We think it is abundantly proved by Mr. Houck that there has been no substantial change in the United States in the law with respect to navigable rivers, (although the contrary has been asserted,) but that the true test of "navigability" was always the fact of a river being in fact navigated, or capable of being navigated; that all streams above tide are not in England innavigable. *Nav. Rivers, passim*. In an English case cited in Woolrych on Waters, 41, Mr. Justice BAYLEY observed: "The strength of the *prima facie* evidence arising from the flux and reflux of the tide must depend upon the situation and nature of the channel;" and held of a petty stream, although the daily tides went up it, that it was not a navigable river. And Woolrych says of the English law: "Public user for the purposes of commerce is consequently the most convincing evidence of the existence of a navigable river." Page 42.

13. *The doctrine of "appropriation," so called, is not the doctrine of the common law.*

Counsel for respondent assert that the property in the use of waters is, by the common law, acquired only by *appropriation*. In support of this proposition are cited *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 Barn. & Ald. 261; 2 Bl. Comm. 14, 403; *Cox v. Matthews*, 1 Vent. 237; *Liggins v. Inge*, 7 Bing. 692; *Sackrider v. Beers*, 10 Johns. 241; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 287; *Godd. Easem.* 250 *et pas.*

Mason v. Hill, *supra*, was decided in the king's bench in 1833. The court there said:

"The position that the first occupant of water for a beneficial purpose has a good title to it is perfectly true in this sense: that neither the owner of the land *below* can back the water, nor the owner of the land *above* divert it, to his prejudice. In this, as in other cases of real property, possession is a good title against a wrong-doer."

He adds that the owner of a mill, if the stream is obstructed or diverted, may recover consequential damages to *his mill*, (*Rutland v. Bowler*, Palmer, 290;) and to the same effect are some American cases. "But," says Lord DENMAN, in *Mason v. Hill*, "it is a very different question whether he can take from the land below one of its natural advantages, which is capable of being applied to valuable purposes, and generally increases the fertility of the soil even when unapplied, and deprive him of it *altogether* by anticipating him in its application to a useful purpose. * * *. We think that this proposition has originated in a *mistaken view* of the principles laid down in the decided cases of *Bealey v. Shaw*, *supra*; *Saunders v. Newman*,

supra; and *Williams v. Morland*, 2 Barn. & C. 915. It appears to us also that the doctrine of Blackstone, and the *dicta* of learned judges in some of those cases, and in that of *Cox v. Matthews*, have been *misconceived*." The court then proceeds to show that neither *Bealey v. Shaw*, nor *Saunders v. Newman*, nor *Williams v. Morland*, nor the *dictum* of Lord Chief Justice TINDAL in *Liggins v. Inge*, nor that of Lord HALE in *Cox v. Matthews*, (when properly understood,) nor the observations of Blackstone, ought to be considered as authority that the first occupant or first person (although a riparian owner) who chooses to appropriate a natural stream, has a title against the owner of the land below, and may deprive him of the natural right to the water. And Lord DENMAN adds that the view taken in *Mason v. Hill* as to the riparian right accords with the law as laid down by Serjeant ADAIR, chief justice of Chester, in *Prescott v. Phillips*, cited in 6 East, 213, by Lord ELLENBOROUGH in *Bealey v. Shaw*, and by the master of the rolls in *Howard v. Wright*, 1 Sim. & S. 190.

It has been suggested that what is said on the subject in *Mason v. Hill* was mere *dictum*, since, it is claimed, that case might have been decided on the theory of "appropriation." The case shows that the question was fairly presented, and was fully, and, in one point of view, necessarily, considered.

Sackrider v. Beers, 10 Johns. 241, was an action at law. The defendant had taken water out of the stream, and conducted it by means of a raceway to a point in the stream below the plaintiff's dam. Plaintiff recovered.

In *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282, the plaintiff had fully *released* to the defendant. The court said the remedy of the plaintiff, if any, ought to be sought at law by an action on the case, or upon the covenants contained in his deed of release.

Goddard, in his *Law of Easements*, (page 251,) declares "that all riparian owners of natural streams have a riparian right to the use of water as it flows past their lands, as long as they do not interfere with the natural rights of other riparian owners, and to sue for disturbance is now an *established doctrine of the law*." He adds: "The doctrine was not *established* until comparatively modern times," etc. He says, after referring to some of the earlier decisions, that the [apparent] theory of appropriation was much modified by various decisions "as the nature of riparian rights was brought more fully under consideration;" citing in this connection *Mason v. Hill*, *supra*, and *Cocker v. Cowper*, 5 Tyrw. 103. He concludes: "Appropriation of the water of flowing streams has thus gradually fallen from being considered the means of acquiring important rights to being deemed of *no importance whatever*." Mr. Angell, however, cites a case of as early a date as 32 Edw. III., where an assize of nuisance was brought by A. against B., for that B. had made a trench from a river, and drawn away thereby a part of the water and stream another way from that in which it did formerly use to run; and the assize passed for

the plaintiff; and it was adjudged that the water should be removed to its ancient channel at the cost of the defendant. Water-courses, 93. See, also, Y. B. 14 Hen. VIII. 31, referred to by Angell.

In *Chasemore v. Richards*, 7 H. L. Cas. 384, Lord WENSLEYDALE declares: "We may consider, therefore, that this proposition is *indisputable*; that the right of the proprietor to the enjoyment of a water-course is a natural right, and is not acquired by *occupation*," etc.

In examining the numerous cases which establish that the doctrine of "appropriation" is *not* the doctrine of the common law we meet an embarrassment of abundance. The authorities referred to under the next head, and many others, clearly hold to the contrary of the proposition contended for by counsel for respondent.

14. *Riparian rights.* *By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners, for purposes hereafter to be mentioned.*

In the case now here there is no question as to the use of water for propelling machinery. And, in treating of the riparian right at common law, we shall reserve, for the present, the consideration of the effect of the diminution of the flow of a stream, by reason of its consumption by a riparian proprietor, to satisfy what has been called "natural wants,"—its reasonable consumption by cattle, or for domestic uses,—and also the effect of absorption and evaporation by reason of its application to the purposes of irrigation. As to the *nature* of the right of the riparian owner in the water, by all the modern, as well as ancient, authorities, the right in the water is *usufructuary*, and consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus. Ang. Water-courses, § 94, and notes. But the right to a water-course begins *ex jure nature*, and, having taken a certain course naturally, it cannot be diverted to the deprivation of the *rights* of the riparian owners below. So say all the common-law text-books, and the decisions. Ang. § 93. *Aqua currit et debet currere ut currere solebat* "is the language of the ancient common law." Id.; *Shury v. Piggot*, Bulst. 339; *Countess of Rutland v. Bowler*, Palmer, 290. "As a *general proposition*, every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, *without diminution or alteration*." Washb. Easem. 319. "Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as is wont by nature, without *material* diminution or alteration." Gould, Waters, § 204. Each riparian proprietor has a right to the natural flow of the water-course undiminished, except by its reasonable consumption by upper proprietors.

Ang. c. 4, *passim*. The right to the flow of the water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel. Use does not create, and disuse cannot destroy or suspend it. Each person through whose land a water-course flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same water-course has a right unreasonably to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it. Chief Justice SHAW in *Johnson v. Jordan*, 2 Metc. 239. The right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament. *Cary v. Daniels*, 5 Metc. 238. *Prima facie* every proprietor on each bank of a river is entitled to the land covered by the water to the middle thread of the river, and has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. Priority of occupancy of the flowing waters of a river creates no right, unless the appropriation be for a period which the law deems a presumption of right. Mr. Justice STORY in *Tyler v. Wilkinson*, 4 Mason, 397. Whatever may be said of *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, as bearing on the right to irrigate, it recognizes the riparian right. CRESSWELL, J., says: "It appears to us that all persons having land upon a flowing stream have, by nature, certain rights to the use of the stream, whether they exercise them or not, and they may begin to exercise them whenever they will."

It has always been held that a grant of land carries with it the water flowing over the soil. The well-known maxim, *cujus est solum, ejus est usque ad cælum*, inculcates that land, in its legal signification, has an indefinite extent upward. We need not add that rights to the use of water may be acquired by grant, under some circumstances by *assent*, and by adverse user and possession. It is unnecessary to pursue the subject further, or to refer to the many textbooks and decisions of the courts in England and in other states which fully support the proposition laid down in the foregoing title, No. 14.

The supreme court of California has not been silent with respect to the subject. "The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes. *Sacket v. Wheaton*, 17 Pick. 105; 1 Cruise, Dig. 39; Ang. 3." *Hill v. Newman*, 5 Cal. 445. By settled principles of both the civil and common law, the riparian owner has a usufruct in the stream as it passes over his land, of which he cannot be deprived by mere diversion. *Pope v. Kinman*, 54 Cal. 3. The right of a riparian proprietor to have the water of a stream run through his land is a vested right, and an interference with it imports damages. *Creighton v. Evans*, 53 Cal. 55. The riparian right is fully recognized in *Ferrea v. Knipe*, 28 Cal. 340,

where it was held that, although an upper riparian proprietor had a right to the use of a stream for watering his cattle, and for domestic purposes, he had not a right to dam up the creek and spread out the water over a large surface, by which it became lost by absorption and evaporation to an extent which prevented the stream from flowing to the premises of the lower proprietor, such obstruction not being a proper or *reasonable* use of the water. As decided, the judgment in *Hale v. McLea*, 53 Cal. 578, necessarily involved a determination of the question. It was there assumed that a defendant through whose land ran a subterranean stream which continued to the land of the plaintiff, had no greater right to divert the water than if the stream had been on the surface.. This was an assumption *against* the defendant, adversely to whom the case was decided. Mr. Justice CROCKETT says:

"Tested by the rule [as to surface streams] the utmost that can be claimed for the defendant on the facts is that he is entitled to take from the stream as much water as he needs for watering his cattle, and for domestic uses,—such as cooking, washing, and the like,—leaving the surplus to flow to the spring of plaintiff in its natural channel." "If it were a surface stream, the plaintiff would be entitled to have it flow to and across his lands, in its natural channel, subject only to the right of the defendant to use so much of the water as is necessary to supply his natural or primary wants as above indicated." "But the findings show that the defendant has diverted the whole body of the stream through pipes, in such a manner that no portion of the water can reach the spring, and the surplus, at the beginning of this action, was *running to waste*." "There is no question in this case involving the right of a riparian owner to the use of water for the purposes of *irrigation*."

Hanson v. McCue, 42 Cal. 303, was decided on the ground that, upon the facts of the case, no defined subterranean channel, with water flowing therein, existed. But both Chief Justice WALLACE and Mr. Justice CROCKETT, who delivered opinions, seem to assume that the rules of law which apply to surface, apply to underground currents flowing in a definite channel; and that, as to surface streams, the right of a riparian proprietor is to have the water flow *ubi solebat*.

15. *By our law the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.*

To decide this appeal it is not imperatively necessary to lay down a rule which shall govern the matter of *irrigation* by riparian owners. By the common law none but riparian owners can employ, or suffer the employment of, the water for any purpose. The defendant here relies entirely on its right to appropriate under the provisions of the Civil Code—a right limited only by the capacity of its canal—the quantity actually appropriated and appropriately applied. It is not averred that the defendant is a riparian proprietor. Neither the statutes of the general government nor those of the state contemplate (if it were possible in fact) appropriations for the benefit of the

United States. They must always be for the benefit of the persons seized of lands, or actually possessed of tracts of the public domain. The defendant's appropriation was "for the purpose of irrigating and supplying with water the lands in the notice of appropriation designated, and lying along the route of said canal." Finding. The notices of appropriation do not describe the tract of land it was the intention to irrigate, nor are the limits of the tracts irrigated described in the findings. There is no suggestion that such tracts, if any there are, belong to or are possessed by the same person or persons, nor any (an important consideration) that the surplus waters were returned to the channel. It is only the tracts next the stream which are riparian lands, and the owners of such tracts are alone riparian owners. Even if the defendant were treated as having received a license from the owner of the tract in which its canal heads, or as being itself the owner of that tract, there is no pretense that the water actually diverted was used to irrigate that particular tract, or that the quantity consumed was necessary or reasonable for that purpose. Nevertheless as, upon a new trial of this action, the question may possibly be presented, we propose to make a few observations upon the doctrine of the common law with regard to irrigation by riparian owners.

Mr. Angell submits whether it may not fairly be deduced from the authorities that for an *essential* diminution of the water of a watercourse, which nature has directed to run in a certain and determinate channel for *any* purpose, the law in this country will not interpose. "So far as the question may be supposed to imply that an upper appropriator may not "essentially" diminish the water by using it for domestic purposes, and for watering cattle, the weight of authority is that he may, if *necessary*, consume *all* the water of the stream for those purposes. Gould, Waters, § 203. Such is the California rule. *Ferrea v. Knipe*, *supra*, and *Hale v. McLea*, *supra*. Indeed, in case of a small rivulet, the necessary consequence of using it at all, by one or more upper owners, for these "natural" or "primary" purposes, must often be to exhaust the water.

Chancellor KENT (3 Comm. 429) is sometimes quoted as proving that water cannot be employed for irrigation, sometimes as proving that it may be. He says:

"Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the general sense of mankind, to debar any riparian proprietor from the application of water for domestic, *agricultural*, or manufacturing purposes, provided the use of water be made under the limitation that he do no *material injury* to his neighbor below him, who has an equal right to the subsequent use of the same water."

It seems to us that the foregoing (although a very distinct statement of the general proposition) ought not to be taken literally, unless the words "material injury" be impressed with a signification the equivalent of a substantial deprivation of capacity in a lower proprie-

tor to employ the water for useful purposes. The adjective is prefixed to "injury," and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The passage as a whole may be fairly said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietors of water, either for drinking or for agriculture, etc. Undoubtedly, as against an appropriation by a mere wrong-doer, a riparian proprietor may insist upon the entire and complete natural flow of the stream. The employment by Kent of the words "material injury" implies that every diminution is not any injury, and it excludes, where water is reasonably used above for irrigation, mere sentiment, or the consideration of a diminution from the natural flow so far merely as such flow pleases the eye or gratifies a taste for the beautiful. Of course, in ascertaining whether irrigation is reasonable, its effect in depriving the lower proprietor of natural irrigation is to be considered with the other circumstances. Moreover, as we have seen, it is established that, so far as the use for domestic purposes, all the water of a stream may, if *necessary*, be exhausted. In that case the lower proprietor receives none of it, and Chancellor KENT cannot have intended that material "diminution" always means material "injury." *A priori* it would be expected that the decisions in Great Britain and Ireland would not much assist the inquiry, since, owing to the humidity of the climate of those islands, it must rarely happen that any use for irrigation can be *reasonable*; and for any purpose the use must be reasonable, the maxim which every riparian proprietor is bound to respect being *sic utere tuo ut alienum non lædas*. The question whether the use is reasonable is not so much whether the water below is diminished thereby, as whether the lower proprietor is materially *injured* by the diminution,—injured by not receiving the benefit in due proportion of the enjoyment to which he and the other proprietors are entitled. It is obvious that the use of water for the purposes of irrigation always involves some loss by evaporation and absorption, and must often result in a sensible and clearly perceptible reduction of the quantity in the channel. An entire diversion of a water-course by an upper riparian proprietor, (or a diversion of a part of it,) for irrigation, without restoring to the channel the excess of the water not actually consumed, is never allowed. Whether or not a *diversion* of water is reasonable is a question not so much as mentioned by any writer or judge. The very proposition assumes the right of the proprietor above to use the water for his own purposes, to the *exclusion* of the proprietors below,—a proposition inconsistent with the doctrine universally admitted, that all proprietors have the same rights. *Van Hoesen v. Coventry*, 10 Barb. 518-522.

In *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, the court said that the detention for the purposes of irrigation was, under the circumstances of that case, necessarily injurious, the effect being *wholly to prevent* the natural course of the stream for a certain number of hours.

In *Chasemore v. Richards*, 7 H. L. Cas. 349, the lords seem to refer with approbation to the "American" doctrine of irrigation.

Embrey v. Owen, 6 Exch. 352, decides that the use of water by a defendant for irrigation was no injury to the plaintiff, a mill-owner, in fact or law. There the irrigation took place only at intermittent periods when the river was full, etc. But in delivering his opinion, PARKE, B., after quoting from KENT, said:

"In America, as may be inferred from this extract, and as is stated in the judgment of the court of Exchequer in *Wood v. Waud*, a very liberal use of the stream for the purposes of irrigation, and for carrying on manufactures, is permitted. So, in France, where every one may use it '*en bon pere de famille, et pour son plus grand avantage*.' Code Civil, art. 640, note *a*, by Pailliet. He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above cited case of *Wood v. Waud* it was observed that in England it is not clear that a user to that extent would be permitted; nor do we mean to lay down that it would *in every case* be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon *the circumstances of each case*. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of *degree*, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not."

And in the same case the learned judge said:

"It was very ably argued before us by the learned counsel for the plaintiffs that the plaintiffs had a *right* to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed, and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a *right*, and, if continued, would be the foundation of a claim of adverse right in that proprietor. We by no means dispute the truth of this proposition with respect to every description of right. Actual, perceptible damage is not indispensable as the foundation of an action. It is sufficient to show the violation of a right, in which case the law will presume damage. *Injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White*, 2 Ld. Raym. 938, by Lord HOLT, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgment of the late Mr. Justice STORY in *Webb v. Portland Manuf'g Co.*, 3 Sum. 189. But

in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them. The law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright v. Howard*, 1 Sim. & S. 190, followed by *Mason v. Hill*, 3 Barn. & Adol. 304, and 5 Barn. & Adol. 1, and ending with that of *Wood v. Waud*, 3 Exch. 748, and is fully settled in the American courts. See 3 Kent, Comm. 439, 445. The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. See 5 Barn. & Adol. 24. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state. If it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, *subject to the similar rights* of all the proprietors of the bank on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will."

Professor Washburn (Easem. 234) refers "to two or three recent English cases" where the subject of irrigation is considered, and where the courts take occasion to speak of the American cases with approbation, etc.

Gould (citing in the notes many English and American decisions) writes, (Gould, Waters, § 217:)

"The right of a riparian proprietor to divert the waters of a stream for the purpose of irrigation is recognized in England and generally in this country. According to the later decisions in both countries this is not a natural want, authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable, and must not materially affect the *application* of the water by other riparian proprietors. The *extent* of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land, abutting on one part of the stream, could not lawfully irrigate such land *continually* by canals and drains, and so cause a serious diminution of the quantity of water, though there may be no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for the purpose. If the water used for irrigation is not abstracted on a person's own land, but is withdrawn at a distance *above it*, or returned at a distance *below it*, this would have a material bearing upon the question of reasonable use with respect to an opposite or other proprietor affected by such diversion. So, a riparian proprietor who obstructs the stream by a dam for the purpose of overflowing and irrigating his land, or who diverts the water for such purpose *excessively*, and without returning the *surplus* into the natural channel, is liable to the owner of a mill below, the operation of which is thereby impeded, or to another proprietor below who only uses the water for *irrigation*, and is deprived of *that right* to an *unreasonable extent*."

WESTON, J., in *Blanchard v. Baker*, 8 Me. 253, observes:

"A riparian proprietor may make a reasonable use of the water itself for domestic purposes, for watering his cattle, or even for irrigation, provided it is not unreasonably detained, or *essentially* diminished."

In *Gillett v. Johnson*, 30 Conn. 180, BUTLER, J., speaks of the right of a defendant to irrigate as *limited*:

"She was bound to apply the water in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle. The claim of the defendant was that she had a right to divert *the whole* for the purposes of irrigation regardless of the rights of the plaintiff. *Such* diversion was unreasonable, and therefore illegal."

And in *Arnold v. Foot*, 12 Wend. 330:

"The defendant has a right to use so much as is necessary for his family and cattle, but he has no right to use it for irrigating his meadow, if he thereby deprives the plaintiff of the *reasonable use* of the water in its natural channel."

The supreme court of Massachusetts has said:

"Every man through whose land the water passes may use it *for irrigating his land*; but he must so use it as to do the least possible injury to his neighbor, who has the same right." *Anthony v. Lapham*, 5 Pick. 175.

In *Newhall v. Ireson*, 8 Cush. 595, Chief Justice SHAW says:

"Even [in cases which *Newhall v. Ireson* does not necessarily overrule] where it has been considered that a riparian proprietor had authority to make use of a stream for purposes of irrigation, and thus, by that use, divert a portion of it, it has been held, under the condition, that such diversion was, under all the circumstances, *a reasonable use* of the stream, and that the *surplus* of the water thus used must be returned into its natural channel."

The same learned judge and luminous writer has very fully considered the matter of irrigation in *Elliot v. Fitchburg R. Co.*, 10 Cush. 193-195:

"This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose land it passes, as are held to apply to other water-courses, subject to this consideration: that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream just sufficient to furnish water for domestic uses, for farm-yards, and watering-places for cattle. The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in water-courses passing through or by their lands. It presupposes that the diversion of *any portion* of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right. The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris*, of such character that while it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made *than a just and reasonable use*, it cannot be said to be wrongful or *injurious* to a proprietor lower down. What is such a just

and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is therefore, to a considerable extent, *a question of degree*; still, the rule is the same: that each proprietor *has a right to a reasonable use* of it for his own benefit, for domestic use, *and* for manufacturing and agricultural purposes.

"It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation; but this, we think, is an abstract question, which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes; yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, *wholly* abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the *substantial benefits* which they might derive from it if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump,—for the mode is not material,—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, while the other would nearly deprive him of the whole beneficial use, and yet in both the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject: *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. 269; *Anthony v. Lapham*, 5 Pick. 175.

"This rule that no riparian proprietor can wholly abstract or divert a water-course, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream *is common to all the riparian proprietors*, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration, or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper proprietor *for taking any portion* of the water of the stream for any purpose. Such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it. *Colburn v. Richards*, 13 Mass. 420. It would also follow, as the legal and practicable result, that no proprietor could have *any beneficial use* of the stream without an encroachment on another's right, subjecting him to actions *toties quoties*, as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have

such an action, then every proprietor on the brook to its outlet in Nashua river would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimac river to the ocean. This is a sort of *reductio ad absurdum* which shows that such *cannot be the rule*, as was claimed by the plaintiff."

In *Evans v. Merriweather*, 3 Scam. 496, the supreme court of Illinois said:

"The use must be a reasonable one. Now, the question fairly arises, is that a reasonable use of running water by the upper proprietor by which the fluid is entirely consumed? To answer the question satisfactorily it is proper to consider the wants in regard to the element of water. These wants are either natural or artificial. Natural, are such as are absolutely necessary to be supplied in order to his existence; artificial, such only as, by supplying them, his comfort and prosperity are increased. To quench thirst and for household purposes water is absolutely indispensable. In civilized life water for cattle is also necessary. These wants must be supplied, or both man and beast will perish. The supply of a man's artificial wants is not necessary to his existence; he could live if water was not employed in irrigating his lands or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is indispensable for the cultivation of the soil, and in these water for irrigation would be a *natural want*."

There can be little doubt, under the authorities, that for a riparian proprietor entirely to consume water (except ordinarily for domestic uses, etc.) is to use it unreasonably, as is said in *Evans v. Merriweather*, and that was the question involved in that case. The distinction between natural and artificial "wants" seems to be derived from a distinction previously recognized, and which has sometimes been designated as a difference between the use of water for "ordinary" and "extraordinary" purposes. Thus, Lord KINGSDOWN, in *Miner v. Gilmour*, 12 Moore, P. C. 156, said:

"By the general law applicable to riparian proprietors, each has a right to what may be called the ordinary right of a use of water flowing past his land, —for instance, to the reasonable use of the water for domestic purposes, and for his cattle; and this, without regard to the effect that such use may have, in case of deficiency, upon the proprietors lower down the stream. But, further, he may have the use of it for any purpose, or *what may be deemed* the extraordinary use of it, provided he does not thereby interfere with the *lawful* use of it by other proprietors, either above or below him. Subject to this condition, a riparian proprietor may dam up a stream for the purpose of a mill, or divert the water for the purpose of *irrigation*. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts on them a sensible *injury*."

The real difference here pointed out between the classes of uses is that, as is assumed, water may be used for *ordinary* purposes, without regard to the effects of such use, in case of deficiency below, while with reference to extraordinary uses the effects on those below must always be considered in determining its reasonableness. Lord KINGSDOWN's "instances" indicate that he was using them as illustrations of the relative importance of the uses by him mentioned. It

may perhaps be doubted whether an arbitrary classification can be made which is applicable everywhere where the common law prevails. Even the use of water of a stream for *potation* may not be of paramount importance, when the stream is small, and the particular proprietor is amply supplied with water for such purpose by living springs independent of the creek; and it may happen, all the conditions being considered, that the exhaustion of an entire stream by large bands of cattle ought not to be permitted. Or, indeed, it might be that a flouring-mill would be of more relative consequence than the cultivation of the ground. See Escriche with respect to riparian rights in Mexico. This last, however, is hardly a supposable case since the general introduction of steam as a propelling power. The distinction between natural and artificial "wants" would be, under supposable conditions, somewhat fanciful. The urging and pressing necessity of a particular use as distinguished from another, may itself depend on circumstances. We cannot say that it is always reasonable, in a "hot and arid climate," to elevate irrigation to the rank of primary uses, to which drinking usually belongs. If that should be adopted as the uniform rule, the upper proprietor might perhaps exhaust all the water for irrigation to the entire exclusion of those below him,—“a proposition inconsistent with the doctrine universally admitted, that all proprietors have the same rights.” *Van Hoesen v. Coventry, supra*. The reasonable usefulness of a quantity of water for irrigation is always relative. It does not depend on the convenience of or profitable results to the particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors on the stream. It depends, in other words, on all the circumstances.

We anticipate the objection that this is not an absolute rule at all, but, as said by the judges in the opinions quoted from, the very nature of the common right is such that a precise rule as to what is reasonable use by any one proprietor for irrigation cannot be laid down. A stream may be so small that any use for irrigation may deprive all the others of any like use, and the same may be true of a larger stream, where the use is by several of a large number of proprietors. The effect might be that while there might be sufficient water to supply several for irrigation, there would not be enough for all, and so all might be deprived of the benefit. But the private interests of all would in most cases, if not in every case, lead to an avoidance of the supposed evil. It is not to be doubted that the riparian proprietors would settle by convention upon a plan by which each could secure a reasonable use for irrigation purposes; as by authorizing each to stay the flow at recurring periods, or otherwise distributing it for their mutual and common benefit. The right of the riparian proprietors to a reasonable use of the water of the stream for purposes of irrigation is recognized in many of the California cases hereinbefore referred to, and in *Anaheim Co. v. Semi-trop. Co.*, 64 Cal. 185.

16. *On behalf of the defendant certain witnesses gave testimony tending to prove that, after the commencement of the action and issue joined, and during the trial of this action, there was no water-course as claimed, and no channel through which water could have flowed. The court erred in rejecting evidence, offered by the plaintiffs in reply, tending to prove that after the dates mentioned by said witnesses for defendant there was a water-course and channel.*

The court below found, as its findings are construed by both parties, that no water-course (connected with Kern river or otherwise) runs by or through any of the lands of the plaintiffs. We cannot say but there was a substantial conflict with respect to that matter, and in accordance with the established rule, must affirm the judgment and order, unless at the trial the court erred in rejecting or admitting evidence bearing, or claimed to bear, on the question of the existence of the water-course.

The court below refused to permit the plaintiffs to introduce certain evidence, after the defendant had closed, on the ground that the same was merely cumulative.

One exception saved by the plaintiffs related to an offer of testimony as to a place spoken of as "De Weber Road-crossing." With regard to that exception we think it may fairly be argued from the record that the defendant introduced evidence tending to prove there was no channel at any point where the De Weber road crosses the swamp, at a time several years before the commencement of this action; but we also think that the plaintiffs had already given evidence that at the time, and subsequent to the time, mentioned by defendant's witnesses, the De Weber road did cross a channel. We cannot say, therefore, that the court erred in refusing to permit further evidence in reply with respect to that matter.

The plaintiffs, in making out their case, introduced witnesses who stated that at various times prior to the diversion of water by the defendant they had passed along Buena Vista slough, and that there was a channel throughout its alleged length. As to several of these witnesses it might be questioned whether their inspection was not broken and interrupted. Crocker said that, as he passed along, the channel was in places concealed from his vision; McCrary, that the slough or channel existed at each section line; Still, that he had crossed through *nearly* every quarter section of the swamp. In argument, however, counsel for plaintiffs have insisted that in opening their case they proved a continuous slough from Buena Vista lake to Tulare lake, not merely as an inference from its existence in different places, but as a physical object, visible to their witnesses from one lake to the other. Assuming, as claimed by plaintiffs' counsel, that some of their witnesses pursued the alleged slough throughout its entire length, viewing each and every portion of it, it would be difficult to say on what principle plaintiffs could demand the absolute right, by way of reply, to contradict the declarations of witnesses for

the defendant that, at or about the times when the plaintiffs' witnesses had stated there was a channel from Buena Vista lake to a point below the plaintiffs' lands, there was in places *no* channel between the lake and that point.

Defendant called as witnesses Murray F. Taylor and others, who testified that, after the commencement of the action, and after answer filed herein, and the trial was commenced, they had passed from one side to the other of the swamp (avoiding disconnected sloughs and ponds) without crossing a channel. Plaintiffs offered to prove by McCrary that he subsequently ran a certain line through portions of township 27 S., range 22 E., and "what natural objects" he found on the line he ran. As no witness on the part of the defendant had testified with respect to such a line in the township named, the court properly sustained an objection to the offer.

But the plaintiffs also offered in reply to show by the witness McCrary "that at each one of the lines where the witnesses for defendant testify they have crossed, not only has this line been run where they testified to, but that the line has been run by this witness from one-half a mile to three-quarters of a mile on each side of that line, and that an examination has been made between these lines as to all channels and natural features of the country between the lines on each side of the line," etc.; and plaintiffs offered to prove the same things by Mr. Harrold, "who accompanied McCrary," and by Huntley, Beard, Noble, and others. Defendant might have insisted on the offer being made more definite; that plaintiffs' counsel should *name* the witnesses whose testimony they intended to rebut, and specify the exact fact they disputed; as, the fact that there was no channel where defendant's witnesses crossed. The offer to prove by McCrary, "in case he found sloughs or channels, or anything of that kind, they were leveled, and their width ascertained," did not absolutely exclude the idea that he found no slough or channel. But no such specific objection to the offer was made, and it sufficiently appears from the transcript that both the learned judge (who ruled that the offer was of cumulative testimony) and counsel understood the evidence on the part of the defendant against which the *offer* was directed.

The defendant's witness McMurdo testified that in April, 1881, (after suit brought and answer,) there was no water flowing at points in the alleged slough above the lands of the plaintiffs; and his testimony tended to prove that at the same time no water was flowing, and no channel existed, at another point also above such lands. After defendant rested plaintiffs offered to prove that within 30 days prior to June 1, 1881, the witness McCrary, with Beard and Huntley, had gone from Headquarters (a place above the points where McMurdo had stated no water flowed) *in a boat* to the Bonestell House, which is below certain lands of the plaintiffs. Taylor, Jastro, Cross, and Barker, witnesses for the defendant, testified to crossing the swamp on the fourteenth of April, 1881, (after the commencement of this

action,) and to the absence of a channel on the route they pursued. One Estee conducted the party from a point near his house, on the west side of the swamp, to the Round corral, near the east side. Estee was not examined by the defendant. In reply the plaintiffs called him, and asked: "What did you see when making that crossing as regards sloughs or channels?" The court sustained an objection to the question, and the plaintiffs excepted to the ruling. Witnesses for defendant, McMurdo and Fillebrown, testified to the running of a line (after the trial had commenced) across the body of swamp land, ascertaining levels along that line, and to the making of a profile of the same. They also testified that in running the line they came to a pond which constituted no part of a continuous slough or channel, but was without inlet or outlet. One G. W. Smith was called by plaintiffs, who testified that he followed the same line; that he also came to a pond, as to which there was evidence tending to prove it was the pond mentioned by defendant's witnesses, to which there was both inlet and outlet. Other offers, similar in character, were made by plaintiffs, to which defendant objected. To the ruling of the court sustaining the objection of defendant to the several offers plaintiffs duly excepted.

We think the first question presented by these rulings may fairly be stated thus: Defendant gave evidence tending to prove that, during the trial, there were places along the line of the alleged slough and channel where there was in fact no channel,—breaks in the continuity. The question to be considered is not modified by the claim of respondent that the effect of its evidence was to establish the absence of any channel through which the water was wont to flow, and to prove that, on the extraordinary occasions when the water came into the slough, it soon ceased to flow in a defined channel, but spread throughout the swamp. If the water did not flow with regular periodicity, or if, flowing periodically, it had no defined channel, (other than the whole swamp,) the plaintiffs had no cause of action,—in the first case, because there was no water-course; in the second, because there was no such water-course as described in the complaint; and perhaps, also, because the plaintiffs, being owners only of swamp lands, (even conceding the water in the swamp might constitute a stream,) were owners merely of the bed of the stream, and were not *riparian* proprietors. Gould, Waters, 148; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; S. C. L. R. 10 Ch. 679. But the testimony, to contradict which the offers of the plaintiffs were made, was testimony that the swamp land had been crossed on divers lines without the persons so crossing it coming into contact with any defined channel, or distinct evidences of such. There may be a continuous water-course through a body of swamp lands. The plaintiffs had given evidence tending to establish the existence of such a water-course. The evidence of defendant was to establish that there was no such water-course by proof that there was none at places where its witnesses

crossed the swamp. That such testimony tended to prove, or, if true, proved that there was no water-course touching the plaintiffs' lands, is not an objection to the counter-testimony offered. Testimony in reply is directed against the precise facts testified to by defendant's witnesses, not against the inferences which may be drawn from them. The witnesses testified that they crossed the swamp on certain lines, and found no channel. Did the court err in disallowing the offer of plaintiffs to prove that at such places there was in fact a channel at or subsequent to the times mentioned by defendant's witnesses?

All agree that it is within the discretion of the trial court to *admit* additional evidence in support of the plaintiffs' case after the defendant has rested. Of course, it is always safer to admit evidence claimed to be in reply, if the court entertains doubt of its admissibility. Nevertheless, the respondent here has a right to insist that it is for the appellants to point out plain error in the rejection of evidence. The rules as to the transfer of the burden of proof are not always determinative of the rules as to testimony in reply. The burden of proof is shifted by every species of evidence strong enough to establish a *prima facie* case. 2 Best, Ev. 473. But this only means that there is a necessity of evidence to answer the *prima facie* case, or it will prevail. *Heinemann v. Heard*, 62 N. Y. 455. A party on whom is the affirmative cannot reserve a portion of his evidence until the opposite party has exhausted his evidence to negative that offered in the first instance. Tayl. Ev. § 386. Questions as to the admissibility of evidence in reply, offered by the plaintiff, arise ordinarily where the answer consists of denials of the affirmations of the complaint. Where the answer avers new matter which it is for the defendant to prove, evidence on the part of the plaintiff to meet the evidence given by the defendant in support of his affirmative plea is not given in reply or "rebuttal," as the term is used in this connection. Rebutting testimony is addressed to *evidence* produced by the opposite party, not to his pleading.

It seems, indeed, at one time to have been held in England that when two pleas were tendered—as the general issue, and another plea of affirmative matter constituting a defense—the plaintiff was compelled to prove in advance the non-existence of the affirmative matter. Lord ELLENBOROUGH held the general rule to be, "where, by pleading or by means of notice, the defense is *known*, the counsel for the plaintiff is bound to open his whole case in chief, and cannot proceed in parts." *Rees v. Smith*, 2 Starkie, 31; *Delauney v. Mitchell*, 1 Starkie, 439. The practice seems long to have been settled in the English courts, however, that where the general issue is pleaded, and the plaintiff is also notified of a special defense, he has his option to give all the evidence he intends to offer to rebut the averments of the special plea or notice in the first instance, or to give none of such evidence, and to reserve all to be given in reply. *Browne v. Murray*, Ryan & M. 254. In this country the right of the plaintiff to reserve all his evi-

dence, to meet the evidence of the defendant in support of his special or affirmative plea, has always been recognized. And so, where the plea or answer consists of denials alone, under which, however, affirmative matter is provable which may constitute a defense, the plaintiff is entitled to rebut the defendant's evidence of such affirmative matter. In a note to *Greswolde v. Kemp*, Car. & M. 635, the reporters say:

"One test whether the plaintiff is entitled to call witnesses in reply to the defendant's proofs seems to be whether the defendant's defense is disclosed by the plea. * * * He cannot reasonably be called on to give contradictory evidence by anticipation of proof which the defendant might never give, or which, if given, the plaintiff could not foresee."

As was said by BRONSON, J., in *Hollister v. Bender*:

"The substance of the allegation to be tried, rather than the particular form of the pleading, must determine where the *onus* lies; particularly where the defendant is not required to plead the particular matter on which he intends to rely." 1 Hill, 153.

In that case the action was *assumpsit*; the plea *non-assumpsit*, under which, by the New York practice, the defendant, without actually controverting the promise, might prove payment, release, accord, and satisfaction, etc. If, said Judge BRONSON, any of these defenses were pleaded specially, the defendant would clearly have the affirmative of the issue, "and the burden of proof is the same when the defense is affirmative matter sought to be proved under a denial of the promise." The rule is not that the plaintiff must anticipate all evidence that may be admitted under the denials of an answer. The rule assumes that evidence may be admitted which he cannot reasonably be expected to anticipate.

Mr. Croswell, in his note to section 469, Greenl. Ev. (14th Ed.,) says:

"There is considerable conflict in the decisions in regard to the order of proof and the course of trial in the different states. In some of the states the party is only required to make a *prima facie* case in the opening, and may reserve confirmatory proof in support of the very points made in the opening till he finds upon what points his opening case is attacked, and then fortify it upon those points. *Clayes v. Ferris*, 10 Vt. 112. But in this state [Massachusetts] the defendant must put in all his evidence in the first instance, and the plaintiff in his reply is confined to fortifying those points in his case which are attacked by defendant. And, in some of the states, it is understood that this process of making and answering the plaintiff's case is allowed to be repeated an indefinite number of times; but at common law the plaintiff puts in his whole evidence upon every point which he opens, and the defendant then puts in his entire case, and the plaintiff's reply is limited to new points first opened by defendant."

Investigation shows that the preponderance of authority is in favor of what Mr. Croswell calls "the common-law rule," and it has never been suggested that any other rule obtains in California. The rule has been expressed in different terms by writers and judges. Mr. Croswell says the evidence to rebut may be confined to "new points

first opened by the defendant." Mr. Taylor states it negatively. Ev. § 386.

In *Hastings v. Palmer*, COWEN, J., said:

"Strictly speaking, the plaintiff or party holding the affirmative is bound, in the first instance, to introduce all the evidence on his side, except that which operates merely to answer or qualify the case as it is sought to be made out by his adversary's proofs." 20 Wend. 225.

And Starkie wrote:

"After the defendant has adduced his evidence the plaintiff's counsel at once proceeds, without any observations, to tender any evidence he may have in reply; but this must be confined by negating specific acts sworn to by defendant's witnesses which he could not be expected to have anticipated." Ev. (10th Ed.) side page 60J.

We are brought back to the proposition that where the plaintiff is not informed by the answer of new matter which constitutes a defense he is entitled to adduce evidence in reply to the evidence given to establish such matter. It is admitted that it is no objection to evidence in reply to an affirmative defense that it may strengthen the plaintiff's original case, and upon just principles, it would seem that if the new matter offered by the defendant may constitute an affirmative defense, the plaintiff is not precluded from replying to it, because such new matter may also have a tendency to weaken or negative plaintiff's case as originally presented.

A water-course has been said to consist of "bed, banks, and water." The water need not flow continually, but it would seem the flow must be periodical,—such as may be expected during a portion of each year. It must be made to appear that the water usually flows through a regular channel with banks or sides. Ang. § 4. It may be conceded that it was for the plaintiffs here to establish a natural stream, flowing at least periodically, up to the time of the diversion; and that to justify a permanent injunction the court must have been satisfied that the water would have continued to flow except for the diversion. The court would be authorized to deny the decree prayed for if the evidence showed that the channel proved to exist when the diversion occurred had disappeared (and ceased to exist) as the result of natural causes, and not as a consequence of any acts of the defendant, or of interference by others.

Evidence that there were no indications of a channel at a certain date would, perhaps, tend to prove that there was no channel at a previous date. But, unless we can say as *law* that the channel could not have gone out of existence, such evidence would not establish conclusively that the channel never existed; nor would it create the disputable presumption that "a thing once proved to exist continues as long as is usual with things of that nature." Code Civil Proc. 1963. The presumption that a thing existing in the present existed at any time in the past, if it could be considered to be a presumption, would be the reverse of the Code presumption. The effect of the evidence

must, of course, depend upon the permanent or transitory nature of the thing itself. Apply the Code presumption to the case before us. Let us suppose a water-course was proved at or before the commencement of the trial. The disputable presumption is that it continued "as long as is usual with things of that nature." We cannot say how long a channel for water will continue.

It is not essential to a water-course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. The law cannot fix the limits of variation in these and other particulars. As was said, in effect, by CURTIS J., in *Howard v. Ingersoll*, 13 How. 428, the bed and banks or the channel is in all cases a natural object, to be sought after, not merely by the application of any abstract rules, but, "like other natural objects, to be sought for and found by the distinctive appearances it presents." Whether, however, worn deep by the action of water, or following a natural depression without any marked erosion of soil or rock; whether distinguished by a difference of vegetation, or otherwise rendered perceptible,—a channel is necessary to the constitution of a water-course.

Of course we cannot judicially declare that a channel is of such a nature that it can never cease to exist. Both the evidence and findings herein show that, as a result of the action of water, channels have been closed and new channels formed. We cannot say but the *indications* of a channel may be removed by other natural forces. We can conceive that along the course of a stream there may be shallow places where the water spreads, and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the lowest portion of the depression, it flowed in a channel, notwithstanding the fact that, the water being *withdrawn*, the "distinctive appearances" that it had ever flowed there would soon disappear.

Causes are ordinarily tried with reference to the condition of things prior to and when an action is commenced. The pleadings (except supplemental) relate to that date, and the evidence is confined to the averments or denials of the pleadings. A plaintiff seeking the peculiar relief here sought, must satisfy the court that, unless the injunction be made perpetual, he will be deprived of water in the future. But the continuation of the *status quo* at the commencement of the action is an *inference*. The plaintiffs here were not bound to prove by independent evidence that the channel continued to exist after suit brought. The issue was, had they a cause of action when the suit was commenced? If they had, it was because of conditions existing when the water of Kern river was diverted, and when they commenced their proceedings; and this is none the less so because, in order to secure the decree they prayed for, the conditions must be such as would authorize the court to infer that they would continue

in the future. The inference would always have to be drawn, whether educed from facts proved to exist prior to suit brought, or from facts existing at the time of the trial. It was not the duty of plaintiffs, under the pleadings, in the first instance, to prove the continued existence of a channel after the action was begun, except so far as it might be implied from its existence previously. Even, therefore, if the evidence of the defendant as to the absence of a channel at times after the action, and after the trial was commenced, be treated merely as evidence tending to prove its non-existence before, the plaintiffs were not bound to anticipate it by contradictory proofs. The pleadings gave no notice that such evidence would be offered.

But the evidence given by the defendant also tended to prove that the channel, or the distinctive appearances of it, had ceased. It is not *impossible* that they had ceased between the dates testified to by the plaintiffs' witnesses and those of the examinations made by the witnesses for the defendant. If the channel had so ceased to exist, that fact would constitute an affirmative defense. The defense was not pleaded in terms, and, as the evidence tended to prove that a channel had never existed, it was admitted without objection. That fact ought not to deprive the plaintiffs of their right to reply to the new matter constituting an affirmative defense, of which the answer had not informed them. They could not reasonably have been expected to anticipate that the defendant would offer evidence of new matter of which the answer did not give them notice. Further, the testimony of certain witnesses for the defendant was not merely to the bald fact that there was no channel at a certain time. The facts to which they testified were that, on an occasion, they passed from one side to the other of the lands through which the slough had been said to run without crossing or coming to any slough or channel. The court refused to permit the plaintiffs, in reply, to produce evidence tending to prove that on the occasion referred to the defendant's witnesses *did* meet with a slough or channel. Thus, the defendant having called some of those who made the trip together, the court rejected the plaintiffs' offer to call another of the same party to contradict the statement of those examined by the other side. It is difficult to distinguish this from the other offers made; but it presents the question sharply. In this instance there can be no possible doubt that the offered testimony related to the matter testified to by the witnesses for the defendant.

Our conclusion is that the court below erred in sustaining the defendant's objections to offers of evidence, with respect to the existence of a slough or channel, made by plaintiffs after the defendant had rested.

17. *The court below erred in rejecting all or some of the certificates of purchase offered by the plaintiffs in reply.*

In their amended complaint the plaintiffs allege

"That plaintiffs were, at the commencement of this action, the owners in fee, seized and possessed (and for more than a year theretofore they and their grantors were such owners) of all those lands situate in the county of Kern, in the state of California, and particularly described (according to the surveys by the authority of the United States of America, and referred to the Mount Diablo base and meridian) in a certain schedule which is hereto annexed, marked 'Schedule M,' and made a part of this complaint; that said lands are swamp and overflowed lands, and as such belonged to the state of California until the year 1876 and later, in which year, and at various times afterwards, and before the commencement of this action, they were granted by the state to the plaintiffs and their grantors."

The action was commenced September 2, 1880. In its answer to the amended complaint the defendant avers:

"That heretofore, to-wit, on or about the fourth day of May, A. D. 1875, defendant's grantors, acting in the full faith and *bona fide* belief that a large portion, to-wit, more than seventy-four thousand (74,000) inches, measured under a 4-inch pressure, of the waters of said Kern river were unused, vacant, unappropriated, and free and open to appropriation and use, posted a certain notice of appropriation of water on the north bank of said river, in Kern county, state of California, at a point on or about the south-west quarter of section thirteen, (13,) in township twenty-nine (29) south, range twenty-seven (27) east, Mount Diablo base and meridian, according to the United States surveys; wherein they claimed, and whereby they notified, plaintiffs, plaintiffs' grantors, and all persons whomsoever it might concern, that they claimed and appropriated, and proposed and intended to take out and divert, use, and consume, a large part and portion, to-wit, seventy-four thousand (74,000) inches, measured under a 4-inch pressure, of the flowing waters of said Kern river, for the purpose of irrigating certain lands in said notice described, and of supplying thereunto and thereon for other purposes in said notice set forth; that within ten days after the posting of said notice, to-wit, on the fourth day of May, A. D. 1875, the said notice was duly recorded in the office of the county recorder of said Kern county, in Book 1 of Water Rights, page 37, to which said record reference is here made, and which said record is made a part hereof; that defendant's said grantors thereby appropriated and acquired the said amount of flowing waters of said Kern river, with the right to take out, divert, use, and consume the same for the uses and purposes in said notice mentioned, all of which appropriations, rights, and properties they, (defendant's said grantors,) on, to-wit, the eighteenth day of May, A. D. 1875, granted, bargained, and sold, transferred, assigned, and conveyed, to this defendant; that within twenty days after the posting of said notice as aforesaid, to-wit, on or about the — day of May, A. D., 1875, defendant, for the purpose of utilizing said waters of Kern river, in the manner and at the places in said notice mentioned, commenced the construction of that certain ditch or canal known as the 'Calloway Canal,' and being the same as in said complaint described, and thereafter and thenceforth defendant continuously and diligently prosecuted the work on said canal until the same was completed, and expended thereon, and in the construction thereof, large and vast sums of money, amounting in the aggregate, to-wit, ninety-thousand (\$90,000) dollars; that during the construction of said canal defendant diverted and used the aforesaid amount of water in irrigating and fertilizing the lands in said notice described, and for stock and other beneficial purposes on said described lands, and defendant has continued so to use said amount of water from and after the completion thereof."

At the trial, the plaintiffs, as part of their evidence in chief, produced patents from the state of California granting to the plaintiffs

or their grantors certain of the lands described in the complaint. The several patents are dated January 18, 1876, February 17, 1876, September 11, 1876, and June 15, 1877. And the plaintiffs also gave in evidence the judgment roll in an action brought by the *People of the State of California v. John Center and others*, by the judgment in which action it was decreed that the plaintiffs herein have certain of the lands described in the complaint in the present action, and that they were entitled to patent for the same as provided in "An act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties," approved March 20, 1878. The decree in the said action (*People v. Center*) was entered September 17, 1878.

We are about to consider whether the court below erred in rejecting, when they were offered by plaintiffs, all or any of the certificates of purchase issued by the state land-office to assignors of the plaintiffs. The court below held that there was *no stream*. As we have seen, however, the court erred in refusing to admit certain evidence bearing on that issue. In deciding the question as to the admission of the certificates we must assume that there was evidence of a stream running from Kern river to some of the lands described in the complaint, and to a tract described in at least one of the certificates. It does not follow, however, that all the certificates would in any event have been admissible. It is to be borne in mind that if the court below had found a water-course to, through, or past any one or more of the tracts described in the complaint, only such of the certificates of purchase would have been admissible as showed the purchase of tracts so found by the court to be touched or traversed by the water-course. If at the trial the court found, on sufficient evidence, that no water-course existed, or that none of the lands described in the complaint bordered on it, and had committed no error with respect to the admission of evidence relating to these matters, it is very clear that no material error would have been committed by rejecting all of the certificates of purchase. It is asserted by counsel for respondent that, in any view of the case, no evidence was given tending to prove that the stream ran through or touched the lands described in any of the certificates of purchase offered, except one. If the court erred in rejecting one of the certificates, the consequence, so far as it should influence the action of this court, is the same as if all were erroneously rejected. But in case there shall be a retrial in the superior court, it is perhaps important, and it is certainly proper, to limit any general statement in such manner as that it may be made applicable to the evidence as it shall be presented to that court when the case shall be retried. If we shall say, in general terms, that the certificates of purchase ought to have been admitted, this must be understood in a limited sense, and to apply only to the certificates with reference to the lands described, when there is evidence that they are lands by or through which the water-course passed. All the sections or fractional

sections mentioned in any one certificate constitute a single tract of land. If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one certificate, the patent can operate by relation (for the purpose of this suit) to the date of those certificates *only*, the lands described in which border on the stream.

The defendant having given evidence to prove the matters so as aforesaid pleaded in its answer, the plaintiffs, as evidence in reply, offered *certificates of purchase*, dated September 30, 1872, for sections and portions of sections (being part of the lands described in the complaint) in township 25 S., range 21 E.; portions of sections in township 26 S., range 21 E.; sections and portions of sections in township 25 S., range 22 E.; sections and portions of sections in township 26 S., range 22 E.,—each of said certificates being signed and issued by the register of the state land-office, and the same appearing to have been canceled by issuance of patent; also like certificates for portions of the lands described in the complaint, one dated February 5, 1877, and three, March 2, 1874. By the first section of the act of March 27, 1872, "to put in effect the provisions of the Civil Code relative to water-rights," title 8 of part 4 of division 2 of the Civil Code went into full force and operation on the first day of May, 1872. St. 1871-72, p. 622. All the certificates of purchase above mentioned were therefore issued after the title of the Civil Code became operative.

It is manifest that if, as contended by counsel for *appellants*, the state is a "riparian proprietor" within the meaning of section 1422 of the Civil Code, the defendant could acquire no rights to water by appropriation, as against the grantees of the lands from the state, even as against those who became such after the appropriation was made. But, in that case, no injury was done to the appellants by the rejection of all the certificates of purchase, since the appellants, as part of the evidence in chief, had given in evidence their patents issued after the appropriation. In order, however, to meet inferences which may be drawn from the assumption that the state is a "riparian proprietor," within the meaning of the section, it is proper to consider that matter. It is urged by counsel that the title of the Civil Code only relates to the right to appropriate waters upon public lands of the United States, the same right growing out of priority of appropriation, recognized by the courts for many years past, and recognized and confirmed by the acts of congress of 1866 and 1870; that the state, in the exercise of its police power, and of a trust assumed on its part, has only regulated the conduct of its subjects, going on lands of the United States, (under an implied or express license,) with reference to this matter of appropriation. It is admitted the state may give the right to appropriate water on its lands, but it is contended the state has not done so, and, on the contrary, has reserved the rights of all riparian proprietors, of whom it is one.

The grant however is general. "The right to the use of flowing water, etc., may be acquired by appropriation." Civil Code, 1410. No class of lands is mentioned from which water may be diverted, yet, as to its lands, the *United States* is a riparian proprietor. True, the United States had already recognized the right of appropriation on its lands; but if the acts of 1866 and 1870 had never been passed, it cannot be doubted that section 1422 of the Civil Code would have been held *not* to apply to public lands of the United States. This would have been necessary to give effect to the title, and to carry out the apparent intention of the legislature, in the light of the history of the country to which reference has been made. Thus, by implication, the United States, as a riparian proprietor, is excluded from the benefit of the section. "The rights of riparian proprietors are not affected by the provisions of this title." Civil Code, 1422.

The citizens of the state have never been prohibited from entering upon the public lands of the state. The courts have always recognized a right in the prior possessor of lands of the state as against those subsequently intruding upon such possession. The same principle would protect a prior appropriator of water against a subsequent appropriator from the same stream. It is not important here to inquire whether, as against a subsequent appropriation of water, a prior appropriator of land, through which the stream may run, would have the better right. It is enough to say that, as between two persons, both mere occupants of land or water on the state lands, the courts have determined controversies. The implied permission by the general government to private persons to enter upon its lands has been assumed to have been given by the state with reference to the lands of the state; and the state, for the maintenance of peace and good order, has protected the citizen in the acquisition and enjoyment on its lands of certain property rights obtained through possession,—perhaps the mode by which all property was originally acquired. In view of these facts, we feel justified in saying that it was the legislative intent to exclude as well the state as the United States from the protection which is extended to riparian proprietors by section 1422 of the Civil Code.

We have elsewhere had something to say with reference to the class of persons whose rights are protected by section 1422. For the present, we shall assume that it includes those who may become riparian proprietors at any time before an appropriation of water is actually made in accordance with the provisions of the Civil Code. Assuming this, the certificates of purchase above mentioned were admissible in evidence if the other certificates, which were of a date anterior to the enactments of the Civil Code, were admissible.

To the introduction of each of the certificates of purchase, when offered, counsel for defendant objected on the grounds that it was "irrelevant, immaterial, and not proper testimony in rebuttal." It has been suggested that the plaintiffs were precluded from showing

title in themselves prior to 1876, by reason of their allegation in the complaint "that the lands belonged to the state of California until the year 1876 and later." If they were estopped by that allegation, they would have been equally estopped if the certificates had been offered as part of their evidence in chief. But we think they were not so estopped. The lands are swamp lands, and are alleged to have been granted by the state. If the averment had not been inserted that the lands belonged to the state up to the grants, the presumption would have been that they belonged to the state up to the date of the patents, or, at least, up to the initiation of the proceedings which ended in patents. Yet, notwithstanding the presumption, the plaintiffs would have been entitled to prove that *they* owned them at a date previous to that at which the complaint alleges they became the owners. The averments are, in effect, that the lands belonged to the state until they were granted to plaintiffs. The dates of the grants, as pleaded, are immaterial, if they were in fact granted before the diversion of water. As to the averment of previous ownership by the state, it is an averment of a fact of which we would take judicial notice, and may be disregarded. If the complaint had simply stated that the plaintiffs had become the owners at a certain date, by virtue of grants, would it be an objection to the admission of a grant of an earlier date that the state then owned the lands? Under our system that which the law presumes need not be alleged, and, if alleged, ought not to determine the rights of parties, unless the presumption, independent of the allegation, would determine them.

The certificates, in connection with the patents, would have been admissible as part of plaintiffs' evidence in chief under the averment of ownership in fee. In connection with the patents, they would have proved a title to every intent, as against the state and its grantees, as of the dates of the certificates.

In *Union Mill v. Dangberg*, 2 Sawy. 450, HILLYER, J., said:

"It is settled that the entry and payment, and certificate thereof, convey the equitable title. Thereafter the land ceases to be public, and the government has no right to sell it again, but holds the legal title in trust for the purchaser. * * * As possessors and equitable owners they (the holders of certificates) are entitled to enjoy *all the incidents* to the land and its ownership, as well as the land itself. The patent, when issued, relates back to the original entry,—the inception of the title,—so far as is necessary to protect the purchaser's title to the land." *Gibson v. Choteau*, 13 Wall. 92; *Gilman v. Lockwood*, 4 Wall. 410; *Hughes v. U. S.*, Id. 232; *People v. Shearer*, 30 Cal. 648; *Carroll v. Safford*, 3 How. 441.

The certificates offered by the plaintiffs herein were evidence of a right of entry by the assignors of the plaintiffs, and of the receipt by the state of *part* of the purchase money; in the last respect differing from certificates issued to pre-emptioners under the laws of the United States, which evidence the receipt of the whole of the purchase money. The right to the possession might have been terminated by a failure to pay the balance of the purchase money; but the patents issued

when the certificates were canceled proved payment of the balance of the purchase money, and related to the dates of the certificates. The certificates and patents would have proved that plaintiffs and their assignors had been entitled to the possession of the lands in law and equity from those dates. They certainly would have shown them to have been the owners, so far as the fact of ownership could have been made the basis for relief in an action like the present.

There can be no doubt but the equitable owner in possession of a tract of land bordering a stream is entitled to relief in a court of equity against the wrongful diversion of water of the stream. Even at law, as between parties claiming under patents from the general or state government for the same land, the junior patent will prevail if the proceedings to secure it were commenced before those culminating in the senior patent. Here the plaintiffs have patents which relate back to the certificates, (the contracts of the plaintiffs and their assignors having been fully performed,) so as to protect them in their title to the lands, with all their incidents. Assuming that the rights of these parties are to be determined by the decision of the question, did the plaintiffs acquire a right to their lands *before* the defendant appropriated the waters? the patents of the plaintiffs related to the certificates of purchase as against the defendant's appropriation.

Inasmuch as a sale of lands includes a sale of the corporeal hereditament,—a right to the flow of the water,—it is clearly the intention of the statutes providing for sale of the state lands that the purchaser shall be protected from a deprivation of any of the valuable incidents of ownership until he shall lose his right to purchase by failure to complete his contract,—to reserve and withdraw such lands from the privilege according to appropriators to divert waters from state lands. To hold otherwise, and so to construe the Code as that he who has made part payment for land, and entered into possession under a contract with the state guarantying to him a complete title in case he shall pay the balance, can be deprived of the benefit of that which is a valuable incident of ownership, (notwithstanding he shall subsequently have fulfilled his contract according to its terms,) would operate manifest injustice. We are not now speaking of the power of the state. Doubtless, it may sell its lands with such limitations as it may deem proper. But if the Code provisions, and the statutes providing for the disposition of state lands, can be held to mean that the purchaser shall have riparian rights as against subsequent appropriators, it would lead to iniquitous results to construe the provisions in such manner as that he shall not secure the benefit of those rights in case he performs his contract; in other words, that his patent shall not relate to his certificate of purchase.

So far as the certificates merely tended to prove title in the lands at and prior to a wrongful diversion of water by defendant they were not admissible *in reply*. Proof that they were owners at the time of

the diversion complained of—that is, the diversion which occurred after they became owners as alleged—was part of their original case. The plaintiffs were fully informed by the answer that defendant relied upon a right to appropriate water acquired from the state prior to the dates of the patents. But that was an affirmative plea, the averments of which it was for the defendant to establish. If when the plaintiffs rested they had proved title by patent, the existence of a water-course running through the lands, and diversion by defendant subsequent to the patents, they had proved *their case*, not merely *prima facie*, but conclusively, in the absence of proof of the affirmative matter set forth in the answer. They were not bound to disprove in advance the appropriation pleaded. Having made out, or attempted to make out, their case in the first instance, the plaintiffs would not have been entitled, in contradiction of evidence given on the part of the defendant, under the denials of the answer that the plaintiffs were not the owners at the time of the alleged diversion, to produce further evidence in support of their title. But, after the defendant rested, the plaintiffs were authorized to meet the evidence in support of the plea that the water was appropriated by evidence that the waters were never legally appropriated, by the defendant. If the waters could be appropriated, as against the lands described in the complaint, only while they remained the lands of the state, then evidence that, when the appropriation was made, the lands were *not* the lands of the state was admissible, and none the less admissible because it also proved that the plaintiffs or their assignors were then the owners. Such evidence was not evidence in reply to new matter proved under the denials of the answer, but was evidence relating to an issue made by the plea of the defendant, an issue as to which the defendant had the affirmative. It was evidence which, by every interpretation of the rule, the plaintiffs had a right to reserve until after the defendant had closed.

It has been suggested that the plaintiffs gave some evidence in chief tending to prove their *possession* prior to the appropriation. We are not aware that the English rule, which at one time prohibited a plaintiff, in case he gave any evidence tending to negative an affirmative defense in the first instance, from giving further like evidence in reply, was ever enforced in this country or *in equity*. Moreover, the mere prior occupation of lands of the state can constitute no reason for preventing the diversion of water flowing through them by one expressly authorized by the state to divert the water from the occupant.

In opposition to these views, and as adjudications that the certificates of purchase, and possession under them, gave the plaintiffs no riparian rights, and that the certificates, as against the defendant, were not evidence even *prima facie* of the payment of any portion of the purchase money, the counsel for respondent cite *Smith v. Logan*, 1 Pac. Rep. 678; *Covington v. Becker*, 5 Nev. 281; *Lake v. Tolles*,

8 Nev. 285; *Brewer v. Hall*, 36 Ark. 351; *Lansdale v. Daniels*, 100 U. S. 118; *Megerle v. Ashe*, 33 Cal. 84; *Smith v. Athern*, 34 Cal. 506; *Daniels v. Lansdale*, 43 Cal. 41; *Osgood v. Water Co.*, 56 Cal. 574.

It is suggested that the certificates were not even *prima facie* evidence of the receipt of any money by the state as against the defendant, alleged to be a stranger to the contract. But if, by reason of the fact of the payment of one-fifth of the purchase money by the assignors of plaintiffs, the issuance of the certificates, and the entry thereunder, the assignors of plaintiffs acquired riparian rights, the defendant is not a grantee of the legal title of the waters from the state. Even if it should be conceded that, in a suit for specific performance by a vendee against the grantee of his vendor's title, the vendor's receipt for part of the purchase money from his vendee would not be evidence against the grantee, the analogy is not perfect. Here there is no specific grant to the defendant to divert the water. It claims to have acquired the right to take it by taking it. The laws of the state are to be read together. Statutes provide for the sale of the lands, and the mode by which the title can be acquired by individuals. They are to pay 20 per cent. of the purchase price, and then a certificate issues. On the payment of the balance, within a certain time, the purchaser receives a patent. As against the state the certificate is evidence of the receipt of certain moneys; it is also evidence of the right of possession. The state has done no act indicating a purpose to transfer to another its right to the balance of the purchase money, or its duty, upon the receipt thereof, to convey the legal title. If a certificate is obtained without the previous payment of the 20 per cent. it is for the state by proper proceeding to annul the certificate. While the contract of purchase is recognized by the state authorities as alive, the water of a stream flowing through the land cannot be diverted by a mere appropriator, because it is the intent of the statutes that the water shall not be so appropriated. The rights of appropriators are all subject and subordinate to those of persons with whom the officers of the state may have previously dealt as purchasers of lands, and recognized as such by delivery of certificates of purchase. All lands thus contracted for are reserved from the effect and operation of any appropriation of water until failure of the purchaser to complete his payments, the completion whereof can be proved by patent issued within the time limited by law. It remains with the state to determine whether the purchaser of the land has complied with his contract, and whatever is recognized as sufficient evidence of such compliance by the state is sufficient evidence against one attempting to appropriate water after the purchaser of the land has been let into possession, as shown by a certificate of purchase.

In this view the cases cited have little bearing on the question we are considering. This is not merely a case of two persons claiming to derive by patent from the same source, between whom the prior

equity prevails. The defendant had an absolute right to divert the water when it appropriated the flow, or it had no right. The plaintiffs would have had no equity after paying for the land in full (had patents been refused) on which they could follow the legal title to the flow of the waters into the hands of the defendant, and have a trust decreed. They would have no right, legal or equitable, arising out of their ownership of the lands to divert the waters outside of their own lands, or to demand from another a conveyance of such right. The effect of holding that a valid diversion of water from the lands could be made after part payment therefor, and certificate, would be to deprive them of the moneys paid, or of the benefit of the water, which may have been a principal inducement to the purchase.

It may be said that the purchaser knows that he is liable to have the water diverted by a subsequent appropriator when he makes his payment. But the matter of notice cannot determine the right or be conclusive of the proper interpretation of the statutes. If construing the statutes one way, the purchaser has notice when he makes the first payment that the water may subsequently be diverted, it is also true, construing the statutes the other way, the appropriator has notice that the land has been contracted and partly paid for. In the one case, however, the purchaser has already parted with value; in the other, the appropriator has expended nothing prior to the purchase and part payment by the purchaser. Assuming, as has been assumed thus far, that the statutes do not authorize the diversion of water from lands which shall have passed into the absolute ownership of private persons, it is equally clear their purpose is to protect the flow of water to lands contracted for and partly paid for under the laws of the state.

In *Smith v. Logan*, *supra*, cited by respondent's counsel, it seems to have been held that one in possession of land, under an unexecuted contract for the sale thereof, cannot assert the rights of a riparian proprietor in an adjoining stream. In that case it appeared that the land was owned in fee by another private person, who had contracted to sell it to a defendant in the suit. The supreme court of Nevada said: "The contract is unexecuted, and the conveyance depends on the performance by Logan of the obligations imposed upon him. Since he has not acquired the fee, it is obvious that the doctrine of riparian proprietorship cannot be invoked in his behalf." When water is diverted from land an injury is done to the possession, and ordinarily it is sufficient if the plaintiff shows he has the possession as against a mere wrong-doer. Gould, Waters, 476. But inasmuch as it here appears that the fee was in the state when the diversion commenced, the mere possession of state lands would not be sufficient to establish a right to the water in plaintiffs, as against one authorized by the state to appropriate. It became necessary, therefore, for the plaintiffs to establish that they had acquired the right to the possession from the state. Did the contracts of their assignors with the

state, and their entry and possession, show this? The plaintiff in such cases is not bound to prove the same rule as he alleges, "for the disturbance is the gist of the action, and the title is only the inducement." Gould, Waters, 478, and cases cited in note. He need not prove the precise title to the land was alleged, but must prove that he is entitled to the water. If he has acquired the right to the possession of the land from the state, even although he may hold it subject to the right of the state to deprive him of the possession if he shall not satisfy a deferred payment, it would seem that he is entitled to the enjoyment of the flow of the stream as an incident to his possession. One subsequently diverting water from the land cannot defend his acts by proving that the plaintiff is not the owner in fee, although entitled to the possession as against the legal owner and third parties. But if this were doubtful when the legal title is in another private person, here, as we have seen, it is the evident intent of the statutes that those placed in possession of lands under contracts made with the state shall not be deprived of flow of the water by mere appropriators while the right to the possession shall continue in the purchaser as against the state.

It would seem to have been held in *McDonald v. Bear River Co.*, 13 Cal. 220, that a contract of purchase and possession under it constitute an equitable estate, with the present right to the enjoyment of all its incidents. There the whole purchase price had been paid. Of the other Nevada cases cited by counsel for respondent, *Covington v. Becker* holds that, upon public lands of the United States, the prior appropriator of water has the better right as against a subsequent appropriator of the same stream. In *Lake v. Tolles* the plaintiff was a riparian proprietor, holding under a United States patent. The defendant had a bare possession of unsurveyed public lands higher up on the stream. It was decided that the defendant had no riparian rights, and could not dispute the plaintiff's right to the water. In the Arkansas case it was held that a mere certificate of the swamp-land commissioners of that state that the applicant "has this day applied to purchase" a designated tract imported in itself no contract. *Megerle v. Ashe* that, as against a prior patent from the state of lands as school lands, (500,000-acre grant,) a subsequent patentee from the state may introduce evidence that he had acquired a prior pre-emption right; but, to overcome the state patent, must prove that he filed his declaration after the plat of the survey had been filed in the office of the United States register. In *Smith v. Athern* the established rule is repeated:

"At common law, and under our mode of procedure, in case of conflicting patents to land from one paramount source, the court, in actions of ejectment, will look behind the patents, and ascertain which party had the prior equity; and when ascertained, it will attach itself to the legal title, which, by relation, takes effect at the time the equity accrued; and thus a junior patent, founded on a prior equity, will prevail over an elder patent founded on a junior equity."

Lansdale v. Daniels asserts the principles laid down in *Smith v. Athern*, that the prior equity must prevail, and applies it in a case where, in an action to recover the possession of lands, the defendant filed a cross-complaint alleging prior equities. Upon the facts of that case, however, it was held that the plaintiff had both the prior patent and the prior equity. *Lansdale v. Daniels* merely adjudges that the filing of a pre-emption declaration before the surveyor general has filed his plat of survey is premature, and a nullity. *Osgood v. Water Co.* presented a question of priority between an appropriator of water on lands of the United States and a pre-emptor. It was there held that, by reason of the express language of the seventeenth section of the act of congress of July 9, 1870, amending the act of July 26, 1866, the rights of the pre-emption claimant as against an appropriator, date only from his patent or certificate of purchase.

It is not necessary here to inquire whether the section of the amendatory act of 1870, referred to in *Osgood v. Water Co.*, should be read distributively, so as to mean that all patents thereafter issued, or pre-emptions thereafter "allowed," (or proved up and paid for,) should be subject to water-rights previously acquired under, or recognized by, the act of 1866. The right of appropriation, which is the basis of defendant's claim, so far as it may affect land of the state or its grantees, is to be derived from some law of the state. *Osgood v. Water Co.* construes statutes of the United States; and no one of the decisions cited by counsel interprets the statutes of the state bearing upon the question of water-rights, or determines the relative rights of those deriving title to lands from the state and appropriators of water.

It is contended by defendant, however, that from the time the title of the Civil Code relating to water-rights went into operation, no grantee of state lands has any "riparian rights;" that title went into operation on the first day of May, 1872. St. 1871-72, p. 622. If this be so, the certificates hereinbefore mentioned as having been issued subsequently to that date were properly rejected.

The bill of exceptions shows that plaintiffs also offered in evidence certificates of purchase issued prior to 1872; but if the proposition of defendant's counsel be correct, the certificates last mentioned were not admissible *in reply*, because they would have tended to make out an entirely new case. The plaintiffs were obliged to prove, in the first instance, that they were entitled to the relief prayed for; that they were the owners or entitled to the exclusive possession, by right derived from the state, of the lands through which the stream flowed; and that defendant had diverted water from *their* lands. If, by their evidence in chief, they entirely failed to prove that they were entitled to have the water flow to their lands—and they did so entirely fail if their patents, issued after the provisions of the Code took effect, gave them no right to the water,—they could assert no claim to prove facts on which their whole case depended, after the defendant had rested. It was necessary to inquire, therefore, whether the provisions

of the Civil Code from the time they took effect (May 1, 1172) operated to deprive subsequent grantees of state lands, intersected or bordering on streams, of all the rights known as "riparian rights." Such is the contention of defendant, and it includes the proposition that section 1422 of the Civil Code only protects riparian rights already acquired when the title of the Code went into operation. For convenience, we have treated the question presented in an earlier place in this opinion. We have there endeavored to show that section 1422 of the Civil Code saves riparian rights to those receiving grants of state lands subsequent to the enactment of that section. *Ante*, title 11. Assuming this, the court below erred in excluding the certificates of purchase.

For errors mentioned in foregoing titles (Nos. 16 and 17) a new trial should have been granted by the court below.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKEE, J.; SHARPSTEIN, J.; THORNTON, J.

ROSS, J., (*dissenting*.) I dissent for the reasons given in my dissenting opinion filed when the case was last under consideration. 4 Pac. Rep. 929.

MORRISON, C. J., (*dissenting*.) I dissent for the same reasons.

MYRIC, J., (*dissenting*.) I dissent from the judgment, and from the views of the majority of my associates, as to riparian rights, for two reasons:

1. I do not think that the adoption of the common law of England, by the act of the legislature of this state of April 13, 1850, was intended to or did establish a rule of decision as to the right of appropriation of water for irrigation. The land of the birth of the common law of England had no occasion to consider or act upon the necessity for irrigation, and appropriation was not within the scheme of its laws. The rights of riparian owners (whatever they were) had reference to the country and its needs, of which irrigation was not an essential part. The point decided in *St. Helena Water Co. v. Forbes*, 62 Cal. 182, had reference to the right of condemnation; no question as between riparian rights and the right of appropriation was considered or involved.

2. The plaintiffs in this case are not in position to claim an absolute right to the flow of water over or through their lands. The "Arkansas Act," so called, was applied to this state by the act of congress of September 28, 1850. That act, in substance, is as follows: To enable the state of California to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation were granted to the state. The lands were to be listed;

and, on the issuance of a patent, the fee-simple to said lands should vest in the state, subject to the disposal of the legislature: provided, the proceeds of said lands should be applied exclusively, so far as necessary, to the purpose of reclaiming said lands by means of levees and drains. The only title of plaintiffs to the lands in question was acquired under the "Arkansas Act," and the acts of the legislature of this state passed in pursuance thereof. Therefore they cannot deny that the lands were either swamp lands or overflowed lands, and were therefore unfit for cultivation. Neither can they deny the right of the legislature as owner, or as the law-making power, to adopt such means by levees or by drains as might to it seem necessary or fitting to reclaim the lands. The lands were either "swamp lands," (spongy land; low ground filled with water; soft, wet ground; marshy ground away from the sea-shore. Web. Dict.,) or they were "overflowed lands,"—lands covered with water. The lands were granted to the state because they were in a condition of nature, unfit for cultivation, and for the purpose of having them reclaimed. The state became proprietor, with the obligation on its part to adopt the necessary means to that end. This could be done either by levees or drains,—in any way to keep off or draw off the water. After the grant of congress, and before the title of plaintiffs accrued, while the state owned the lands, the state, *as proprietor*, initiated a system of appropriation of water. The natural result of that system, applied to the waters of Kern river, would be to reduce the body of water flowing to the lands of plaintiffs, thus measureably accomplishing the object of the grant. It will not do to say that the plaintiffs acquired a right to the lands before the appropriation by defendant, and that by such acquisition the state lost control as "proprietor," because, by the terms of the grant, the lands were to be reclaimed. The plaintiffs could obtain no right or title to the lands without such right or title being subject to the power of the state to direct the method of reclamation. The proposition that lands which, in a state of nature, were soft, spongy, overflowed, and, in consequence thereof, were unfit for cultivation, and were granted for the purpose of having the water kept off or drawn off, have attached to them the right to have all water flow to them which in the course of nature would flow, is, in my opinion,—with, I hope, proper respect for the views of those entertaining contrary opinions,—not so clearly established as it ought to be in order to entitle plaintiffs to recover.

I agree with my associates that the court below erred in its ruling as to the evidence offered by plaintiffs in rebuttal, but, if I am correct in the views above expressed, the error was immaterial.

69 Cal. 456

FEDER v. EPSTEIN and others. (No. 9,108.)

Filed April 27, 1886.

PARTNERSHIP—ACTION AGAINST, IN FIRM NAME.

An action "against Samuel Epstein and Wolf Epstein, partners under the firm name of Epstein Brothers, defendants," is not an action against the associates by their common name, but is a suit against the members in their individual names, notwithstanding an averment in the complaint that the defendants "have been and now are partners under the firm name aforesaid."

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

J. H. Shankland and Flournoy, Mhoon & Flournoy, for appellant.

BELCHER, C. C. This was an action to recover the value of certain goods, wares, and merchandise alleged to have been sold and delivered to the defendants. The complaint was entitled "Moses M. Feder, plaintiff, against Samuel Epstein and Wolf Epstein, partners under the firm name of Epstein Brothers, defendants." It was alleged that the defendants "have been and now are partners under the firm name aforesaid," and the prayer was for "judgment against said defendants," etc. The summons had the same title as the complaint, and then followed: "The people of the state of California send greeting to Samuel Epstein and Wolf Epstein, defendants;" and it concluded with a notice that, if the defendants failed to appear and answer the complaint, the "plaintiff will take judgment against you," etc. The sheriff returned that he served the summons "on Epstein Brothers, by delivering to Samuel Epstein, one of said defendants, personally, in the county of Ventura, a copy of said summons," etc. Samuel Epstein failed to appear and answer, and a judgment of default was entered against him.

The plaintiff then moved the court to amend the judgment so as to make it a judgment against the firm of Epstein Bros., and to be enforced against the joint property of the firm, as well as against Samuel Epstein and his separate property. The court denied the motion, and the plaintiff has appealed from the order.

We see no error in the ruling. The associates were not sued by their common name, but by their individual names, and the case was therefore not within the provisions of section 388 of the Code of Civil Procedure. *Davidson v. Knox*, 7 Pac. Rep. 413. The judgment, as entered, was authorized by section 414 of the Code; and, if not deemed sufficient, proceedings may be taken to have the other defendant bound by it. Sections 989-994, Code Civil Proc.

The order should be affirmed.

We concur: SEARLS, C., FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

v.10p.no.9—50
Cal.Rep. 9-11 P.—40

CALIFORNIA REPORTER

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69 Cal. 460

KELLY and another v. EDWARDS and others. (No. 11,370.)

(*Supreme Court of California.* April 27, 1886.)

1. OFFICE AND OFFICERS—MANDAMUS TO TRY TITLE TO OFFICE.

Mandamus is not the appropriate mode of trying title to office.

2. SAME—MANDAMUS TO ADMIT PETITIONER TO OFFICE—REQUISITES OF PETITION.

If the right to office can be tried by *mandamus*, still a petition for a writ of mandate to compel a board of officers to admit the petitioner to a seat among its body, which he claims he is entitled to by reason of legal appointment, is defective if it does not appear therefrom that he has been refused admission to such office, or that he has not continuously been enjoying all the rights thereof, or if it fails to show that there is another person in possession of the office who asserts a right thereto adverse to petitioner.

THORNTON, J., dissents.

In bank. Application for writ of mandate to compel the board of fire commissioners to admit the petitioners to seats in the board, which seats the board claimed were being occupied by Siebe, one of petitioners, and one Mason, as members of such board, holding over until their successors are elected and qualified. Respondents demurred to the petition on the grounds stated in the opinion.

John L. Love and *J. N. E. Wilson*, for petitioners. *P. G. Galpin*, for respondents.

MCKINSTRY, J. The allegation of the petition is, in effect, that the respondents refuse to recognize the validity of the appointments of November 9, 1885, or to permit the petitioners to sit and act as members of the board of fire commissioners, under and by virtue of their November appointments, respectively. The petition shows that Siebe was a commissioner under an appointment for a term to expire December 5, 1885, and until his successor should qualify. There is no express averment in the petition, and no averment from which it is necessarily inferable, that Siebe has not continued to serve as fire commissioner, or that the respondents have prevented him from acting as a member of the board, or from discharging any of the duties of commissioner, or that they have interfered with any right or privilege attached to or connected with his office as commissioner. The demand made on respondents, as alleged in the complaint, was that the petitioners "be allowed to take their seats as members of said board, by reason of said election and appointment" in November. The refusal of the respondents to comply

with the demand should be construed to be as broad and no broader than the demand. And such is the effect of the averments, as understood by counsel for petitioners. His brief contains the statement: "He [Siebe] claims by virtue of his appointment for a term of four years. Respondents recognize him only as a 'holder-over;' that is, as holding until the appointment and qualification of his successor."

The validity of the November appointments is a matter of law, as to which the opinion of respondents could be of no consequence, except as a wrong opinion might be an excuse for depriving Siebe of some actual right, or be a basis for a refusal to perform a duty imposed by law upon themselves.

Mandamus can be resorted to to compel a duty specially enjoined by law. But for aught that appears Siebe is now enjoying every right and privilege connected with the office of fire commissioner. What duty have the respondents to perform in the premises? It is no part of their duty to declare their judgment that the November appointments were regular and legal. And the opinion of this court on that subject cannot be obtained under a pretext of a proceeding to compel the respondents to do that which the law does not require them to do. If Siebe is enjoying all the rights to which a member of the board is entitled, how can it be said that the board has precluded him from the enjoyment of the office? Certainly the opinion of a majority of the board, that he is enjoying his rights as a holder-over, and not by virtue of an appointment for a new term, is unimportant.

It is said Siebe cannot sue himself as an intruder. That may be true, but until he is disturbed in the enjoyment of some substantial right there is no necessity for any litigation. His right to hold the office for any definite term cannot be determined or strengthened by any action of the other members of the board.

The petition fails to show that Mason is not holding over, or that there is not now an incumbent of the seat claimed by the petitioner Kelly. If there be such incumbent claiming a right to the place, and actually enjoying its benefits, and discharging its duties, with the assent of the other members of the board, we cannot here adjudge that petitioner Kelly has a better title to the office than the occupant—*First*, because the incumbent is not a party to this action; *second*, because *mandamus* is not the appropriate mode of trying the title to an office.

It will not be contended that the respondents or the board should be compelled to admit to the board a *sixth* fire commissioner. If there be an incumbent of the seat demanded by Kelly, it must follow that a judgment would be to command that the board be composed of six members, or to command, not only the admission of Kelly, but the *expulsion* of another person.

The petition is defective, in that it does not appear therefrom that Siebe has been refused admission to the board, or that he has not been continuously enjoying all the rights of office as a member thereof. It is defective in not showing that there is no person in possession of the office claimed by Kelly, who asserts a right thereto adverse to Kelly. This last is true even if the right to the office can be tried by *mandamus*, because the person, if any, in possession has not been made a party to this proceeding. If there be such person, and the petitioner shall aver him to be a usurper, the title to the office can be tried in the manner provided by the Code of Civil Procedure, §§ 803-810. There can be no great hardship in requiring the petitioners here to state in their complaint, fully and distinctly, the facts which show them to be entitled to a writ of mandate.

Since the submission of this cause our attention has been called to *Lewis v. Whittle*, 77 Va. 415. In that case the *mandamus* was refused. It was held, however, that wherever there is a right to exercise an office, and one is dispossessed of such right, and has no other adequate specific remedy, *mandamus* should be allowed; and that, inasmuch as *quo warranto*, while it

might remove the incumbent, would not put the petitioner in possession, *quo warranto* is not an adequate remedy. But by our Code, in an action for usurpation of an office, judgment may be rendered upon the right of the party claimed to be entitled to the office. Code Civil Proc. 805. In the Virginia case the petition for writ of *mandamus* was by John F. Lewis and 18 others (appointed by the governor visitors of the medical college) to command the *respondents*, Whittle and 18 others, who were the acting visitors of the college, to deliver to the petitioner the possession thereof. In the case at bar the incumbent of the office claimed by Kelly, if there be an incumbent, is not a party to the proceeding.

Demurrer sustained, with leave to petitioners to file an amended petition in 15 days.

We concur: SHARPSTEIN, J.; MORRISON, C. J.; MCKEE, J.; MYRICK, J.

I dissent: THORNTON, J.

69 Cal. 479

OAKLAND PAVING CO. v. HILTON. (No. 11,194.)

(Supreme Court of California. May 1, 1886.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—CALIFORNIA STREET LAW—EFFECT OF PROVISIONS OF CALIFORNIA CONSTITUTION OF 1879.

Section 19 of article 11 of the California constitution of 1879, providing that "no public work or improvement of any description whatsoever shall be done or made in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed," required no legislation to enforce it, and the provisions of the act of April 1, 1884, entitled "An act to authorize the city council of the city of Oakland to improve the streets, lanes, alleys, courts, and places in said city," which authorized a contract to be made in advance of an assessment to pay for that work, are inconsistent with such constitutional provision, and ceased to be operative on the first day of January, 1880, the date when the constitution took effect. Such constitutional provision does not retroact on any contract entered into for street work, in accordance with law, before the constitution went into operation, but is prospective in affecting with nullity and rendering void any contract entered into after such date, or in annulling any statute then in force or which might thereafter be passed inconsistent with its provisions. MCKINSTRY and SHARPSTEIN, JJ., dissenting.

2. CONSTITUTIONAL LAW—PROVISIONS, WHEN SELF-EXECUTING.

When a constitutional provision is prohibitory in its language, no legislation is required to execute such provision, for it is then self-executing.

3. SAME—CONSTITUTIONAL AMENDMENTS IN CALIFORNIA—METHOD OF ADOPTION.

Constitutional amendments in California may be proposed in either house of the legislature, and if, when so proposed, two-thirds of all the members elected to each of the two houses shall vote in favor of it, such proposed amendment shall be entered in their journals. By such entry it is meant that the amendment must be copied or enrolled on the journal in full; that is, the identical amendment must appear on the journal, and no identifying or other reference to it in any way will satisfy such requirement.

4. SAME—AMENDMENT TO SECTION 19, ART. 11, CALIFORNIA CONSTITUTION—VALIDITY OF.

Constitution amendment No. 1, proposed by the legislature at its regular session in 1883, and attempted to be ratified by vote of the people at the general election in 1884, purporting to amend section 19 of article 11 of the California constitution, is void, and never became, and is not now, a part of the constitution, because said amendment was not entered at large in the journals of the two houses, as provided in section 1 of article 18 of the constitution of California, and the law still stands as it was in the constitution when it was ratified in 1879, unchanged or unaffected by amendment.

5. SAME—STREET LAW—CONSTITUTIONALITY OF CALIFORNIA ACT OF MARCH 18, 1885.

As the proposed amendment to article 11, § 19, of the California constitution was not constitutionally adopted, the act of March 18, 1885, providing for work upon

streets, lanes, etc., and to amend the act of March 6, 1883, being inconsistent with the constitution as it stood unamended, in attempting to provide a general system of making contracts before the collection of the money therefor, is void and unconstitutional in that regard.

In bank. Appeal from superior court, county of Alameda.

C. T. Johns, for appellant. *John H. Boalt*, *Henry Vrooman*, and *C. T. H. Palmer*, for respondent.

THORNTON, J. This is an application by plaintiff, a corporation, to the superior court of the county of Alameda, for a writ of mandate to the defendant, commanding him, as city marshal of the city of Oakland, to enter into and execute a certain contract for grading, curbing, and macadamizing, to the official grade, a portion of a street in the city of Oakland, and to fix the times for the commencement and completion of the work to be done under the said contract, which the said defendant had refused to sign and execute. In obedience to an alternative writ, the defendant appeared and by his answer showed cause for refusing to execute the contract above referred to, as follows: "*First*: That all the proceedings of the city council of the city of Oakland, purporting to acquire jurisdiction for the ordering of said work, and to order the same and award to the Oakland Paving Company herein the contract therefor, all as alleged in the affidavit of M. H. Eastman herein, were taken in violation of the first sentence of section 19 of article 11 of the present constitution of this state, for the following reasons, to-wit: (1) Constitution amendment No. 1, proposed by the legislature at its regular session in 1883, and attempted to be ratified by the vote of the people at the general election in 1884, never became and is not now a part of the constitution, because said amendment was not entered at large in the journals of the two houses, as provided in section 1 of article 18 of the constitution of California. (2) Said proposed amendment was read only once in the assembly. (3) The act of the legislature of the state of California, entitled 'An act to provide for the submission of proposed amendments to the constitution of the state of California to the qualified electors for their approval,' approved March 7, 1883, was passed by the legislature and approved by the governor subsequent to the attempted passage of said constitutional amendment No. 1, and therefore said amendment is not included within the terms and meaning of said act of submission of March 7, 1883, and there never has been, and is not now, any statute under which said amendment can be properly submitted to the people."

The court below by its judgment ordered the writ to issue as prayed for in the plaintiff's petition. This judgment is appealed from by defendant. Several questions arise on this appeal, which this court is called on to decide. The proceeding for the street work in this cause is taken under certain acts of the legislature, neither of which provide for levying, collecting, and paying into the treasury of the city an assessment previous to the making a contract for letting or doing the work, or previous to the commencement of such work. Street work or improvements within the limitations of the constitution may be devolved by the legislature on the corporations of cities and of consolidated cities and counties in this state. The constitution of 1879 provides that "no public work or improvement of any description whatsoever shall be done or made in any city in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed." Section 19, art. 11, Const. This provision of the constitution was before this court, Department

2, for its application and construction, in *McDonald v. Patterson*, 54 Cal. 245. The case there presented was in regard to a contract under the provisions of the act of April 1, 1872, (St. 1871-72, p. 804,) relating to the improvement of streets in the city and county of San Francisco, and the application therein was for a writ of mandate commanding the defendant, who was superintendent of streets, etc., of the city and county above mentioned, to execute in his official character a contract for street work in advance of the levy and collection of the assessment referred to in the constitutional provision above quoted. It was held in that case that section 19 of article 11, above set forth, required no legislation to enforce it, and that the provisions of the act of April 1, 1872, relating to street improvements in San Francisco, which authorized the superintendent of streets to execute contracts for such improvements, in advance of the levy and collection of the assessment, are inconsistent with the section of the constitution referred to, and that they ceased to be operative on the first day of January, 1880. The above decision was approved by this court in bank by its action in denying a rehearing. Subsequently the same question was presented to this court in bank in *Donahue v. Graham*, 61 Cal. 276, and was decided in the same way on the authority of *McDonald v. Patterson*, *supra*, thus a second time approving the ruling in that case.

It should be mentioned here that SHARPSTEIN, J., who had concurred in *McDonald v. Patterson*, dissented in *Donahue v. Graham*, and that McKINSTRY, J., also dissented. Indeed, the last-named justice never concurred in the ruling of *McDonald v. Patterson*.

We see no reason to change the ruling of this court in the cases just referred to. In our judgment the language of section 19, art. 11, above quoted, was not intended to apply only to contracts let under laws to be passed by the legislature after the constitution of 1879 went into effect. It was intended to strike with nullity all contracts made under any laws, in advance of the execution of which no assessment had been levied, collected, and paid into the treasury of the city. The constitutional provision was not retroactive, but prospective. It did not retroact on any contract entered into for street work in accordance with law before the constitution went into operation. It was prospective in affecting with nullity and rendering void any contract entered into after the date just mentioned; was also prospective in annulling any statute then in force or which might thereafter be passed inconsistent with its provisions. The constitutional provision is prohibitory in its language, and when that is the case no legislation is required to execute such provision. It is then self-executing—operating *proprio vigore*. The constitution in regard to contracts for street work presents in itself a complete rule in the particular mentioned. It requires no legislation to make it more complete. Every constitutional provision is self-executing to this extent, that everything done in violation of it is void. *Brien v. Williamson*, 7 How. (Miss.) 14. The fifteenth amendment to the federal constitution provides that "the right of citizens of the United States to vote shall not be abridged by the United States or by any state on account of race, color, or previous condition of servitude." This provision is self-executing to the extent that of its own force it abolishes all distinctions in suffrage based on the particulars mentioned, (Cooley, Const. Lim. 133,) whether these distinctions existed in a statute subsisting when the amendment went into operation or whether the statute was subsequently enacted. The same may be said of the provision of the same constitution that no state shall pass a law impairing the obligation of contracts (article 1, § 10, Const. U. S.) as of all the matters prohibited by section 10 of article 1, just cited. See *Ewing v. Oroville Min. Co.*, 56 Cal. 649. Nor is this section 19 limited to prohibiting the legislature from passing laws authorizing contracts in the future in violation of its provisions. It does this, but it does more: it operates on all contracts for street work whether entered into under laws existing when the section went into effect or under statutes subsequently en-

acted. Whenever a case arises presenting a contract of the character indicated it operates to declare such contract void and of no effect. See *County of Los Angeles v. Lamb*, 61 Cal. 198. In fact it is the solemn declaration of the paramount organic law operating on all departments of the government, expressed in the clearest and strongest language of prohibition. No act can be done by any department contrary to its provisions. It is a law absolutely controlling the legislative, executive, and judicial departments of the government. It takes effect on laws already passed as well as to those to be enacted in the future.

In thus construing this provision in section 19, it is taken in connection with all other provisions of the constitution, especially with subdivision 22 of article 1, and section 1 of article 22. No other provision of the constitution dominates it or changes its interpretation. The language is plain and perspicuous, and we cannot attribute to it any other meaning than that given in the two cases above cited in which it is interpreted. In fact we do not see there is any necessity for the legislature to enact a statute to execute the provisions of the section of article 11 above cited. It would be useless to do so, for the legislature is not called on to perform a duty so useless as to forbid that which is already forbidden. By the express declaration of the first section of article 22 of the constitution all laws inconsistent with the constitution ceased when that instrument began to operate. This was so held in *McDonald v. Patterson*, *Ewing v. Oroville Min. Co.*, and *Donahue v. Graham*, *supra*. The act of April 1, 1864, entitled "An act to authorize the city council of the city of Oakland to improve the streets, lanes, alleys, courts, and places in said city," (St. 1863-64, 333,) which authorized a contract to be made in advance of an assessment (section 8 of act) to pay for that work, in that is inconsistent with section 19, art. 11, of the constitution, and so far it ceased to have any existence when the constitution took effect. When we say ceased, we mean it went out of existence, as if repealed by a valid act of the legislature. When it ceased to have existence it was recalled or revoked. This is the primary meaning of "repeal," as its etymology imports. That a statute may be recalled and repealed by a constitution as well as by a statute "goes without saying." See *Cass v. Dillon*, 2 Ohio St. 608. The section 19 of article 11 repealed the statute so far as pointed out above by implication. *Cass v. Dillon*, *supra*; *Ohio v. Evans*, 1 Ohio St. 437. Section 1, art. 22, expressly repealed it. We can find nothing in the constitution which saves the above provision of the act of 1864 from the annulling effect of the sections of the constitution above cited. But it is argued that section 19 of article 11 has, by the operation of an amendment of the constitution, ceased to form a part of it; and that the statute approved March 18, 1885, entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," (St. 1885, p. 147,) passed subsequent to the ratifying of the amendment, which, like the statute of 1864, provides for a contract for doing street work in advance of an assessment levied, is constitutional. St. 1885, § 8. If the constitution was amended, as contended, prior to the enactment of the act of 1885, the objection to the act of 1885 in regard to the particular above indicated ceases to be of force. If it had not been so amended when the act was passed, the objection still remains in full force.

The following facts were admitted by the parties hereto, as appears in the bill of exceptions in the record: "(1) That all the proceedings of the city council of the city of Oakland and the advertising thereof ending in the award to the said the Oakland Paving Company of the contract for the grading, curbing, and macadamizing Tenth street, between Madison and Alice streets, in said city, and recited in the affidavit of M. H. Eastman, an officer of said the Oakland Paving Company, for and in its behalf, herein applying for writ of mandate, were taken in regular form under the general street act, on page

147 of the published statutes of 1885, and also under the act specially providing for street work in the city of Oakland on page 333 of the published statutes of 1863-4, and the act to amend the same on page 443 of the published statutes of 1869-70, and, aside from the questions herein of the validity of the constitutional amendment, were sufficient, under any or all of said acts to entitle said the Oakland Paving Company to the city marshal's completion and execution of the contract tendered, and receiving the bond therewith, as said tenders are recited in said affidavit. (2) That the legislature of 1883 proposed to amend section 19 of article 11 of the constitution, by senate bill 10, as the body of the same appears on page 2 of the published statutes of 1883; and that, as appears by the senate journal thereof, on pages 16, 50, 59, 103, and by the assembly journal thereof, on pages 171, 176, and 255, said proposal was introduced in the senate by Senator McClure, on the eleventh day of January, 1883; was read therein for the first time and placed on file for second reading on the nineteenth day of January, 1883; was therein read the second time and ordered engrossed on the twentieth day of January, 1883; was therein read the third time, and finally proposed on the part of the senate by more than two-thirds of all the members elected, on the thirtieth day of January, 1883; was transmitted to the assembly on the last day aforesaid; that on the following day the committee on judiciary therein unanimously reported their opinion that it was not necessary that proposed amendments to the constitution be read more than once before being voted upon; that on the seventh day of February, 1883, therein the proposed amendment as aforesaid was read the first time, was treated as a resolution, and amendments offered by Assemblymen Storke and Levenson being lost, and the previous question ordered, was finally proposed on the part of the assembly, without further reading, by more than two-thirds of all the members thereto elected; that the names of 28 ayes and 5 noes in the senate, and of 68 ayes and 2 noes in the assembly, voting so thereon, were entered in the journals of the respective houses; and that the entries of said proposal in said respective journals were by identifying references to said senate bill 10, as proposing the said amendment of the constitution, but that the text of the amendment proposed was not copied at large in the respective journals. (3) That said proposed amendment to the constitution as it appears on page 2 of the public statutes of 1883 is the same throughout as the so-numbered 'Amendment No. 1,' to the constitution, voted upon by the people for approval and ratification at the next general election in November, 1884. (4) That one day after the final proposal of said amendment to the constitution on the part of the senate, the senator who had introduced said proposal also introduced the senate bill 223, which afterwards became 'An act to provide for the submission of proposed amendments to the constitution of the state of California to the electors for their approval,' approved March 7, 1883, as the same appears on page 53 of the published statutes of 1883; and that during the progress of said act for submission through both houses no debate was had, nor amendment made nor offered, nor questions raised—any of them—upon the point whether said constitutional amendment, already proposed, was or was not intended to be included under the provisions of said act. (5) That thereafter the governor issued his proclamation for a vote of the qualified electors upon three proposed amendments to the constitution at the next general election in November, 1884, and therein included the amendment aforesaid, designating it as 'Amendment No. 1,' and caused the same to be advertised in all respects as prescribed by said act for submission; and that it was voted upon, and the votes were canvassed in all respects as prescribed by said act. (6) That at said general election 149,285 votes were cast for 'Amendment No. 1,' and 7,363 votes were cast against 'Amendment No. 1.' "

The constitution provides for its amendment and points out the mode specifically by which it shall be done. Inasmuch as the mode of amendment

is so established by the paramount law, it is unnecessary to consider the question whether the people of a state may not amend its constitution, where no mode is fixed for that purpose in the organic law. When a mode is thus established and ordained, it must be followed. The people of a state may impose a limit upon their own power, and when this is done by the constitution it must be regarded as much a portion of the paramount law, and as obligatory on the whole people, as any other portion of the constitution. If we do not so hold, we would sanction revolution and violence, and place *lawlessness on a level with law*. The majority of the people, according to law, having adopted the constitution with a mode of amendment in it, we must regard it as a solemn declaration to the minority in the state, as binding as a compact with such minority that the majority, however large or overwhelming, will never exercise its irresistible power, its *vis major*, to change the law of its organization as a government in any other way. We hold it to be sound law that a constitution, adopted as was the present constitution of the state of California, is not lawfully changed by the votes of every elector in the state, unless in the mode provided in it. *Koehler v. Hill*, 60 Iowa, 547; S. C. 14 N. W. Rep. 738, and 15 N. W. Rep. 609. The majority in favor of the change may be so irresistible in its physical power as to command the forced acquiescence or unwilling consent of an inconsiderable minority, but nevertheless a change of the constitution so brought about contrary to its provisions would be lawless, revolutionary, and unconstitutional, and it would be the duty of this court, in obedience to the oath which its members have taken, so to declare it, in favor of any litigant who should invoke its judgment in the course of regular procedure, though the sole litigant invoking its aid and power should constitute the non-consenting minority. If they did not so declare, the organic law would not afford that protection and refuge which it was intended to afford.

The mode of amendment to be considered here is declared and ordained in article 18, and in the first section thereof, which is as follows: "Any amendment or amendments to this constitution may be proposed in the senate or assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof such proposed amendment or amendments shall be entered in their journals, with the yeas and nays taken thereon, and it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time and after such publication as may be deemed expedient. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished, by numbers or otherwise, that each can be voted on separately. If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this constitution."

It will be observed that an amendment of the constitution may be proposed in either house of the legislature, and if, when so proposed, two-thirds of all the members elected to each of the two houses shall vote in favor of it, such proposed amendment *shall be entered in their journals*. The constitutional requirement is not limited to an entry of the proposed amendment in the journal of one house of the legislature, but in their *journals*; that is to say, in the journal of each house, in that of the senate and in that of the assembly also. This language is too clear to admit of doubt. It needs no interpretation. It is so clear that interpretation could not make it clearer. It would only confuse and mystify, instead of making it plainer and more perspicuous. Its meaning is so plain that there is no room or necessity for interpretation.

Now, according to the admitted facts appearing above, the only entry of the proposed amendment upon the journal of each house was by a mode styled "identifying reference." This mode is explained as consisting only of a reference to it as "Senate Bill 10." Is this the entry ordained by the constitu-

tion? And this leads to an examination of the meaning of the words "shall be entered in their journals." What, then, is the meaning of these words? In interpreting the meaning of the language of the constitution we adopt the same rule which obtains in interpreting statutes, agreements written or oral, and all written or spoken language. That rule is that we must presume and hold that the words have been employed in their natural and ordinary meaning, unless we find technical words or words of art employed. When such words are employed we must assume that they are used in their technical meaning. Such is the rule laid down by this court in *Weill v. Kenfield*, 54 Cal. 113, in the decision of which case all the court except Justice MYRICK concurred. In fact we think we are at liberty to say that all the members of this court concurred in the above rule as there laid down, for it cannot be supposed that Justice MYRICK would have dissented from a rule of law so long and so well established. See on this point *Cooley*, Const. Lim. 72, and cases there cited in notes. It is hardly necessary to say that the words "shall be entered in their journals" are not words having a technical meaning. They are not words pertaining to any art or mystery. They are plain words in common, every-day use, both by the learned and unlearned, and plain in this respect. No forced or unnatural construction should be put on them, but they should be construed as having the meaning which men ordinarily attach to them. Said MARSHALL, C. J., in *Gibbons v. Ogden*, 9 Wheat. 188, of the federal constitution: "The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant.

The learned Justice COOLEY, in commenting on these words, observes, (we cite them here as peculiarly applicable:) "This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to redeclare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." *Cooley*, Const. Lim. pp. 72, 73. We must, then, in accordance with what is said above, construe the words "shall be entered in their journals" in their natural and ordinary sense. And first we remark that the words "shall be" are words of command. Such is their natural and ordinary meaning. They are not permissive or only directory to be heeded or not by the senate and assembly, but mandatory and peremptory, exacting compliance with and obedience to them, and prohibitory of any action conflicting with them. They are not only so by their common meaning, but are declared to be so by the language of the twenty-second section of article 1 of the constitution. The obedience commanded to the mandate of those words is not partial or simulated, but absolute and entire. This mandate should not be frittered away and rendered illusory by ingenious or subtle refinement, but regarded in its full and honest requirement.

The journals of the houses of the legislature are well-known books. They are required by a provision of the constitution to be kept. "Each house shall keep a journal of its proceedings," is the command of the paramount law. Section 10, art. 4. The contents of the journals are prescribed. They are the proceedings of the respective houses. They are not only required to be kept, but to be *published*, that the proceedings of each house shall be made known to the people, and that the restraint of publicity shall have its effect on the discharge of their solemn and responsible duties on each individual member of the two houses. The words "entered in" are to have their nat-

ural and ordinary meaning. The word "entered" must be construed in connection with the preposition "in" and their journals. Whatever meaning we may attribute to the word "enter" or "entry," taken by itself, in arriving at its meaning here we cannot dissociate it from the words used with it. We must arrive at the meaning of the word "entered" when connected with the words joined with it; that is, the *context*. We must look at all the words of an instrument to ascertain its meaning, (Cooley, Const. Lim. 70, 71;) we are not allowed to reject any. When a paper is directed to be entered in a book, the obvious meaning is that it should be transcribed therein. When a master directs his servant to enter a paper in a book, as when a merchant or a lawyer orders his clerk so to enter a written agreement in a volume kept for that purpose, a man of ordinary intelligence would interpret it as meaning that it should be copied into the book. A sufficient reason appears why he should so interpret the direction. Papers are copied into a book for permanent preservation that they may be in the future conveniently referred to. The object for so entering a paper in a book would not be attained unless the paper was copied or written out in full or at length in the book. A merchant would not regard his command to his clerk as obeyed if the clerk only numbered the paper, stated the file where it might be found, and inserted the number and file in the book. If such conduct were persisted in by a clerk, a dismissal from employment as an unfaithful servant would inevitably follow. Such an entry by the number of the paper and stating the file where it could be found would not attain one of the main objects of having it entered in a book, which is to preserve its entire text, so that in case of the loss of the paper an identical copy could be found.

The journals required by law to be kept are a record of the proceedings of the houses of the legislature, and so intended. They are, to all intents and purposes, records made in *perpetuam memoriam rei* there entered. The *official record* of what is "done and passed" in a legislative assembly is called "The Journal." Cush. Leg. Ass. par. 415. The term "to keep a record" evidently means to *make a permanent record* of the daily proceedings. Pars. 423, Cush. Leg. Ass. *supra*, as also pars. 327, 415, 642, of same work. Officers are appointed by law to make the records. Pol. Code, §§ 245-261, inclusive. They are styled "records" in some of these sections. It is commanded by section 255 that "the minute clerk of the senate and the minute clerk of the assembly must *keep a correct record* of the proceedings of their respective houses;" by section 256 that "the journal clerk of the senate *must record each day's proceedings in the journal*, from which they must be read by the secretary each day of meeting, and then be authenticated by the signature of the president;" by section 257 the same provision is made as to the journal clerk of the assembly,—"*must record each day's proceedings in the journal*." These journals are to be preserved by an officer designated by law and appointed for that purpose,—the secretary of state. Sections 261, 407, Pol. Code. These journals, or copies of them, properly certified, will be admitted in evidence in any court of justice in this state by virtue of the statute, (Code Civil Proc. §§ 1855, 1918,) and by the common law, (1 Greenl. Ev. 482; paragraph 427, Cush. L. & P.,) and perhaps the original journals, and the journals published under the requirement of the constitution, may come within the scope of judicial knowledge, (section 10, art. 4, Const.; Code Civil Proc. § 1975, sub. 3.)

As the journals of the senate and assembly are records, and intended to be such, the obvious meaning of entering a proposed amendment in the journals is to make such amendment a matter of record. Entering in the journals is the same as entering in or on the record. Why should it be entered for any other purpose? And when entered as a record, it has all the effect, and subserves all the purposes, of a record. The great purpose is to preserve in permanent and enduring form authentic and reliable evidence of the con-

tents of the amendment proposed, that in the form which it appears on such record it may be submitted to the electors for ratification by their suffrages, and, when ratified, the evidence of what has been ratified may be preserved in an unmistakable, permanent, and enduring form. To furnish and preserve this evidence in a certain and more unmistakable form and manner, the entry must be made in the journal of each house. The journals should be regarded as matter of record, and when questions arise as to what is contained therein, they must be tried and determined by inspection of the record only.

The record in the journals is like other records, and, as Lord COKE declares, is a monument of so high a nature, and importeth in itself of such verity, that if it be pleaded that there is no such record, it shall not receive any trial by witnesses, jury, or otherwise, but only by itself. 3 Bl. Comm. 331. There is nothing here in conflict with what is said in *Sherman v. Story*, 30 Cal. 256; for there the question arose as to a statute of which it was contended it was not properly published, and the court held to determine this fact it could not look beyond the statute as it was enrolled, authenticated, and deposited with the secretary of state. Here the point arises as to a proposed amendment to the constitution, and the law as to enrollment, authentication, and deposit with the secretary of state does not embrace it. *Koehler v. Hill*, 60 Iowa, 554; S. C. 14 N. W. Rep. 738, and 15 N. W. Rep. 609.

No provision exists in the constitution which allows such proposed amendment to be entered on the journal of either house by an *identifying reference*. We cannot wipe out the requirements of the constitution by any such euphuism or any device of that character. The constitutional requirement is imperative and peremptory, and demands obedience. In *Crosby v. Dowd*, 61 Cal. 557, the judgment on foreclosure of a mortgage described the premises as to which the foreclosure was decreed by reference to certain deeds recorded in the recorder's office of Santa Clara county, and stating the books and pages in which they were transcribed, and the dates of their recordation. The property was sold under this judgment. The purchaser brought ejectment on the sheriff's deed executed to him upon the sale. This court held that the judgment did not describe the property sold, and that the purchaser could not, for that reason, recover. The judgment was held to be no judgment at all,—void. The judgment was a record, the description in which could not, as in a conveyance, be made good by evidence *aliunde*. The record must be tried by itself. Here was a case of *identifying reference*; yet the identifying reference was held of no avail. It was held insufficient in a judgment *inter partes*, but here we are called on to hold it sufficient in a matter where the constitution is most explicit in its requirements as to what shall go into the record.

If an identifying reference is here sufficient, the reference may as well be to a paper filed in the sheriff's office at San Francisco, or in the recorder's office of the county of Del Norte or San Diego, or in any public or private office in the state, or in any state. Concede the power to exist as claimed,—that is, to act by identifying reference,—and we see no limit to it. It is as unlimited as the sources of places of reference. The device of an identifying reference is of modern origin. It had its genesis in Kansas, in 1881, in the *Prohibitory Amendment Cases*, 24 Kan. 700, which were decided by the supreme court of that state at its January term in the year last mentioned. The reasoning by which the learned court reached the conclusion it did is not based on any sound legal principles, but contrary to them. Neither the argument nor the reasoning can command our assent or approval. The argument is illogical, and based on premises which are without any sound foundation, and rest merely in assumption. The provision in the constitution of Kansas is that the "proposed amendments, together with the yeas and nays, shall be entered in the journal." Article 14, § 1. The court said: "Is the failure to enter

this amendment at length on the journals fatal? *It is well said* by counsel that no change can be made in the fundamental law, except in the manner prescribed by that law." The case of *Collier v. Frierson*, 24 Ala. 100, is then cited as affirming the above rule, which it does. The court properly stated the conclusions reached in the Alabama case,—that "proceedings under a constitution to change that constitution must be in accordance with the manner prescribed by that constitution." "But this," said the court, "only brings us to the real question in this case." It then proceeds to state this real question in these words: "Is a proposition to amend the constitution in the nature of a criminal proceeding, in which the opponents of the change stand as defendants in a criminal action, entitled to avail themselves of any technical error, or mere verbal mistake, or is it rather a civil proceeding, in which those omissions and errors which work no wrong to substantial rights are to be disregarded?"

The real question was stated above as follows: "Is the failure to enter this amendment at length on the journals fatal?" The question seems now to be changed. Is it in the nature of a criminal proceeding? or, rather, is it a civil proceeding? Certainly, it is a civil proceeding. But we are not aware that in either civil or criminal action that errors or mistakes which work no wrong to substantial rights are to be regarded. If the law, whether constitutional or statutory, declares technical omissions or errors or verbal mistakes a violation of a party's right, then such right is substantial, and errors, whether technical or otherwise, or originating in verbal mistakes, work wrong to substantial rights, and are to be regarded by courts of justice in any action, whether civil or criminal. This is the universal rule. If a defendant can only by the paramount law be prosecuted for a public offense on indictment found by a grand jury, he cannot be prosecuted by information which contains the same averments preferred by a prosecuting officer. The trial may be quite as fair and full, and as free from error in other respects, on his trial on an information as on an indictment, still the conviction on the trial by the former cannot stand; and this consequence cannot be put aside by pronouncing the proceeding by indictment mere machinery and form. It is a substantial right assured to him by the law of the land, to have the form or machinery of an indictment employed, and, though it is form or machinery, he has a substantial right to it, and no court will or can deprive him of it.

The court, after stating the real question above quoted, proceeds to remark: "Unhesitatingly we affirm the latter, [that is, that it is a civil proceeding.] The central idea of Kansas law, as of Kansas history, is that substance of right is grander and more potent than methods and forms." This is so under all systems of law, when occasions arise for its application. The court proceeds thus: "The two important vital elements in any constitutional amendment are the assent of two-thirds of the legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to the essentials is secured, but they are not themselves the essentials."

That the elements mentioned by the learned justice are important and vital cannot be doubted; but that they are the only important and vital elements cannot be conceded. The learned court here assumes, without any reason, that entering on the journals is not vital and important. The convention which framed the constitution of Kansas, and the people who adopted it, and made it their paramount law, thought otherwise. This is plainly apparent from their inserting other elements in their constitution. It would be a rash assertion, and one which no sound principle of constitutional law sustains, that the words, "such proposed amendments * * * shall be entered on the journal," were inserted in the constitution of Kansas, to be observed or not as the legislature, or any other department of the government of that state, should think proper. If this is form and machinery, it is form and

machinery established by the constitution. It is not unsubstantial and non-essential, but a part of the instrument which all officers are sworn to support, as much as any other portion of the constitution; for when an oath is taken to support the constitution, it embraces the whole instrument. These provisions may not be disregarded for the reason, says the court, that by them certainty as to essentials is secured. We can conceive of no stronger reason why they should be regarded by legislators and courts. The constitution makers inserted them for that reason. They, in effect, ordain and declare that no other mode or form or machinery is permissible to secure certainty in doing the act permitted. Declaring that those requirements are non-essential, is in effect saying that the convention which framed the constitution, and the electors which ratified their action, spent their time in framing and inserting in their organic and paramount law non-essential and unimportant provisions.

The court then proceeds to give an illustration of a case which never has occurred, and in all probability never will occur. It is a sufficient answer to say that the question put only proposes one difficulty to solve another to the solution of which it does not in any whit tend. Take the case of a failure by the secretary of state to publish in any paper whatever. What then would be the consequence?

The court says further: "The records of the proceedings of the two houses are made, not by the houses themselves, but by clerical officers. True, they are under the control of the respective houses, but in fact the records are made by clerks. May they defeat the legislative will? The constitution does not make amendments dependent upon their approval or their action: To insure certainty, and guard against mistake, journal evidence of the amendment and votes is prescribed, but this is mere matter of evidence, and not the substantial condition of constitutional change." This argument would have force if the clerks were not officers of the house, and under their control. If the houses of the legislature of Kansas were so impotent that they could not compel their clerks to do their duty and obey their commands, we must say that such argument would prevail; but we must presume that the houses in Kansas were able to have their commands obeyed, and if a clerk refused to obey, they would have the power to put some one in the position who would obey; especially as we are informed that the clerks "are under the control of the respective houses." The clerks are servants, and there is no probability that they will fail to perform the behests of their masters. If they are under the control of the houses, they are their servants, and the journals must be held to be made up by the houses. *Qui facit per alium, facit per se.*

The court speaks of the journal evidence as mere matter of evidence. We agree that journal evidence is evidence, and that of the highest character; but if the court means to say that it is mere matter of evidence, in the sense that any other evidence can be received than that of the journals, we cannot concur. In our judgment, the entry of the proposed amendment on the journal furnishes, unless, perhaps, in the case of its loss or destruction, the only evidence of the contents of the amendment proposed.

Again, "in constitutional changes," said the court, "the popular voice is the paramount act." "True, a popular vote without previous legislative sanction must be disregarded." When this is said, the whole question is conceded, for if the popular vote without legislative sanction must be disregarded, we can know of no legislative sanction except that given in the mode ordained by the constitution, of which the entry in the journals is a material and essential part. If we can leave out a part of this mode, we can leave out the whole. If legislative sanction only is requisite, why may not that sanction be by a vote of a majority of the members elected to the two houses, instead of two-thirds? The history of the mode in which the amendment was proposed is given in the opinion, and it does not appear that the *yeas*.

and *nays* were entered on the journals. The numbers, not the names, were so entered. But, clearly, this was not sufficient. The meaning is that the names of those voting *yea* and those voting *nay* shall be so entered. The names are required to be given for one reason, among others, that they may be known and held to accountability by those they represent. This is not attained by the giving the numbers of those voting *yea* and *nay*, respectively. Another reason is that the names may be counted, so that it may be seen by all that the two-thirds vote was given.

Another reason given by the Kansas court for holding the amendment adopted and ratified, is that amendments so proposed had been previously adopted and recognized as a part of the constitution. In other words, as the legislature had frequently violated the constitution, a subsequent violation should be held to be no violation. Frequent violations of the constitution, in our judgment, instead of inducing courts to hold such violations lawful, is the strongest reason that courts should so exercise their power as to put an end to them. This is the highest duty of courts, and one from which they should not shirk, and which they cannot evade. The Kansas case substantially holds that the provision as to entry on the journals is directory only,—that it is not a mandate which is required to be obeyed. This is a dangerous rule to sanction in the interpretation of constitutions,—one wholly repudiated by this court, and which is forbidden by our present law. Article 1, § 22, Const. Finally, the judgment of the learned and able court of Kansas is in conflict with all the judgments of other able and learned courts and jurists on this question.

In 1883 two questions were submitted by the house of representatives of the legislature of Massachusetts to the judges of the supreme judicial court of that state for their opinion. One of these questions, numbered second on the list, was: "Can any specific and particular amendment or amendments to the constitution be made in any other manner than that prescribed in article 9 of the amendments adopted in 1820?" The judges who answered the questions were LEMUEL SHAW, SAMUEL PUTNAM, S. S. WILDE, and MARCUS MORTON, gentlemen whose fame as great jurists and lawyers is acknowledged in all lands where the principles of the common law are studied and administered. The great Chief Justice SHAW every where stands among the ablest of able judges. Their answer was that such amendments could only be adopted in the mode prescribed in the constitution of the state. They said: "We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them. Considering the questions in this light, we are of opinion, taking the second question first, that under and pursuant to the existing constitution there is no authority given by any reasonable construction or necessary implication by which any specific and particular amendment or amendments of the constitution can be made in any other manner than that prescribed in article 9 of the amendments adopted in 1820. Considering that previous to 1820 no mode was provided by the constitution for its own amendment, that no other power for that purpose than in the mode alluded to is anywhere given in the constitution, by implication or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and the power of altering the constitution thereby conferred to have been cautiously restrained and guarded, we think a strong implication arises against the existence of any other power under the constitution for the same purposes." See Opinion of Judges, 6 Cush. 574.

In 1854 a similar question came before the supreme court of Alabama in *Collier v. Frierson*, 24 Ala. 108. That able court said: "The constitution can be amended in but two ways: either by the people, who originally framed it, or in the mode prescribed by the instrument itself. If the last mode is pursued, the amendments must be proposed by two-thirds of each house of

the general assembly; they must be published in print at least three months before the next general election for representatives; it must appear from the returns made to the secretary of state that a majority of those voting for representatives have voted in favor of the proposed amendments; and they must be ratified by two-thirds of each house of the next general assembly after such election, voting by yeas and nays, the proposed amendments having been read, at each session, three times, on three several days, in each house. Const. Ala. Clay, Dig. 40. We entertain no doubt that to change the constitution in any other mode than by a convention every requisite which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done—certain requisitions are to be observed—before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the legislature, or any other department of the government, can dispense with them? To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." In this case it was distinctly held that every requisition which is demanded by the constitution must be observed to change the constitution, and the *omission* of any one of them is fatal to the proposed amendment. Observe the reasoning,—that these prerequisites are a part of the constitution, and the disregard of them by any department of the government "would be to violate the instrument which they are sworn to support."

In *State v. McBride*, 4 Mo. 303, decided at the April term, 1836, of that court, it was held that "the general assembly, acting itself under a power granted by the constitution, can only change the constitution in the manner prescribed to it." In this case it appeared that the constitution of Missouri authorized the general assembly, at any time, to propose such amendments to the constitution as two-thirds of each house shall deem expedient. The court held, in the case cited, that it would look into the proceedings of the legislature to see that all prerequisites had been complied with, and that the proposed amendments had been adopted by the two-thirds vote required.

In *Wells v. Bain*, 75 Pa. St. 39, (1874,) it is held that when a convention to frame amendments to the constitution is sitting under a legislative act from which all its authority is derived, the submission of its labors to a vote of the people in a manner different from that prescribed by the act is nugatory.

In *Wood's Appeal*, 75 Pa. St. 59, (1874,) it is held that such a convention as the one above mentioned has no inherent rights. It has delegated powers only, and must keep within them.

In *Wells v. Bain*, *supra*, the court said: "The words 'in such manner as they may think proper,' in the declaration of rights, embrace but three known recognized modes by which the whole people—the state—can give their consent to an alteration of an existing lawful frame of government, viz.: (1) The mode provided in the existing constitution; (2) a law, as the instrumental process of raising the body for revision, and conveying to it the powers of the people; (3) a revolution. The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government, the remedy of the people is in the third mode,—revolution."

The questions under consideration have been recently (1888) very fully considered by the supreme court of Iowa, in the case of *Koehler v. Hill*, 60 Iowa, 543; S. C. 14 N. W. Rep. 738, and 15 N. W. Rep. 609. The constitution of Iowa provides that "any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election; and shall be published as provided by law for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment to the people, in such manner, and at such time, as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the general assembly voting thereon, such amendment or amendments shall become a part of the constitution of this state." Article 10, § 1.

The eighteenth general assembly of Iowa adopted a resolution introduced into it for amending the constitution of that state by adding a clause at the end of section 26. This resolution so adopted was sent to the senate, and adopted in a different shape from that in which it passed the house. The resolution adopted by the senate was as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, or to be used, any intoxicating liquors whatever, including ale, wine, and beer." The house, on the return of the resolution, concurred in it as amended by the senate. The house journal shows that the committee on enrolled bills reported to the house that they had examined the joint resolution, and that the same was correctly enrolled. Thereupon such enrolled resolution was signed by the members of the house and president of the senate, and approved by the governor. The joint resolution thus signed and approved was as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquor whatever, including ale, wine, and beer." This proposed amendment to the constitution in the form in which it was enrolled was agreed to by the nineteenth general assembly, and ratified by the electors at a special election held on the twenty-seventh day of June, 1882. It will thus be seen that the amendment as adopted was materially, in substance, different from the one ratified by the electors. It was not contended in the argument of the cause that this was not so. The proposed amendment was entered in the journal of the senate as above, but not in that of the house. 60 Iowa, 559, 560; 14 N. W. Rep. 746, 747. There was, however, an identifying reference in the house journal, and the court held this not a compliance with the constitutional provision. 60 Iowa, 560; 14 N. W. Rep. 747. "It matters not if not only every elector, but every adult person in the state, should desire and vote for an amendment to the constitution, it cannot be recognized as valid unless such vote was had in pursuance of, and in substantial accord with, the requirements of the constitution." 60 Iowa, 549; 14 N. W. Rep. 741.

The court further said: "The constitution provides for its own amendment, and the manner in which this may be done is prescribed with particularity, and yet the provisions are ample and readily understood. An amendment may be 'proposed in either house of the general assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, the proposed amendment shall be entered on the journals, with the yeas and nays taken thereon.'" 60 Iowa, 554, 555; 14 N. W. Rep. 744. "We deem it sufficient to say that if there is any provision of the constitution

which should be regarded as mandatory, it is where the constitution provides for its own amendment otherwise than by means of a convention called for that purpose. * * * The object of the provision cannot be doubted or misunderstood. It is to preserve, in the manner indicated, the identical amendment proposed, and in an authentic form, which, under the constitution, is to come before the succeeding general assembly. * * * It is immaterial, however, whether the constitution provides the best method for the preservation and authenticity of the proposed amendment or not, for the constitutional mode must prevail, even if it be conceded some other would have been better. It may be suggested that 'to enter' or 'entering' on the journal does not necessarily mean spreading the same at length thereon. This will be conceded, but that it may so mean must also, we think, be conceded. See Webst. Dict. Various instances where the words 'to enter' or 'entered' occur in statutes and constitution may, no doubt, be cited, where they do not mean spread at length. But this is not of much significance; for the object to be attained must be considered, in determining the meaning of the word 'entered,' as used in the constitution. The evident intent of the constitution is that the proposed amendment should be entered at length on the journal, or, at least, so entered as to leave no reasonable doubt as to its provisions. This must be so, or the entering of the yeas and nays can be as readily dispensed with as entering the resolution; and yet this is the constitutional mode of ascertaining whether a majority of the members elected to each house agreed to the amendment. Cooley, Const. Lim. (2d Ed.) 141. When the object intended to be accomplished is considered, we think there is no doubt that it is the design and intent of the constitution that a proposed amendment thereto should be so entered on the journals that it can be known, by an examination of the journals, what it is that has been agreed to by each house of the general assembly which first acts thereon, to the end that the succeeding general assembly may certainly know what its predecessor did. It seems to us that a simple entering on the journal of the title or object of a proposed amendment does not accomplish the intent of the constitution, and the thought that this must be so is much strengthened when regard is had to all the provisions of the constitution. That instrument provides that upon the final passage of a bill the yeas and nays must be taken, and the same entered upon the journal. This necessitates the entering on the journal of the title or substance of the bill to be voted upon. This being so, if no more than this was intended in relation to a constitutional amendment, the provision as to entering it on the journal is unnecessary and meaningless. There is no provision requiring a bill to be entered on the journal, but the constitution does require that a proposed amendment thereto 'shall be entered' on the journals, with the 'yeas and nays.' This must mean that the amendment shall be spread at length thereon, and the yeas and nays set out in the journal in full or at length. No distinction between the two can possibly be drawn." 60 Iowa, 555-557; 14 N. W. Rep. 744, 745.

On a rehearing the court further said: "We have already seen that the constitution requires that a proposed amendment to the constitution shall, when agreed to, be entered upon the journal of each house, with the yeas and nays. The eighteenth general assembly disregarded this constitutional requirement. The resolution is not entered upon the journal of the senate in the form that it was adopted by the nineteenth general assembly, and the senate substitute is not entered upon the journal of the house at all. Indeed, it is impossible to determine from the house journal that the senate substitute ever passed the house. It seems fairly inferable from the house journal (pages 502, 503) that the house readopted the original Harvey resolution, denominating it the 'senate amendment.' The constitution, then, having required this entry upon the journal, is the general assembly at liberty to disregard its provisions? Is this constitutional provision mandatory, or simply

directory? A mandatory provision is one which must be observed; a directory provision is one which leaves it optional with the department or officer to which it is addressed to obey it or not, as he shall see fit. Courts sometimes exercise the power of declaring statutory provisions directory. Even in the case of a statute, the exercise of this power is a delicate one, and must be indulged very sparingly. But in the case of a constitutional provision, the exercise of this power is of much more doubtful propriety. Judge COOLEY, in his excellent work upon Constitutional Limitations, (page 78,) as a result of his examination of the authorities upon the subject, holds the following language, which commends itself to us for its evident soundness: 'But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must, at all times, shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people in adopting it have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised, as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end; especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.' We adopt the foregoing quotation as giving expression to our own views. Placing the most liberal construction upon the provision of the constitution under consideration of which it is susceptible, we think it requires, at least, that the entries upon the journals shall show the terms of the amendment submitted. This is not shown upon the journal either of the senate or house of the eighteenth general assembly." 60 Iowa. 643-645; 15 N. W. Rep. 629, 630.

The conclusion reached by the court is that the proposed amendments shall be so entered on the journals of each house as to "show the terms of the amendment submitted." We cannot see how this conclusion can be refuted.

We will add here that under our constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is settled by the constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. Article 1, § 22. 'This section, in our judgment, not only commands that its provisions shall be obeyed, but that the disobedience of them is prohibited. Under the stress of this rule it is the duty of this court to give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people used plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said.

The words "entered upon the journal" are frequently used in the constitution, as in article 4, §§ 10, 15, 16, 28. In section 28, art. 4, it is provided that "in all elections by the legislature the members thereof shall vote *viva voce*, and the votes shall be entered on the journal." Can there be any doubt of the meaning here? Section 10, art 4, is equally clear in its meaning. This is a section that requires each house to keep a journal of its proceedings; and it is further declared that "the yeas and nays of the members of either house, on any question, shall, at the desire of any three members present, be entered on the journal." Section 15 of same article has reference to the final passage of bills, and on this "the votes shall be by yeas and nays on each bill separately, and shall be entered on the journal."

We cannot see any doubt as to the meaning of these words here, "the names of the members voting yea or nay shall be entered on the journal;" and it is further provided that "no bill shall become a law without the concurrence of a majority of members elected to each house." This latter clause gives strength to the meaning attributed to the requirement of the words first-above quoted from the section. It was no doubt inserted to settle the question that the courts could look at the journals to see whether, on the final passage, a majority of the members elected to each house had voted for the bill on its final passage. See *Santa Clara R. R. Tax Case*, 9 Sawy. 226; S. C. 18 Fed. Rep. 426.

Section 16, art. 4, ordains that "every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter such objections upon the journal, and proceed to reconsider it." That it is required that the objections shall be made to appear in writing on the journal there can be no doubt. It is not required that the whole message shall be transcribed in the journal, but the constant practice of legislatures is to have the message itself transcribed at large on the journal before they proceed to consider the bill returned further.

No such thing as *identifying reference* is anywhere mentioned or hinted at in the constitution. The words are used which exclude it. The identical thing must appear on the journal,—not a reference to it in any way. Can it be held that the yeas and nays must not appear on the journals when an amendment is proposed? Yet why does not such reference satisfy the requirements of the constitution in regard to the yeas and nays as well as in regard to the amendment proposed. The language is the same as to both, and if such a reference is sufficient as to one, it must be as to the other. The list of yeas and nays may be preserved, numbered, and filed, and a reference made to it, as well as to a bill by its number.

As to what former legislatures have done in the mode of proposing amendments by reference as above, the only weight which should, in our opinion, be given to such practices is this: that we should be more careful to enforce the constitution as it is written. Because one legislature does not obey the mandate of the constitution, is no reason why a subsequent legislature should violate it, or that a court should approve its violation, or hold that by such action the constitutional provision has been erased and done away with. It should be remembered that the legislature in proposing amendments to the constitution is not exercising legislative power. Such is the ruling of this court in *Hatch v. Stoneman*, 6 Pac. Rep. 734, where it is held that the governor has nothing to do with such proposals. The power given to the legislature is a grant of power. It has it not without the constitutional provision. The grant is given to be exercised in the mode conferred on the legislature by the constitution. It is so limited by the people acting in the exercise of their highest sovereign power. In such case the mode is the measure of the power. Its action outside of the mode prescribed is as much

a nullity as that of a board of supervisors of a city outside of the statute defining its power in regard to the grading of a street. The rule is forcibly stated by Justice COLERIDGE in *Christie v. Unwin*, 3 Perry & D. 208, as applicable to powers conferred by statute, is just as applicable here, for the constitutional provision is a statute ordained by a people as part of its paramount law. "However high the authority," says the learned justice, in the case just cited, "to whom special statutory power is delegated, we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the lord chancellor as to any order of petty sessions." The legislature, acting outside of the constitution, is without jurisdiction, and its action null.

We are of opinion that section 19, art. 11, of the constitution has never been changed in the mode appointed by the highest law of the state, and that it still stands as it was in the constitution when it was ratified in 1879, unchanged or unaffected by amendment. It follows from the foregoing that the act of 1885, above mentioned, is, so far as regards this case, unconstitutional, as being inconsistent with the constitution. We are therefore of opinion that the judgment of the court below is erroneous, and should be reversed, and cause remanded for a new trial in accordance with the views herein expressed.

McKEE, J. I concur.

McKINSTRY and SHARPSTEIN, JJ. We concur in the judgment. In our opinion the act of April 4, 1864, as amended by the act of March 29, 1870, is still in force. The affidavit for *mandamus* fails to show that the acts above mentioned were complied with.

(69 Cal. 465)

THOMASON v. RUGGLES. (No. 11,184.)

(Supreme Court of California. May 1, 1886.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—STREET LAW IN SAN FRANCISCO—EFFECT OF PROVISIONS OF CALIFORNIA CONSTITUTION OF 1879.

The California act of April 1, 1872, in relation to street improvements in the city and county of San Francisco, and providing a general plan of street work by contract, such contract to be entered into, and the work performed, before the collection of the money, such act being a part of the charter of the city and county of San Francisco, was in force until the California constitution of 1879 went into effect, January 1, 1880, when it became inoperative, and, in effect, was repealed; being inconsistent with section 19, art. 11, of such constitution, which provided that "no public work or improvement of any description whatsoever shall be done or made, in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable, or may be assessed, upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected, and paid into the city treasury, before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed." McKINSTRY and SHARPSTEIN, JJ., *contra*.

2. CONSTITUTIONAL LAW—CALIFORNIA CONSTITUTION—METHOD OF AMENDMENT.

The amendment of section 19, art. 11, of the California constitution, proposed by the legislature of 1883, and adopted by vote of the people in 1884, was constitutionally adopted, although such amendment when it was proposed was not entered in full in the journal of each house an entry thereof having been made in such journals by an identifying reference to the title of the proposed amendment; such latter entry being a sufficient compliance with the constitutional provision that amendments must be proposed in writing in the senate or assembly, and such proposed amendment or amendments shall be entered in the journals of both houses, with the yeas and nays taken thereon. McKEE, J., *dissenting*.

3. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—STREET LAW—CALIFORNIA ACT OF MARCH 18, 1885.

The California act of April 1, 1872, constituting the street law of San Francisco, under its charter, having been repealed by operation of the constitution of 1879

and the municipality having no other street law under its charter, the state has power, in pursuance of its sovereign authority over highways within the state, to pass general laws regulating street work; and the act of March 18, 1885, providing for work upon streets, sewers, etc., within municipalities, is such a general law, and is applicable to the city and county of San Francisco. *McKINSTRY* and *SHARPSTEIN*, JJ., *contra*; *McKEE*, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco. *C. H. Parker*, for appellant. *John L. Love*, for respondent.

MYRICK, J. On the first of April, 1872, the legislature passed a law relating to street improvements in the city and county of San Francisco. This act, from section 4 to section 13, inclusive, provided a general plan of street work by contract, such contract to be entered into and the work performed *before* the collection of the money. This act was a portion of the charter of the city and county, and was in force until the constitution went into effect, January 1, 1880. That constitution contained the following clause, viz.: "No public work or improvement of any description whatsoever shall be done or made in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected, and paid into the city treasury, before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed." Article 11, § 19.

It will thus be seen that after January 1, 1880, no public work or improvement, chargeable upon private property by special assessment, could be done or contract therefor made, *until* an assessment had been levied, and the amount of the cost and expense had been collected and paid into the treasury. This provision of the constitution seems to have stricken deeper than merely prohibiting the doing of work; it declared that until the collection of the money no contract for doing the work could be let. As the entire system provided for by the sections of the act referred to (4 to 13, inclusive) seems to have reference to the letting of contracts before assessments and collections, did not the entire system fall together, as well as that portion which provided for resolutions and declarations of intention as those portions which were in direct antagonism?

The constitution contains the following clause: "The provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof." Article 22, § 1. The effect of this clause upon the act of April 1, 1872, is one of the questions presented to us; it being claimed on one side that it in effect repealed the act; and on the other, that the operation of the act was merely suspended until the constitutional amendment hereinafter referred to. We shall consider this question further on.

There being no law in existence for the performance of work according to the clause of article 11, § 19, above quoted, the legislature passed an act, March 6, 1883, for the levying of assessments, collecting moneys, and making of contracts for street work in compliance with that clause. On the fourth of November, 1884, by a vote of the people, the constitution was amended by striking out the said clause, thus leaving no constitutional restriction as to performing work before the collection of the money, and leaving it to the legislature to pass such laws in that regard as it might deem expedient, subject only to such prohibitions as may exist regarding the application of such laws to existing charters. This amendment did not affect the act of March 6, 1883, because when that act was passed the general plan thereby adopted was in compliance with the constitution as it then existed; and the subsequent amendment, by removing the prohibition, left the legis-

lative will free to act. On the eighteenth of March, 1885, the legislature passed an act to provide for work upon streets, lanes, etc. This act, in terms, repealed the act of March 6, 1883, and provided a system similar in many respects to the act of April 1, 1872. The general system of making contracts before the collection of the money seems to have been provided for in this act; whatever variations in detail there may be is not necessary to consider in this case.

It is objected that the amendment to the constitution was not constitutionally adopted, and therefore the clause above quoted from article 11, § 19, is still in force; and therefore the act of March 18, 1885, is, in its general features, unconstitutional; and so far as it attempted to repeal the act of March 6, 1883, it is unconstitutional because that object was not expressed in its title. The ground upon which it is claimed that the amendment to the constitution was not properly adopted, is this: Article 18, § 1, of the constitution, relating to amendments thereof proposed in the senate or assembly, declares that such proposed amendment or amendments shall be entered in the journals of both houses, with the yeas and nays taken thereon. When this amendment was proposed it was not entered at length (that is, written out in full) in the journal of each house; the entry made was by identifying reference to the title of the proposed amendment. It will thus be seen that the whole question turns on the meaning of the words "entered in the journals." Various authorities have been presented, claimed to be applicable to the one side or the other, as presented; and, after considering them, and the reasons presented to us, we are of opinion that the amendment was properly passed. The former constitution, as it existed in 1862, contained a similar provision, the words "*on* the journals" being used instead of "*in* the journals." When the amendments of 1862 were proposed in the senate and assembly, they were not entered at length in the journals of both houses, but were entered on the journal of one of the houses by identifying reference to title. These amendments, being adopted by the people, made a radical change in the judicial system of the state,—among other changes, directing that the supreme court should be composed of five justices instead of three, as heretofore,—and enlarging the jurisdiction of the court in some respects. The tribunal thus remodeled continued in existence as the court of last resort in this state from January 1, 1864, to January 1, 1880,—a period of 16 years. The convention which framed the present constitution had before it the requirements of the previous constitution as to amendments, the fact that the amendments of 1862 were adopted as above stated, that the judicial system provided for by such amendments had been in operation without question for 16 years, and with such knowledge used similar language in the instrument being framed. We are justified in saying that the people of this state have, by acquiescence, and by direct act in convention assembled, placed a construction on the words employed; and we may take the course thus pursued, and that pursued in other instances of similar import, as authority in this state that when a proposed amendment is entered in the journal of either house by identifying reference, it is within the meaning and intent of the constitution, entered in the journal of that house.

In *McDonald v. Patterson*, 54 Cal. 245, this court (in Department 2) had occasion to consider the effect of section 19, art. 11, of the constitution, on the act of April 1, 1872; and it was there held that upon the adoption of the constitution the act ceased to be operative. It was not necessary, in that case, to consider the effect of section 1, art. 22. It is now contended that as the prohibitory clause of section 19, art. 11, has been stricken out by the amendment of 1884, the act of April 1, 1872, has ceased to be inoperative, and is revived and is now in force. Section 1, art. 22, reads: "The provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof." The act of 1872 was inconsistent with the constitution,

because it (the act) provided for a system of letting contracts and performing work before collections, and the constitution declared that such thing should not be done. The act, therefore, (so far as it related to this subject,) ceased. It is usual for legislative bodies to use the word "repealed," and, when used, the act referred to is abrogated,—done away with. To "cease" is to put a stop to; to be done away with; to be an extinction. *Webst. Dict.* When, therefore, the constitution declared, as in effect it did declare, that the act of 1872 should cease, it did away with it—it extinguished it—as thoroughly as would be the legislative repeal of a prior act; and the subsequent amendment of the constitution did not revive the extinct act, any more than would the repeal of a repealing act revive the act repealed. Thus, then, it will be seen the city and county of San Francisco has a charter which contains no system of street work where the cost is chargeable upon private property by special assessment.

In that view it is contended that there is and can be no law for the performance of such street work until, by vote of the people of the city and county, a new charter be adopted, or the old one amended in that regard. It is urged that the language of section 6, art. 11, of the constitution—"corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns"—refers solely to organization as such; and that when the corporation is once launched, and has an existence, either under the general law, or under prior existing special law, the legislature may, by general laws, control the corporation in all matters not affecting its actual existence as a body.

In arriving at a proper conclusion in this case, we labor under the great difficulty of endeavoring to harmonize apparently conflicting provisions of the constitution. One idea seems to be prominent in that instrument; that is, local government for local purposes. Yet we find such provisions as the following: "Cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." "Cities and towns heretofore organized or incorporated may become organized under such general laws." A charter, when adopted under the 15-freeholder clause, shall "be submitted to the legislature for its approval or rejection as a whole."

It would be a very difficult matter to determine how far a prior-existing charter may remain intact in all its provisions, and yet be "subject to and controlled by general laws." To illustrate: Suppose a general law were passed that the presiding officer and executive of every municipality in the state should be called the "president" of the corporation, would the "mayor" of the city and county of San Francisco cease to have that title, and be compelled to take on the title of "president of the city and county of San Francisco?" or could he, under the existing charter, retain his title of "mayor?"

It is not necessary to attempt to lay down a rule in advance of an existing case. It is sufficient to take the case now before us. There exists a charter which has no provision for the performance of a certain class of street work. A general law is passed providing a system for the performance of that class of street work. That law does not appear to conflict or interfere with any provision of the existing charter. Why, then, may it not be held to be valid, and yet leave the charter intact in all respects? To so hold is not to hold that the legislature has power over the charter as it exists; it is to hold that where the charter does not make provision the legislature may, by general law, make provision. The act of 1872 has provisions not done away with by the constitution,—such as for the performance of work in certain cases at the expense of the city. To hold the act of 1885 not applicable to the city and county would have the effect of saying that no street work can be done except that which is to be paid for out of the city treasury.

All public streets, alleys, and roads in the state are public highways for the use of the people of the state. The state, in its sovereign capacity, has the original right to control them for the public use. The state for this purpose has the right to grade and repair. "The highways within and through a state are constructed by the state itself, which has full power to provide all proper regulations of police to govern the action of persons using them, and to make, from time to time, such alterations in these ways as the proper authorities shall deem proper." Cooley, Const. Lim. *588. This applies equally to the streets and alleys of a city or village as to country roads. A municipality has no control over a highway unless the right of control has been vested by the state in the municipality.

For convenience, this power of the state is frequently vested in the municipality; but unless so vested it remains in the state; when so vested the municipality acts as the agent of the state. It is from the state only that a municipality has power to levy an assessment on property for street work. In the absence of a delegation of such power, its efforts in that direction would be futile. When, by the act of 1872, that power was delegated to the authorities of the city and county of San Francisco, the action of the authorities rested solely on that delegated authority. When the constitution of 1879 went into effect, that delegated authority was, as to the questions in this case, revoked by the people in their sovereign capacity. No authority or power in that direction existed, save while the act of 1883 was in force. In passing the act of March 18, 1885, the state, acting through its legislature, and in the exercise of its authority over streets, lanes, and alleys, delegated to the authorities of the city and county, as it had the right to do, the authority to pursue the mode therein pointed out for doing the work therein designated.

It follows from the above that the judgment and order sustaining the demurrer must be affirmed. So ordered.

MORRISON, C. J. I concur.

MCKEE, J., (*concurring*.) In my judgment the street law of the city and county of San Francisco (Statutes 1872, p. 804) was struck dead on the first day of January, 1880, by the provisions of section 19, art. 11, of the constitution of the state, and section 1, art. 22, Const., so far as inconsistent with those provisions. *McDonald v. Patterson*, 54 Cal. 248; *Donahue v. Graham*, 61 Cal. 276. On that day the constitution went into effect, and, by its own terms, became the supreme law of the state. About three years thereafter the legislature carried out the constitutional provisions upon the subject of street improvements, in the municipalities of the state, by conferring jurisdiction upon municipalities to order such work to be done in conformity with those provisions. Statutes 1883, p. 32.

It is contended, however, that section 19 of article 11 of the constitution, has since been amended by striking out the inhibitory clause upon the exercise of jurisdiction to order street work to be done before assessment and collection of the money necessary to pay for it, as was required by the constitution; and that now, under the constitution as amended, such work may be ordered and contracted for without the cost and expenses of the work being first ascertained and determined, and collected and paid into the municipal treasury. There is no doubt of the fact that such an amendment to the constitution was proposed at the legislative session of 1884, and that it was voted for by two-thirds of the members elected to each of the two houses. But I find the fact to be that the proposed amendment was not entered in the journals of the houses as required by section 1, art. 18, of the constitution, which provides: Section 1. "Any amendment or amendments to this constitution may be proposed in the senate or assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof,

such proposed amendment or amendments shall be entered in their journals, with the yeas and nays taken thereon," etc. That was one of the methods which the constitution provided for its amendment; the other method provided was a constitutional convention, to be called in the manner prescribed by section 2 of the same article. The constitution is therefore constitutionally amended only by one or other of these methods; and where the first is resorted to for the purpose of amendment, the manner prescribed must be substantially complied with, else no amendment takes place; for the rule is well settled that when power is given to do a thing in a particular way, there the affirmative words marking out the particular way prohibits all others by implication. So that the particular way is the only way in which the power can be legally exercised. *Smith v. Stevens*, 10 Wall. 321; 1 Kent, Comm. 467, note *d*.

In adopting the proposed amendment of 1884 the legislature did not exercise its power in the manner prescribed by the constitution. The proposed amendment was not "entered upon the journals of both houses," as the constitution commanded. What was done in lieu of such entry was to make on the journal of the senate "identifying reference" to the proposed amendment, in the following form: "Senate Bill No. 15. Amendment to the constitution. To amend section 9 of article 13 of the constitution of the state of California." Sen. J. 1884, p. 114. Is that an entry upon the journals, within the intent and meaning of the constitution? I think not.

To quote the language of Chief Justice MARSHALL in *Gibbons v. Ogden*, 9 Wheat. 188: "The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant;" and when they declared that a proposed amendment to the constitution must be "entered upon the journals of both houses," they meant just what the ordinary and popular signification of those terms import, and nothing less. To "enter" a paper upon a public journal or record is to inscribe, to enroll, to record it. Webst. Dict. "Enter;" "Entry," as a matter of record, is the act of setting down, or causing to be set down, in writing; recording, or causing to be recorded, in due form." Abb. Law Dict. 430, word "Entry." Enrollment or recordation is therefore the meaning of the constitution, and that meaning is not satisfied by a mere "identifying reference." I therefore think that the proposed amendment of 1884 was not constitutionally adopted, that it wrought no change in the constitution, and that the Vrooman statute of 1885, passed to carry out the provisions of the alleged amendment, is unconstitutional and void. Hence the only law under which street work can be ordered in the municipalities of the state is the statute of 1883, passed to carry out the provisions of the constitution as it was at the date of the passage of that statute; and, upon these grounds, I think the demurrer to the petition in the proceedings in the court below was properly sustained.

THORNTON, J. I concur in the judgment, and will hereafter give my reasons therefor.

ROSS, J., (*concurring*.) In *Staude v. Election Com'rs*. 61 Cal. 320, after quoting that portion of section 6 of article 11 of the constitution which declares that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws," we said: "The framers of the instrument meant something when they inserted this language in it, and we are not at liberty to hold that they did not mean what they said. Giving, as they did, to all cities and towns, and cities and counties, the right to organize under a general act of incorporation, which the legislature was directed to pass, or to continue their existence under their existing charters, as they might

elect, they nevertheless said that whichever course should be pursued, such cities and towns, and cities and counties, should be subject to and controlled by general laws,—such general laws as shall be passed by the legislature other than those for the ‘incorporation, organization, and classification’ of cities and towns. The constitution has provided, in effect, that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want; and, further, that its charter shall not be changed by special legislation, directly or indirectly, under the guise of laws relating to cities, or cities and counties, containing a population of more than one hundred thousand inhabitants. At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the state, the constitution has said, in effect, that it, as well as all other cities and towns heretofore or hereafter organized, shall be subject to and controlled by such general laws as the legislature shall enact other than those for the incorporation, organization, and classification, in proportion to population, of cities and towns. We do not perceive the danger suggested by counsel for respondents of the consolidation act being ‘eaten away’ by such legislation. It cannot, as already observed, be supplanted by a general act of incorporation without the will of the people expressed at the polls, nor can it be affected by special legislation; and it is not probable that such *general* laws as the legislature may enact in conflict with its provisions will seriously affect it. But be that as it may, the constitution has expressly declared that it shall be subject to and controlled by such laws.”

The courts have no more power to take from, than they have to add to, the provisions of the constitution. As has been seen, that instrument, in express terms, declares that “cities or towns heretofore or hereafter organized * * * shall be subject to and controlled by general laws.” No one will deny that San Francisco is one of such cities. The provision, therefore, is that San Francisco, as well as all other cities and towns of the state, “shall be subject to and controlled by general laws.” In the face of this plain language, how can it be held that San Francisco is *not* subject to, and controlled by general laws? To so hold, would, it seems to me, be to violate the plain and unambiguous language of the organic act. Nor have the courts the power to impose a limitation by saying that such cities and towns shall only be subject to and controlled by some certain *class* or *classes* of general laws. The constitution has imposed no such limitation, and by that we must be governed. The “general laws” spoken of in the concluding clause of section 6 of article 11 do not mean the general laws the legislature is commanded to pass for the incorporation, organization, and classification in proportion to population of cities and towns, or amendments thereto, because it is by the constitution left optional with cities and towns in existence when the constitution was adopted to become organized under such general acts of incorporation or not, as they should elect. But this is the only limitation upon the provision that such cities and towns shall be subject to, and controlled by, general laws that I can find any warrant for in the constitution.

It is unnecessary here to speak of the further provision contained in section 8 of article 11, giving to any city containing a population of more than 100,000 inhabitants authority to frame a charter for its own government, consistent with and subject to the constitution and laws of the state, by causing a board of 15 freeholders to be selected to prepare and propose a charter, etc.

If I am correct in my interpretation of the provisions of the constitution upon the subject, it follows that the Vrooman act of 1885 is not an act for the “incorporation, organization, and classification” of cities and towns, and is a “general” law. It applies to the city and county of San Francisco as well as to every other municipality of the state. A simple reading of the act in question will show clearly that it is not a general law “for the incorporation,

organization, and classification, in proportion to population, of cities and towns," which the legislature is, by section 6 of article 11 of the constitution, commanded to pass. It does not purport to provide for the incorporation, organization, and classification, in proportion to population, of cities and towns; but it does provide for the doing of work upon the streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers, within all the municipalities of the state. It is therefore a general law. A more general one upon the subject could not be framed, and if the constitution means what it says when it declares that "cities or towns, heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to, and controlled by, general laws," I am unable to see why this act does not apply to the city and county of San Francisco as well as to all other municipalities of the state. In my opinion, it does do so. I agree with Mr. Justice MYRICK that the constitutional amendment of 1884, removing the inhibition contained in the nineteenth section of article 11 of that instrument as adopted in 1879, was properly adopted. It was so held by a majority of this court in the recent case entitled *People v. Strother*, (No. 11,284,) 8 Pac. Rep. 383.

For the reasons here given I concur in the judgment.

McKINSTRY and SHARPSTEIN, JJ. We think the street law of 1872 is a part of the charter of the city and county of San Francisco which was not repealed or abrogated by the constitution of 1879. Our reasons for this conclusion are fully set forth in the opinion of Mr. Justice SHARPSTEIN in *Staudé v. Election Com'rs*, 61 Cal. 324, and in the opinion of Mr. Justice McKINSTRY in *Donahue v. Graham*, Id. 277-282. We also think that the act of March, 1885, is not a "general law," within the meaning of the last clause of section 6, art. 11, of the constitution. We do not deem it necessary, however, to dissent from the judgment, inasmuch as the petitioner has not prayed for a writ of mandate, and the petition avers that the law of 1872 is not in force, while the law of 1885 has not been complied with. In the exercise of its jurisdiction to entertain or refuse the application, the court below was justified in refusing it to one who (even if he had asked for a writ) has declared in his petition that, in his own judgment, he is not entitled to it.

HILTON v. HEVERIN. (No. 11,195.)

(Supreme Court of California. May 1, 1886.)

JUDGMENT REVERSED.

For the reasons stated in the opinions filed in *Oakland Paving Co. v. Hilton*, (No. 11,194,) *ante*, 3, judgment reversed.

In bank. Appeal from superior court, county of Alameda.

C. T. Johns, for appellant. John H. Boalt, Henry Vrooman, and C. T. H. Palmer, for respondent.

THORNTON, J. The court below held that the act of March 18, 1885, was in force, and that the proceedings being had under it were valid. The judgment must be reversed on the ground that the act of 1885 is, so far as involved in this case, unconstitutional and void. The reasons for this are stated at length in *Oakland Paving Co. v. Hilton*, (No. 11,194,) *ante*, 3, this day filed.

McKEE, J. For the reasons given in my concurring opinion in the case of *Thomason v. Ruggles*, *ante*, 20, this day filed, I concur in the judgment.

McKINSTRY and SHARPSTEIN, JJ. We concur in the judgment. We are of the opinion that the act of 1863-64, amended in 1869-70, was not affected by the constitution of 1879, and is still in force.

69 Cal. 515

HOLLADAY v. HARE. (No. 9,221.)

(Supreme Court of California. May 14, 1886.)

BANKRUPTCY—DISCHARGE IN BANKRUPTCY—ATTACHMENT.

Where property of a defendant has been attached more than four months before the filing of a petition in bankruptcy by him, the plaintiff, if he recovers in the action, is entitled to a judgment for the enforcement of his attachment lien; and the fact that such property had been released by the giving of an undertaking, under section 555 of the California Code of Civil Procedure will not deprive plaintiff of such right, but will entitle him to the benefit of the undertaking as a substitute for the property, and a judgment so providing is proper.

Department 1. Appeal from superior court, city and county of San Francisco.

Action commenced May 16, 1886, to recover the value of services rendered by plaintiff as an attorney at law. Defendant answered, setting up as a defense his discharge in bankruptcy from all debts existing on the fifteenth day of March, 1877, the day on which his petition for adjudication as a bankrupt was filed. The court found on the trial that plaintiff was entitled to have \$3,078.50 for his services, and that defendant had been discharged in bankruptcy as alleged. It was also found that when the action was commenced plaintiff had, by way of garnishment, attached funds in the California Bank sufficient to satisfy his demand, and that defendant obtained a release of the attachment by giving the undertaking required by section 555 of the Code of Civil Procedure. The court then entered the judgment set forth in the opinion, from which judgment defendant appealed.

J. M. Searwell, for appellant. *S. W. Holladay*, for respondent.

McKINSTRY, J. The judgment appealed from is as follows: "It is therefore now, by the consideration of the court, hereby ordered, adjudged, and decreed that the plaintiff herein, Samuel W. Holladay, do have and recover from the defendant herein, Charles Hare, the sum of three thousand and seventy-eight dollars and fifty cents, (\$3,078.50,) with costs of this action, hereby taxed at \$133; that the said sums of money so adjudged hereby to the plaintiff be enforced or satisfied out of the property attached in this action by the sheriff, on or about the sixteenth day of May, 1876, as appears by this return on file herein, if the said property shall be re-delivered for that purpose, otherwise by proceedings on the undertaking of the sureties, Daniel Dodge, P. H. Cooty, and H. C. Wright, filed herein June 17, 1876, on behalf of the defendant, Charles Hare, and given for the discharge of the writ of attachment, and the release of the property taken thereunder, as appears by the papers on file in this cause."

The prosecution of the action to judgment had not been stayed by any order of the bankruptcy court. But the effect of the discharge of the defendant as a bankrupt was to prohibit a judgment which could be made out of any property of defendant other than that which was attached, (more than four months before the commencement of the bankruptcy proceedings.) Rev. St. U. S. 5,044. The plaintiff here was entitled to a judgment in form, either general, or limited to the property attached. The state law authorized a judgment enforceable, except to the extent that its enforcement was limited by the paramount authority of the law of the United States, adopted to carry out the bankruptcy jurisdiction conferred by the constitution on the courts of the United States. The appellant here cannot complain that the judgment provided for its collection only out of the property attached; that is, of a judgment collectible out of part, instead of the whole, of his property. Such would be the only mode in which the judgment could be satisfied, if it had been general in its form.

In *Myers v. Mott*, 29 Cal. 359, it was held that a general judgment could not be rendered against an administrator, because the statutes provide for the form of the judgment in such case; and that the death of a defendant operated a dissolution of an attachment, because the statutes provide that a decedent's estate shall be distributed *pro rata*, etc. There is nothing in that decision to indicate that if the law relating to the estates of deceased persons had provided that property attached prior to the death should be made applicable to a claim thus secured, the law in that respect would not be recognized as valid.

In *Peck v. Jenness*, 7 How. 612, it was held that the second section of the bankrupt act of 1841 preserved liens valid by the laws of a state, and that when an attachment was issued, and the defendants afterwards applied for the benefit of the bankrupt law, plea of bankruptcy was not sufficient to prevent a judgment being rendered condemning the property under attachment; that a certain section of that act, if it stood alone, would make a plea in bankruptcy a good plea in bar of all debts; but the whole statute being construed together, this was not the result. And so, as it seems to us, with respect to the last bankrupt act. The judgment of the court of common pleas in New Hampshire, which was considered in *Peck v. Jenness*, was "that the plaintiffs recover, against the said Philip Peck and William Bellows, \$1,818.87 damages, and costs of suit; which sums are to be levied only of the goods and chattels and estate of the defendants attached upon the plaintiff's writ aforesaid, and not otherwise."

There is no error in the judgment of the superior court, so far as it provides for its satisfaction out of the property attached.

The portion of the judgment which relates to proceedings on the undertaking of the sureties is mere surplusage. It is simply a declaration of the right of the plaintiff to bring a suit against the sureties,—a right which he would have in any event. It is not determinative that the plaintiff has a cause of action against the sureties. It in no way limits or affects any legal defense of the sureties to an action which may be brought on their undertaking; nor does it determine any claim of the sureties against the defendant, in case they shall hereafter attempt to make him respond for damages which they may be compelled to pay by reason of the undertaking. There is no statute which authorizes the direct collection from the sureties of the judgment against the defendant, and they have not covenanted that a judgment (in the nature of a judgment by consent) shall be taken against them on the entry of a judgment herein against the defendant. If the court erred in admitting the undertaking in evidence, the error is immaterial, because it did not injure the defendant, and cannot affect the rights of the sureties. Judgment affirmed.

We concur: ROSS, J.; MYRICK, J.

69 Cal. 521

NISSEN v. BENDIXSEN. (No. 9,088.)

(Supreme Court of California. May 17, 1886.)

HUSBAND AND WIFE—NEGLECT TO SUPPORT WIFE—LIABILITY FOR NECESSARIES.

A complaint charging, in substance, that defendant neglected to make adequate or any provision for his wife; and that plaintiff, in good faith, during the time of defendant's said neglect, and at the request of said wife, supplied her with certain specified articles, which were necessary for her support and maintenance, and were reasonably worth a sum stated; and that said wife never abandoned defendant, nor did she ever live separate from him by agreement; and that, by reason of the premises, defendant became indebted to the plaintiff for the value of the articles so furnished his wife, no part of which has been paid,—states sufficient facts to constitute a cause of action, under sections 174 and 175 of the California Civil Code.

In bank: Appeal from superior court, county of Humboldt.

Cal.Rep. 9-11 P.—42

S. M. Buck, for appellant. *J. J. De Haven*, for respondent.

Ross, J. Section 174 of the Civil Code provides: "If the husband neglects to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." The next section is as follows: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him by agreement, unless such support is stipulated in the agreement."

The complaint in the case before charges that for more than two years immediately preceding the commencement of this action the defendant neglected to make adequate or any provision for his wife, Egidia Patrina, and that during that period plaintiff, in good faith, at the request of the said Egidia Patrina, supplied her with certain specified articles which were necessary for her support and maintenance, and which were reasonably worth \$751.77; that said Egidia Patrina never abandoned defendant, nor did she ever live separate from him by agreement; that by reason of the premises defendant became indebted to the plaintiff for the value of the articles so furnished his wife, no part of which has been paid. For the defendant it is urged that the complaint does not state facts sufficient to constitute a cause of action against him, in that it does not allege that the goods were sold and delivered to defendant. But the action here was brought under the provisions of the statute above cited, and the complaint alleges the particular facts which the statute declares render the defendant liable to the plaintiff. Upon proof of the facts charged, the law declares the plaintiff entitled to judgment against the defendant, and that being so, it cannot be held that the complaint does not state facts sufficient to constitute a cause of action. In the case of *Jacobs v. Scott*, 53 Cal. 74, the complaint did not allege the facts declared by section 174 of the Civil Code to give a cause of action against the husband, and hence that case was decided in accordance with the common-law rule.

We are not prepared to say that the evidence was insufficient to justify the findings of the court below.

Judgment and order affirmed.

We concur: MYRICK, J.; MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTREY, J.

69 Cal. 519

FRENCH v. COUNTY OF SANTA CLARA. (No. 9,425.)

(*Supreme Court of California.* May 17, 1886.)

JUSTICE OF THE PEACE—EFFECT OF CALIFORNIA CONSTITUTION OF 1879.

The character of the office of justice of the peace was not changed by the reduction of the number of justices in pursuance of the California constitution of 1879, nor were justices' courts abolished, but, on the contrary, they were expressly continued in force; and the failure of a justice elected under such constitution to qualify would leave a vacancy in the office, which the board of supervisors could fill by appointment; but until the qualification of the person duly elected or appointed, the former incumbent, though holding over by virtue of an election under the old constitution, would be legally entitled to the office, under section 879 of the Political Code.

Department 1. Appeal from superior court, county of Santa Clara.

J. C. Block, for appellant. *W. L. Gill*, for respondent.

Ross, J. In 1877 the plaintiff, French, was duly elected one of the justices of the peace for Milpitas township, of Santa Clara county, qualified as such, and entered upon the discharge of the duties of the office. At the election in

1879 one Topham was elected as the successor of French, but he failed to qualify, and French held over. In 1882 French was again voted for and elected a justice of the peace for said township; the board of supervisors of the county having meanwhile provided, pursuant to statute, for the election of but one justice for that township. French failed to qualify, however, but continued to discharge the duties of justice, and for certain services thereafter rendered as such claimed the fees allowed by law. His right to maintain the present action, therefore, depends upon the question whether or not he was rightfully discharging the duties of the office at the time of rendering the services.

It is urged for the appellant that the character of the office was changed by the reduction of the number of justices, and by reason of the fact that the legislature, pursuant to the provisions of the constitution of 1879, enlarged the jurisdiction of justices' courts. We do not think so. Justices' courts were not abolished, but, on the contrary, expressly continued in force, by the constitution of 1879. Section 3, art. 22. Undoubtedly, the failure of Topham to qualify after the election of 1879, and the failure of the plaintiff to qualify after the election of 1882, left a vacancy in the office, which the board of supervisors could have filled by appointment, and such appointee, when qualified, would have been legally entitled to the office. *People v. Taylor*, 57 Cal. 621. But until the qualification of the person duly elected or appointed, as the case may be, the former incumbent is legally entitled to the office by virtue of section 879 of the Political Code, which provides that "every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified."

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

2 Cal. Unrep. 653

KLUMPKE v. ACKERSON. (No. 9,446.)

(*Supreme Court of California*. May 19, 1886.)

APPEAL—HARMLESS ERROR—NONSUIT.

A plaintiff cannot, on appeal, complain of the denial of a motion for nonsuit made by the defendant, the cause having thereafter been submitted on the merits and judgment rendered thereon.

Department 1. Appeal from superior court, city and county of San Francisco.

E. W. Ashby, for appellant. *Chas. F. Hanlon*, for respondent.

MYRICK, J. Action to quiet title. Plaintiff's claim to title is founded on a tax deed which omitted a necessary recital. On the trial in the court below, at the conclusion of plaintiff's evidence, the defendant moved for a nonsuit, which was denied. The defendant then offered his testimony, after which the cause was submitted on the merits, and judgment was rendered in favor of defendant. The plaintiff (appellant) admits that since his appeal was taken this court has held a deed similar to that on which he relied to be invalid, but now claims that the court erred in rendering judgment on the merits, and should have rendered judgment of nonsuit. The motion for nonsuit was made by the defendant. No motion on the part of plaintiff was denied. The case was submitted on the merits, and was so decided by the court. We see no error. The decree in favor of the defendant determined the rights of the parties as presented in this action.

The judgment and order are affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

HOBBS v. NUNN. (No. 9,401.)

(Supreme Court of California. May 19, 1886.)

JUDGMENT AFFIRMED.

Department 1. Appeal from superior court, city and county of San Francisco.

E. W. Ashby, for appellant. *J. M. Burnett*, for respondent.

BY THE COURT. The point presented in this case is the same as that presented in *Klumpke v. Ackerson*, (No. 9,446,) *ante*, 31, this day decided. On the authority of that case the judgment and order are affirmed.

69 Cal. 538

PEARSON v. CREED and another. (No. 11,286.)

(*Supreme Court of California.* May 20, 1886.)

TAXATION—TAX SALE—VALIDITY OF ASSESSMENT.

Section 3628 of the California Political Code, as amended in 1880, provides that a mistake in the name, or supposed name, of the owner of real property, shall not render an assessment invalid. Prior to this amendment, such a mistake would have rendered the assessment invalid, and therefore a person claiming title through a sale for taxes in 1880, which sale is alleged to be invalid by reason of a mistake in the name of the person to whom it was assessed, must, in order to sustain his title, affirmatively establish that a valid assessment was made.

Department 1. Appeal from superior court.

Edward Lynch and *A. B. Hunt*, for appellants. *Wigginton & Bennett*, for respondents.

MCKINSTRY, J. The defendants claim title through a sale for taxes. Section 3628 of the Political Code, as amended in 1880, provides that a mistake in the name, or supposed name, of the owner of real property, shall not render an assessment invalid. The assessment here in question was made in the year 1880, and the court below found that *C. E. Graxiola* (the name in which the land was assessed) died in March, 1879. Counsel for respondents admit that, except for the amendment, the assessment to "C. E. Graxiola" would be void, there being no such person then living. *Hearst v. Egglestone*, 55 Cal. 366; *Crawford v. Schmidt*, 47 Cal. 617; *Kelsey v. Abbott*, 13 Cal. 617; *People v. Sneath*, 28 Cal. 615.

The amendment of section 3628 took effect March 22, 1880. The defendants alleged in their cross-complaint, and the court found, that the assessment was made "between the first Mondays of the months of March and July" of that year. It was for the defendants to establish affirmatively that a valid assessment was made, and from the record it does not appear but that the assessment under which they claim was made prior to the amendment of section 3628 of the Political Code. *Lake Co. v. Sulphur Bank Co.*, 4 Pac. Rep. 876, was decided on facts occurring after the amendment became operative.

Judgment reversed, and cause remanded.

We concur: ROSS, J.; MYRICK, J.

69 Cal. 523

RHODA v. ALAMEDA Co. (No. 8,741.)*(Supreme Court of California. May 17, 1886.)***COUNTIES — ACTION ON CLAIM AGAINST BOARD OF SUPERVISORS — ALLEGATION OF PRESENTATION OF CLAIM.**

In an action on a claim against a county a complaint, alleging presentation of the claim to the board of supervisors, and that the affidavit accompanying the claim, which was for a certain number of dollars, "is true and correct, and that the same is due and owing from said county to deponent," substantially complies with the provisions of the statute which requires an allegation of presentation of the claim to the board of supervisors, together with an affidavit "that the amount claimed is justly due," as a condition precedent to the right to maintain an action therefor.

In bank. Appeal from superior court, county of Alameda.

William & Geo. Leviston, for appellants. *E. M. Gibson*, for respondent.

Ross, J. The position taken by the respondent, that it was held by this court when the case was first here (52 Cal. 350) that the original complaint contained no cause of action, and that the present amended complaint, if it contains any, contains an entirely new and distinct one, against which the statute has run, cannot be sustained. The only difficulty with the original complaint was that it did not sufficiently allege the presentation of the claim to the board of supervisors, which was but a condition precedent to the plaintiff's right to present his cause of action to the court. The allegation of the amended complaint in respect to that matter is that the affidavit accompanying the claim presented to the board contained the statement that the claim "is true and correct; that the same is due and owing from said county to deponent," etc. It is contended that this is not a compliance with the provision of the statute which requires the affidavit to such a claim to state "that the amount claimed is justly due." In our opinion, the verification to the effect that the claim, which was for a certain number of dollars, "is true and correct, and that the same is due and owing from said county to deponent," is a substantial compliance with the provision of the statute.

It results that the judgment must be reversed, and the cause remanded to the court below for further proceedings. So ordered.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

69 Cal. 525

COWELL v. STUART. (No. 9,267.)*(Supreme Court of California. May 17, 1886.)***WRIT AND PROCESS—SERVICE—DISMISSAL FOR WANT OF PROSECUTION.**

Civil actions are commenced in California by the filing of the complaint, and the issuance of a summons thereon by the clerk within one year after the filing of the complaint; and if such summons be served within a reasonable time after the issuance thereof, the action will not be dismissed for want of prosecution, though if there has been an unreasonable delay in the service of process, or other want of prosecution shown by the circumstances of the case, such action may be proper.

In bank. Appeal from superior court, city and county of San Francisco. *Robinson, Olney & Byrne*, for appellants. *Pillsbury & Blanding*, for respondent.

Ross, J. This action was brought upon certain promissory notes, and against five defendants. The complaint was filed November 9, 1881. On the sixth day of November, 1882, a summons, duly signed and sealed, was delivered by the clerk to the plaintiff's attorney; but neither the summons, nor a copy of the complaint, was served, or placed in the hands of the sheriff for service, until after the expiration of one year from the time the complaint was filed; nor was there any appearance within the year by either of the de-

fendants. This being so, it is urged on the part of the appellants that the action came to an end.

The provisions of sections 405 and 406 of the Code of Civil Procedure, as amended in 1874, are as follows:

"Sec. 405. Civil actions in the courts of this state are commenced by filing a complaint.

"Sec. 406. The clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within one year thereafter the plaintiff may have a summons issued; and if the action be brought against two or more defendants, who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial."

The statute does not now require, as it did when the case of *Reynolds v. Page*, 35 Cal. 296, was decided, a *certified* copy of the complaint to be served with the summons; so that when the clerk in the present case delivered to plaintiff's attorney a summons duly signed and sealed, he had performed every act it was essential for him to perform in the matter. The action was commenced by the filing of the complaint, (section 405, *supra*,) and within a year thereafter the summons was issued by the officer charged by the law with the duty of issuing it, namely, the clerk. Under the statute in force when *Reynolds v. Page* was decided it was essential to serve a copy of the complaint, *certified by the clerk*, with a copy of the summons, and for that reason the court held that the summons could not be considered as issued until the clerk had also issued that which the law made an essential accompaniment to constitute a valid service. But, as already observed, since the amendment of the statute of 1874, a certified copy of the complaint is no longer necessary, and when the officer who is charged with the duty of issuing the summons has done all that the law requires him to do, we can see no ground for holding that the summons is not issued.

The action being commenced, and the summons issued, within statutory time, the action may nevertheless be dismissed for an unreasonable delay in the service of process, or other want of prosecution, when the circumstances of the case show such action to be proper. In the present case service of process was had within a few months after the issuance of summons, and the delay in issuing the latter seems to have been at the request of some of the defendants, and occasioned by their promises to pay the money. There was nothing in the circumstances of the case requiring of the court below a dismissal of the action for want of prosecution. Judgment affirmed.

We concur: MORRISON, C. J., SHARPSTEIN, J.; MCKINSTRY, J.; THORNTON, J.

(69 Cal. 540)

PEOPLE v. CAMILO. (No. 20,175.)*(Supreme Court of California. May 21, 1886.)***CRIMINAL LAW—TRIAL—DISMISSAL FOR WANT OF PROSECUTION.**

A criminal prosecution will not be dismissed though the defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the filing of the indictment or information against him, if good cause be shown for not prosecuting the proceeding within such time.

In bank. Appeal from superior court, county of Santa Clara.

J. M. Lucas, for appellant. *E. C. Marshall*, Atty. Gen., for respondent.

McKEE, J. It is the policy of the law that persons charged with crime shall have a speedy, as well as a fair and impartial, trial. To that end it is provided by section 1382, Pen. Code: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) * * * (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the filing of the indictment or filing of the information." The defendant moved to dismiss the prosecution against him on that ground, and subsequently, on the same ground, moved in arrest of judgment. Both motions were denied, and we think there was no error in the rulings of the court, because the record shows that sufficient cause was shown for not bringing the action against the defendant to trial within 60 days after the filing of the information.

As this is the only assignment of error presented by the record, the judgment and order are affirmed.

We concur: MORRISON, C. J.; MYRICK, J.; ROSS, J.; THORNTON, J; MCKINSTRY, J.

(2 Cal. Unrep. 654)

BRANDON v. SUPERIOR COURT. (No. 9,066.)*(Supreme Court of California. May 21, 1886.)***REVIEW—WRIT OF—PETITION MUST SHOW WANT OF JURISDICTION.**

Where the petition for a writ of review neither shows nor alleges want or excessive exercise of jurisdiction, the writ will be denied.

In bank. Petition for writ of review.

W. H. Allen and *G. W. Chamberlain*, for petitioner.

McKEE, J. It is manifest, from the facts alleged in the petition, that the justice's court whose judgments we are asked to review had jurisdiction of the subject-matter, and of the person of the petitioner, as defendant, in the action in which the judgment was rendered, (sections 114, 894, Code Civil Proc.) and that, by the appeal taken from the judgment, the superior court acquired jurisdiction to try the action *de novo*, (sections 976, 980, Id.) And as it does not appear by any allegations in the petition that either the superior court or the justice's court exceeded its jurisdiction in any part of the proceedings in the case, the application for a writ of review must be denied. So ordered.

We concur: MORRISON, C. J.; MYRICK, J.; MCKINSTRY, J.; ROSS, J.; THORNTON, J.

(68 Cal. 343)

LITTLE v. JACKS. (No. 9,839.)*(Supreme Court of California. May 27, 1886.)***APPEAL—UNDERTAKING ON APPEAL—TIME FOR FILING.**

To render an appeal to the supreme court effective, in California, the undertaking must be filed within five days after service of the notice of appeal, (Code Civil

Proc. § 940;) and an undertaking filed before the notice of appeal was served is ineffective, and not a compliance with such requirement; and, unless an undertaking be properly filed, the appeal will be dismissed.

In bank. Appeal from the superior court, county of Monterey.
S. O. Houghton, for appellant. *D. M. Delmas*, for respondent.

SHARPSTEIN, J. The motion to dismiss the appeal is based on the ground that the undertaking on appeal was filed *before* the notice of appeal was served. The Code provides that the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal an undertaking be filed. Code Civil Proc. 940. The practice act of 1851 contained a similar provision, and in *Buckholder v. Byers*, 10 Cal. 481, it was held that an appeal could not be rendered effectual by filing an undertaking one month before the notice of appeal was filed. In *Dooling v. Moore*, 19 Cal. 81, the undertaking was filed two days before the notice of appeal was filed and served. The appeal was dismissed on the authority of *Buckholder v. Byers*, *supra*. In *Carpentier v. Williamson*, 24 Cal. 609, it appeared that the notice of appeal was filed on the eighth day of February, 1864, and was served on the respondent on the tenth day of the same month, and that the undertaking on appeal was filed *one day before* the service of the notice. The appeal was dismissed. The court said: "The statute does not authorize or permit the filing of an undertaking before the service of notice, and hence, until the notice has been *filed and served*, the undertaking has no office to perform." In *Hewes v. Carville Manuf'g Co.*, 62 Cal. 516, the undertaking was filed within five days after the notice of appeal was served, but more than five days after it was filed. The motion to dismiss was denied. The court said: "It [the undertaking] must be filed, however, within five days after service of the notice of appeal, and that was done in this case." In *Iverson v. Jones and Chalfant v. Jones*, 5 Pac. Rep. 626, the appeals were dismissed on the ground, as stated in the opinion of the court, that "the undertakings on appeal were filed more than a month before the notices of appeal were filed." "This," said the court, "in our view, is not the undertaking required by law. It is not the case of insufficiency in the undertaking, but it is no undertaking at all." "The certainty of a rule is often more important than the reason of it;" and a statutory rule of practice so well settled as this ought not to be disturbed by a court. The motion to dismiss must be granted unless the respondent has waived the filing of an undertaking. The Code provides that "the undertaking * * * may be waived by the written consent of the respondent." Code Civil Proc. 948.

There has been no such waiver in this case, unless the stipulation to have the case placed on the calendar, out of its order for hearing, constituted it. There is no allusion in the stipulation to the undertaking, and nothing to indicate an intention to waive it. By no rule of construction could it be held to be a written consent of respondent to waive the filing of an undertaking. And, if not, the failure to file it is fatal to the appeal, which, in the absence of an undertaking or a written waiver of it by the respondent, is ineffectual for any purpose. We are now considering a statutory rule, and Broom says: "It is clear that the maxim *quilibet potest renunciare juri pro se introducto* is inapplicable where an express statutory direction enjoins compliance with the forms which it prescribes." Broom, Leg. Max. 519.

We think the provisions of the Code must be complied with in order to render an appeal effectual; and as they have not been in this case, the appeal must be dismissed. Appeal dismissed.

We concur: MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; ROSS, J.

THORNTON, J., (*concurring*.) I concur in what is said in the opinion as to the filing of the undertaking on appeal before the notice of appeal was served.
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As to the waiver, the Code (Code Civil Proc. § 948) provides that the undertaking on appeal may be waived "by the written consent of the respondent." The legal effect of this provision is that it can be waived in no other way. Does the stipulation in writing to put the case on the calendar out of its order for hearing show such consent? for unless it does, it is not a waiver, within the words of the statute. It seems to me that it does not, as it does not appear that the respondent's counsel, when he signed the stipulation, contemplated giving such consent. The stipulation above mentioned was signed with another and different object and intent, and to predicate of it that it consented that no undertaking on appeal should be filed would be to attribute to it an intent entirely foreign to the intent for which the stipulation was entered into, and which was in the minds of the parties when it was executed. Where an intent plainly appears, another and a different one cannot be implied. I therefore concur in the judgment dismissing the appeal.

69 Cal. 533

DURKEE v. CENTRAL PAC. R. Co. (No. 9,067.)

(Supreme Court of California. May 18, 1886.)

EVIDENCE—DECLARATIONS AS PART OF RES GESTÆ.

Declarations of the engineer of a railroad train, made five minutes after an accident occurred, and after a child who was run over by the train had been removed from under the car, and carried away a quarter of a mile or more, are not admissible in evidence, against the defendant railroad company, as part of the *res gestæ*, for the purpose of showing the negligence of the engineer.¹

In bank. Appeal from superior court, county of Alameda.

McAllister & Bergin, for appellant. *H. F. Crane*, for respondent.

MYRICK, J. Action for damages for injuries received by the plaintiff in being run over by a locomotive of the defendant. There was no question as to the plaintiff having been injured. The only questions were as to negligence of the engineer of the defendant, and as to contributory negligence on the part of the father of the plaintiff, the plaintiff being at the time of the injury an infant of the age of about four and a half years. The train of cars had halted, as usual, at a station, (being on time,) and the engineer received from the conductor the usual signal to start. Immediately in front of the engine was a trestle and bridge, just beyond which a county road, leading to the house of plaintiff's father, crossed the track. The child was injured at a point at or near where the trestle joins the hard ground. The engineer testified that on receiving the signal to go ahead, and on starting, he looked along the track, and saw nothing out of the way; but after he was under way he saw the head of the child raise from between the timbers, when he instantly reversed the engine, and whistled for brakes, but too late. A witness for the plaintiff testified he was some distance away, managing a pair of fractious horses, and that at the moment the train started he saw the child standing on the track, throwing its hands as if "daring the engine." It is barely necessary to say that there is no pretense that the engineer *saw* the child in time to avoid the occurrence; but it is claimed he should have seen him, and that his failure to see him was from negligence.

For the purpose of showing negligence on the part of the engineer, a witness was permitted to testify as to declarations made by the engineer; and the ruling of the court in admitting the testimony of this witness is claimed to be error. As soon as the train was stopped the conductor and brakeman removed the child from under the tender, and found that its feet were injured. They did not know whose child it was, but started to carry him to a house near by,—about a quarter of a mile. When near the house, the wit-

¹See note at end of case.

ness met them, and told them whose child he was, and that the father lived at some distance on the other side of the track. The witness went to the engine, which he reached some few minutes after the occurrence,—he thought about five minutes. He there met the engineer and fireman, and asked them how it occurred. The witness, against the objections of the defendant, was permitted to give the reply of the engineer to this question. He testified that the engineer stated to him that when he started up the train he was looking up toward Peacock's (a house on the right-hand side of the road) to see if any one was coming down, and when he turned around he saw the boy, and blew the whistle, but when he reversed the engine it was too late. This evidence was claimed to be competent and proper, as part of the *res gestæ*.

We are of opinion that the declaration was not a part of the *res gestæ*, and that the court erred in admitting it. It is said in 1 Greenl. Ev. § 113, referring to the declarations of an agent, that "wherever what he did is admissible in evidence, then it is competent to prove what he said about the act while he was doing it;" and the editor to the edition of 1866 has inserted, immediately following the above: "The declaration of the driver of a car, after the car had stopped, assigning the reason why he did not stop the car, and thus prevent the injury to plaintiff while crossing the street,—that he could not stop the car because the brakes were out of order,—being made after the injury was inflicted and the transaction terminated, is not admissible against the company in whose employ such driver was, it being mere hearsay;" citing *Luby v. Hudson River R. Co.*, 17 N. Y. 131; and the editor remarks, in a note, that a case holding the declarations of an agent after the event admissible, is certainly not maintainable upon general principles. So, says the same editor, in section 114, "the declarations of the conductor of a railway train, as to the mode in which an accident occurred, made after its occurrence, or those of an engineer, made under similar circumstances, are not admissible." In the case before us the occurrence had taken place, the child had been removed from under the tender, carried away nearly a quarter of a mile, and brought back on the way to the father's house, before the declaration was made. This evidence was material, as tending to show that the engineer was not giving proper attention to his duties.

For the error in admitting in evidence the declaration of the engineer, the judgment and order are reversed, and the cause is remanded for a new trial.

We concur: MCKINSTRY, J.; ROSS, J.; THORNTON, J.; SHARPSTEIN, J.

NOTE.

Declarations, admissible as part of the *res gestæ*, need not be concurrent in point of time with the principal transaction, if they are sufficiently near it, be unpremeditated, and afford a reliable explanation of the transaction. *State v. Jones*, (Iowa,) 17 N. W. Rep. 911.

The statements of a servant of a railroad company, made after an accident, as to his own acts as the producing cause, are not competent evidence, as an admission, to fix the liability upon the corporation, and testimony as to what he said is hearsay. *Patterson v. Wabash, St. L. & P. Ry. Co.*, (Mich.) 19 N. W. Rep. 761.

An admission by the general agent of a telegraph company of its liability for an accident alleged to have been caused by its negligence, two months after the accident, is incompetent. *Randall v. Northwestern Tel. Co.*, (Wis.) 11 N. W. Rep. 419.

In case of an accident by a railroad train running upon and injuring horses on the track, what was said by the engineer to the conductor of the train immediately after the accident, and after the train had stopped, and while they were examining to ascertain what mischief had been done, indicating when he first saw the horses on the track, there not appearing anything but the occurrence to cause or produce the statement, may be proved as part of the *res gestæ*. *O'Connor v. Chicago, M. & St. P. R. Co.*, (Minn.) 6 N. W. Rep. 481.

In an action by a passenger against a common carrier of passengers, to recover compensation for injuries sustained by the overturning of defendant's sleigh, the declarations of the defendant's driver, immediately after the accident, to the effect that the ac-

cident occurred through his carelessness, are outside of his authority, and are incompetent as evidence. *Ryan v. Gilmer*, 2 Mont. 517.

In an action against a railroad for running over a man, evidence of admissions of trainmen to one another, immediately after the accident, is inadmissible. *Adams v. Hannibal & St. J. R. Co.*, 74 Mo. 553.

In an action against a railroad company to recover damages for personal injuries sustained by a passenger by an accident, evidence of the declarations of the conductor and engineer, "a few minutes" after the accident, as to the circumstances, is inadmissible against the defendant. *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112.

In an action against a railroad company by one of its employees, for personal injury sustained by reason of the incompetence of a section foreman, evidence of the statement of the defendant's roadmaster, several days afterwards, that the foreman was incompetent, is not admissible to show knowledge on the part of the company. *McDermott v. Hannibal & St. J. R. Co.*, 73 Mo. 516.

In an action against a railroad company for running upon and killing cattle, statements made by the engineer in charge of the engine which killed the cattle, while he was on the engine, which was off the track, having been thrown therefrom by the accident, but made an hour after the accident, and several hundred yards from where it occurred, are not competent evidence against the defendant to prove negligence. *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628.

69 Cal. 536

ESTEP v. ARMSTRONG. (No. 9,366.)

(*Supreme Court of California.* May 20, 1886.)

1. FRAUD—PLEADING—FACTS TO BE CLEARLY STATED.

In pleading fraud the facts must be clearly stated, so that the court may determine therefrom whether the charge of fraud is well founded.

2. ACTION OR SUIT—CHANGE OF VENUE—VACATING ORDER FOR.

An order of a superior court, transferring a cause to the superior court in another county for trial, on payment of costs, may properly be vacated, if the costs have not been paid; and the court has jurisdiction so to do, notwithstanding the party whose duty it was to pay such costs offers, at the making of the order vacating such former order, then and there to pay such costs.

Department 1. Appeal from superior court, county of Lake.

The allegations concerning misrepresentation and fraud in the "first count," referred to in the opinion, consisted of averments by plaintiff that defendant had represented that certain sums had already been paid by him on the account due by him, thereby inducing plaintiff to accept in settlement a smaller sum than was really due in full payment, which representations plaintiff alleges to be false and untrue. And the plaintiff further alleges that defendant threatened that if his offer of the smaller sum, (\$4,455.17.) as payment in full of his debt, was not accepted, that he would not pay any of such sum, and that it would then only be obtained at the end of a long and expensive litigation, which might continue many years; and that in the mean time his tender would stop all interest on the debt; which threat and statements plaintiff alleges were false and fraudulent, but which, nevertheless, she at the time confided in and believed to be true, and which induced her to accept such sum as full payment, when defendant knew that a much greater sum was due and unpaid. The remaining facts on this point appear in the opinion.

The superior court of Lake county, in which this action was commenced, made an order transferring the cause for trial to the superior court of Sonoma county, on the ground of defendant's residence there, imposing the condition for such transfer, however, that defendant should pay costs, and not specifying any space of time within which such costs should be paid. Fourteen days afterwards the court, without any notice to defendant, arbitrarily vacated its order transferring the cause to Sonoma county, reciting as a reason that defendant had not paid such costs, although the defendant then and there offered to pay the same to the clerk.

Woods Crawford and Eugene W. Britt, for appellant. *R. W. Crump*, for respondent.

MYRICK, J. Fraud is the subject of the action. The complaint contains two counts. As the court found in favor of defendant as to the second count, and rendered judgment accordingly, and the plaintiff has not appealed, it is not necessary to consider that branch of the case.

It appears from the first count of the complaint that the plaintiff held the promissory note of defendant, originally given for \$7,629.25, on which payments had been made, which payments reduced the amount to \$5,240.25. The defendant offered to pay, (and did pay,) and the plaintiff accepted, \$4,455.17 for the delivery to him (defendant) of the note, at the same time claiming this sum to be \$2,000 more than was justly due. The fraud complained of by the plaintiff, in consequence of which she asks judgment for the difference between \$5,240.25 and \$4,455.17, relates to the settlement had between the parties, by which she agreed to accept, and accepted, the less amount. It is a well-known rule that in pleading fraud the facts must be clearly stated, so that the court may determine therefrom whether the charge of fraud is well founded. We are of the opinion that the facts stated in the first count do not constitute a cause of action; that the facts as stated do not form a basis for relief on the ground of fraud. It is not apparent therefrom that the plaintiff was misled by any false misrepresentations by defendant. The demurrer should have been sustained.

No error appears in the order of the court setting aside the order of transfer of the place of trial.

The judgment and order are reversed, and the cause is remanded, with directions that the demurrer to the first count be sustained.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 651

FREDERICKS v. JUDAH. (No. 9,100.

Supreme Court of California. May 18, 1886.)

EVIDENCE—DECEASED WITNESS—ADMISSIBILITY OF TESTIMONY IN ANOTHER ACTION.

In an action to quiet title, the testimony of a witness, taken in a former action between the same parties, and concerning the title to the same land, is admissible, if such witness has since died.¹

Department I. Appeal from superior court, city and county of San Francisco.

P. B. Ladd and Wilson & Otis, for appellant. *Wm. H. Sharp*, for respondent.

ROSS, J. Several of the questions argued by counsel cannot be considered because of the state of the record. The affidavits printed in it are in no manner identified as having been used on the hearing of the motion from the refusal of which the appeal is alone taken. There is no appeal from the judgment. Order 733, referred to in the statement, and therein stated to be made a part of it, is not to be found at all.

The action was brought to quiet the plaintiff's alleged title to a certain lot of land in the city and county of San Francisco, the complaint being in the usual form of such actions. The answer of the defendants, who are the heirs at law of one Ferguson, deceased, denied any title on the part of plaintiff, pleaded title in themselves derived through Ferguson; and, among other things, set up that plaintiff went into possession of the lot as the tenant of Ferguson, and has ever since continued to hold as such, although the term of the lease has long expired. The answer further pleaded in bar a judgment of the county court of the city and county of San Francisco, rendered in an action of unlawful detainer brought by the defendant Maria B. Judah, as ex-

¹ See note at end of case.

ecutrix of the estate of Ferguson, against the present plaintiff, for the restitution of the possession of the lot, etc. On the trial of that action one Dean was examined as a witness on behalf of the plaintiff therein, and cross-examined by the defendant therein, (plaintiff here,) who gave material testimony bearing upon the question as to whether the entry upon the holding of the lot in controversy by Fredericks was as the tenant of Ferguson or not. Dean was dead at the time of the trial of the present action, and the defendants herein, against the objection and exception of the plaintiff, were permitted to give in evidence the reporter's notes of Dean's testimony. This action on the part of the court, it is contended by plaintiff, was error, entitling him to a new trial. But the case shows that the claim of the plaintiff to the lot in question was based solely upon the character of his possession of it. Admittedly he had no paper title. The real dispute between the parties to both actions was whether Fredericks' possession was that of a tenant or an adverse possession under claim of ownership. That being so, the testimony of the deceased witness was properly admitted. 1 Greenl. Ev. § 164; *Orr v. Hadley*, 36 N. H. 579; Code Civil Proc. 1870, subd. 8.

The evidence was sufficient to sustain the verdict. Order affirmed.

We concur: MYRICK, J.; MCKINSTY, J.

NOTE.

The testimony of a witness who gave evidence at a former trial may be reproduced, but it must be placed before the jury as nearly as possible as the witness would have placed it. *Sligh v. People*, (Mich.) 11 N. W. Rep. 782.

Where a witness, called on to testify to the previous testimony of a deceased witness, cannot recollect the very words, he may state, in his own language, the facts detailed, as impressed on his mind at the time. *Hepler v. Mt. Carmel Sav. Bank*, 97 Pa. St. 420.

A stenographer's notes of a witness' testimony upon a former trial between the parties, the witness being beyond the jurisdiction of the court, may be admitted. *Stewart v. First Nat. Bank of Port Huron*, (Mich.) 5 N. W. Rep. 302.

The testimony of a witness, taken down on a former trial by a short-hand reporter, cannot be read in evidence, when objected to by the opposite party, without showing a sufficient excuse for the witness' absence. *Baldwin v. St. Louis, K. & N. Ry. Co.*, (Iowa,) 25 N. W. Rep. 918. See, also, *Warwick v. Elsey*, (Mich.) 10 N. W. Rep. 57.

69 Cal. 531

COUNTY OF SAN LUIS OBISPO v. KING. (No. 8,943.)

(Supreme Court of California. May 18, 1886.)

1. COUNTIES—COUNTY OFFICERS—COMPENSATION—RIGHT TO FEES COLLECTED.

A county clerk, whose salary was fixed by law, and who, under the California act of March 27, 1876, was *ex officio* county recorder, and as such authorized to appoint a deputy county recorder, at a fixed salary to be paid by the county, came within the class of officers mentioned in such statute to whom no compensation should be allowed or paid other than the compensation and salaries prescribed, and who should collect and keep all fees and other compensation provided by law for services in their official capacity, and pay the same into the county treasury; and such an officer is liable to the county for fees so collected, and not paid over.

2. STATUTE OF LIMITATIONS—DEMAND—ACTION FOR PUBLIC MONEYS.

Moneys received by a public officer for payment into the treasury are held in trust for the public, and, until a proper demand therefor, the statute of limitations will not commence to run against an action therefor.

In bank. Appeal from superior court, county of San Luis Obispo.

W. J. & E. Graves, D. S. Gregory, and F. Adams, for appellant. *John Scott and W. H. Spencer*, for respondent.

MYRICK, J. This action was brought to recover of defendant moneys collected and received by him as county recorder as fees. The demurrer of defendant to the complaint was sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action. The defendant, King, was county clerk. Under section 4105, Pol. Code, he was *ex officio* auditor and recorder. An act passed in 1870 had fixed the fees of the recorder. The act of March 31, 1876, (St. 1875-76, p. 608,) fixed the salary of county clerk at \$1,800 per annum, and directed him to appoint a deputy county clerk, to act as deputy county recorder, whose salary was fixed at \$900 per annum. Provision was made for the appointment of another deputy recorder, if necessary, at the same salary. Section 4 of that act declared

that no compensation should be allowed or paid any of the officers named in the act other than the compensation and salaries prescribed therein, (with certain exceptions not here involved;) and that the officers entitled to charge, collect, or receive any fees or other compensation, of whatever kind or nature, allowed by law, for services rendered by them or their deputies in their several official capacities, or for the performance of duties appertaining to said offices, must collect and safely keep the same, and on the first Monday in each month pay the total amount received into the county treasury, to be applied to the payment of the current expenses of the county. We fail to see how there could be any question as to the duty of the defendant. We do not deem it necessary to occupy space in replying to the argument made on his behalf. Can it be a reasonable construction of the act of March 31, 1876, that the defendant, as county recorder, was to have deputies to perform the duties of the office, such deputies to be paid by the county, and he (the principal) have the fees of the office for his own use. As the defendant received the moneys collected by him, and held the same in trust for the county, the action is not barred. No demand was made until the day before suit.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer, the defendant to have leave to answer.

We concur: MORRISON, C. J.; ROSS, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MCKEE, J.

69 Cal. 527

DIXON v. ALLEN. (No. 8,448.)

(Supreme Court of California. May 18, 1886.)

1. LIBEL AND SLANDER—PLEADING—PRIMA FACIE CASE—PRIVILEGED PUBLICATION.

In an action for libel it is not necessary for the plaintiff either to allege or to prove, in making out his *prima facie* case, that the publication complained of was not privileged. This is a matter of defense, to show absence of legal malice in the publication.¹

2. SAME—ACTIONABLE WORDS.

The publication in a newspaper, by a teacher in a school for the preparation and education of persons seeking to become teachers, of and concerning a pupil therein, that "by her conduct in class, by her behavior in and around the building, and by her spirit as exhibited in numberless personal interviews, she has shown herself tricky and unreliable, and almost destitute of those womanly and honorable characteristics that should be the first requisites in a teacher," constitutes a libel, and the words used are unambiguous and actionable.²

3. EXCEPTIONS—GENERAL CHARGE TO JURY—OBJECTIONS, HOW MADE.

An objection to the general charge of a court should specifically point out wherein the objection lies.

4. SAME—BOND FOR COSTS.

The California statute (Acts 1871, p. 553, § 1) requiring an undertaking for costs, in actions for damages for libel, does not deprive the court of jurisdiction in case such undertaking is not filed; and the object of the statute is effected if, when the objection is made, an undertaking be executed, and the defendant thus secured the costs and charges which may be awarded to him.

5. LIBEL—EVIDENCE OF PLAINTIFF'S SOCIAL CONDITION—DAMAGES.

In an action for libel, it is competent for plaintiff to show his or her condition in life, not merely from a pecuniary stand-point, but as to family and family connections, as bearing upon the question of damages.

Department 1. Appeal from superior court, county of Santa Clara.

Action for damages for an alleged libel, published in a daily newspaper by defendant, a teacher in a school for the preparation and education of persons seeking to become teachers, of and concerning plaintiff, a pupil therein, that "by her conduct in class, by her behavior in and around the building, and by her spirit, as exhibited in numberless personal interviews, she has shown herself tricky and unreliable, and almost destitute of those womanly and

¹ See note at end of case, part 1.

² See note at end of case, part 2.

honorable characteristics that should be the first requisites in a teacher." Defendant demurred, and also, on the trial, after plaintiff had established her *prima facie* case, by proving the publication by defendant of the libelous matter complained of, moved for a nonsuit, on the ground, in both cases, that plaintiff had failed to allege or prove that said publication was not privileged; defendant claiming that such publication was a privileged communication, communicated in a proper way to the people of the state, who each and all were interested in the school mentioned, and all matters and publications relating thereto, as a state institution. The demurrer was overruled, and the motion for a nonsuit was denied. During the trial, Mrs. Anna Dixon, the mother of plaintiff, gave testimony as to the number and ages of her children, the brothers and sisters of plaintiff, and as to the death of her husband. No objection was made to the introduction of this evidence (which was offered as bearing upon the question of damages) until it was all in, when defendant moved to strike it all out as irrelevant, which motion was denied on the ground that the objection came too late, and should have been taken to each question and answer. The remaining facts appear in the opinion.

Moore, Luine & Johnston, for appellant. *D.M. Delmas*, for respondent.

MCKINSTRY, J. Appellant insists that the complaint is subject to demurrer because it does not allege in express terms that the publication was not "privileged." The definition of "libel" in the Civil Code, § 45, does not affect the mode of pleading in actions of this character. The complaint herein alleges that the publication was false and "malicious." Prior to the Codes, although the courts held that malice, meaning bad intent, was a necessary ingredient of libel, they also held that it was not absolutely necessary to allege malice in a declaration, and the very common, if not universal, introduction of an allegation of malice in a declaration for libel "was rather to exclude the supposition that the publication had been made on some innocent occasion." *Ex malitia*, in its legal signification, imports a publication that is false, and without "legal excuse." *Towns. Sland.* 88. Nor does section 45 of the Civil Code enact a new rule of evidence. When language is actionable, and it does not appear that it is privileged, it is presumed to be both false and malicious, and no other evidence of falsehood or malice is necessary than the publication itself. *Towns. Sland.* 388. And the malice presumed in a false publication can be evaded in but one way, and that is by showing a legal excuse for the act of publication, *i. e.*, by showing that it was privileged.

The nonsuit was properly denied, because the evidence of plaintiff proved *prima facie* that the publication was false and malicious. The publication was not privileged. Civil Code, 47.

The court below properly charged that the words admitted to have been published were unambiguous and actionable. The instructions asked by defendant, which would have submitted to the jury the meaning or interpretation of the language, were properly refused. The transcript shows no specific exceptions to portions of the general charge of the court. *Sill v. Reese*, 47 Cal. 294; *Hicks v. Coleman*, 25 Cal. 122; *St. John v. Kidd*, 26 Cal. 263; *Brown v. Kentfield*, 50 Cal. 129.

The original complaint was filed July 28, 1881. On the eighth of August of that year, and after service of summons, the defendant obtained from plaintiff, by written stipulation, 20 days' additional time to plead in the cause. On the thirty-first of August, 1881, and after service of an amended complaint, defendant stipulated that the amended complaint should be filed and be considered duly verified. September 2d defendant demurred to the amended complaint. The demurrer was overruled, and 10 days given to answer. By stipulation the time to answer was extended to October 21, 1881, on which day the answer was filed; and thereupon, by agreement of the parties, the cause was set for trial on November 7, 1881. November 1, 1881, defendant's

attorney gave notice of a motion, returnable on the fourth of the same month, to dismiss the action on the ground that no bond for costs had been filed. The court refused to dismiss the action, but gave the plaintiff leave to file the statutory undertaking on the following Monday. On the Monday following, the bond, in due form, was (in legal effect) executed and filed. Counsel for appellant urged that the court should have dismissed the action, and erred in allowing the plaintiff leave to file the bond within the time limited. The statute (Acts 1871, p. 533, § 1) does not deprive the superior court of jurisdiction in case the undertaking is not filed. The object of the statute is accomplished if, when the objection is made, the undertaking is executed, and the defendant thus secured the costs and charges, which may be awarded to him.

The testimony of the witness Anna Dixon was admissible. *Rhodes v. Naglee*, 6 Pac. Rep. 863.

Judgment and order affirmed.

We concur: ROSS, J.; MYRICK, J.

NOTE.

1. **PRIVILEGED COMMUNICATION.** Remarks and stricture of the defendant, a superintendent of the district schools, on plaintiff's ability and methods of teaching, as expressed in an interview with a newspaper reporter, and published in full, held not libelous. *O'Connor v. Sill*, (Mich.) 27 N. W. Rep. 13.

A publication stating that the plaintiff had "disappeared with some of his employer's funds, and the police have been notified," may import a charge of embezzlement. *Malloy v. Pioneer Press Co.*, (Minn.) 26 N. W. Rep. 904.

It was said in *Shattuc v. McArthur*, 25 Fed. Rep. 133, that any written or printed statement calculated to expose a person to the contempt of honorable men is libelous; and that a statement that a general passenger agent of a railroad company "has grown rich by making his local ticket agents, or some of them, divide their commissions with him," comes within the rule, and is libelous.

The Pennsylvania supreme court say in the recent case of *Briggs v. Garrett*, 2 Atl. Rep. 513, that a communication, when made upon a proper occasion, "from a proper motive, and based upon reasonable or probable cause, is privileged, and, when so made, in good faith, the law does not imply malice; but actual malice must be proven before there can be a recovery. Whether the communication be privileged or not is a question for the court, not the jury.

2. **WORDS ACTIONABLE PER SE.** Any article that holds a person up to scorn and ridicule, contempt, and execration, or imputes or implies the commission of a crime not openly charged, is actionable *per se*. *Crocker v. Hadley*, (Ind.) 1 N. E. Rep. 734; *Bradley v. Cramer*, (Wis.) 18 N. W. Rep. 268; *Shattuc v. McArthur*, 25 Fed. Rep. 133.

The fact that the article is in a foreign language does not prevent it being actionable *per se*. *Kimm v. Steketee*, (Mich.) 12 N. W. Rep. 177.

Words intended to expose a person to public contempt, hatred, and ridicule, and to deprive him of the benefit of public confidence and social intercourse, are actionable *per se*. *Call v. Larabee*, (Iowa,) 14 N. W. Rep. 237; such as circulating hand-bills charging a person with larceny, *Bowe v. Rogers*, (Wis.) 7 N. W. Rep. 547. Saying "J. O'D., the old scoundrel, came down and stole my bull, and I can prove it; and if he don't come and settle it up, I will put him through, and will make him pay dear for taking him away,"—imports a charge of larceny, and is actionable *per se*. *O'Donnell v. Hastings*, (Iowa,) 26 N. W. Rep. 433. Charging a man with being a "hog" is, *Solverson v. Peterson*, (Wis.) 25 N. W. Rep. 14. Accusing a married woman of being a prostitute, *Klewin v. Bauman*, (Wis.) 10 N. W. Rep. 398; or charging that "she is slow-poisoning her husband" is, *Campbell v. Campbell*, (Wis.) 11 N. W. Rep. 456; words charging commission of an indictable felony or misdemeanor are, *West v. Hanrahan*, (Minn.) 10 N. W. Rep. 415; *Geary v. Bennett*, (Wis.) Id. 602. It is actionable slander to falsely charge a woman with fornication or adultery, and the charge need not be made in direct terms to be actionable. *Buscher v. Scully*, (Ind.) 5 N. E. Rep. 738. But charging one with "bearing down" when defendant's stock was weighed, and "lifting up" when plaintiff's was weighed, are not actionable unless it is also charged that plaintiff was weigh-master, or in some way interested. *Wilkin v. Tharp*, (Iowa,) 8 N. W. Rep. 467. And it has been held that charging a person with having sworn falsely in a lawsuit, is not. *Schmidt v. Witherick*, (Minn.) 12 N. W. Rep. 448. A publication in newspaper falsely charging one with the commission of crime, is. *Peoples v. Detroit Post & Tribune Co.*, (Mich.) 20 N. W. Rep. 528. And a publication in writing, though not charging a public

offense, is nevertheless libelous if it falsely and maliciously tends to produce such an impression. *Bradley v. Cramer*, (Wis.) 18 N. W. Rep. 268. And where a railroad company, through its superintendent, assigns as a reason for the discharge of an employe a criminal act, it is actionable. *Bacon v. Michigan Cent. R. Co.*, (Mich.) 21 N. W. Rep. 324. Where an employe of a railway is discharged, and, upon inquiry of the official by whom he is discharged, is informed that it was upon the charge of theft, or other accusations that would be slanderous under other circumstances, the fact that he sought the information makes such language a privileged communication, unless the plaintiff can clearly show malice, abuse, or villification in language, manner, or circumstance under which the communication was made by the defendant. *Beeler v. Jackson*, (Md.) 2 Atl. Rep. 916.

(1) *Words Respecting Business Men and Merchants.* Words which impute to a merchant a want of credit or responsibility, or insolvency, past, present, or future, are. *Newell v. How*, (Minn.) 17 N. W. Rep. 383. Every publication in writing or in print, which charges upon or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing and credit as a merchant or business man, is. *Erber v. Dun*, 12 Fed. Rep. 526. A circular setting out a transaction by a firm, and alleging that "they are not worthy of support," and charging them with "base treachery and foul and unfair dealings," is not actionable *per se*. *Donaghue v. Caffey*, (Conn.) 2 Atl. Rep. 397. An article in print, depreciating a merchant's or tradesman's wares, and charging him with counterfeiting genuine articles and their labels, is. *Kimm v. Steketee*, (Mich.) 12 N. W. Rep. 177. Where a bank cashier returned draft sent for collection with these written words, "We return unpaid draft, [describing it;] he [drawee] pays no attention to notices," in action against the cashier for libel it was held that the words do not impute to plaintiff (drawee) any want of integrity and are not actionable *per se*. *Platto v. Geilfuss*, (Wis.) 2 N. W. Rep. 1135.

(2) *Words Regarding Professional Men.* Defamatory words spoken or written of one in his profession are actionable *per se*. *Pratt v. Pioneer Press Co.*, (Minn.) 20 N. W. Rep. 87.

(a) *Regarding Lawyers.* Charging an attorney with "betraying and selling innocence in a court of justice," is. *Ludwig v. Cramer*, 10 N. W. Rep. 81; or calling him a "shyster." *Gribble v. Pioneer Press Co.*, (Minn.) 25 N. W. Rep. 710.

(b) *Regarding Physicians.* Where the words employed in a publication in a newspaper, in stating the conduct of a physician in a particular case, only impute to him such ignorance or want of skill as is compatible with the ordinary or general knowledge and skill in the same profession, they are not actionable *per se*; but where they are such as fairly impute to him gross ignorance and unskillfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they necessarily tend to bring such physician into public hatred, ridicule, or professional disrepute, and are actionable *per se*. *Ganvreau v. Superior Publishing Co.*, (Wis.) 22 N. W. Rep. 726. Publishing in a newspaper, in the "want" column, the words, "Wanted, E. B. Zier, M. D., to pay a drug-bill," are not actionable *per se*. *Zier v. Hofin*, (Minn.) 21 N. W. Rep. 862; but may become so from the circumstances under which they are published. *Woodling v. Knickerbocker*, (Minn.) 17 N. W. Rep. 387; *Zier v. Hofin*, (Minn.) 21 N. W. Rep. 862.

(c) *Regarding Newspaper Men.* Falsely charging an editor with being drunk may be. *State v. Mayberry*, (Kan.) 6 Pac. Rep. 553. Charging a newspaper publisher with being a party to a secret conclave, in which he, the publisher, sold the support and advocacy of his said newspaper to a certain corporation for a large sum of money, is actionable *per se*. *Fitch v. De Young*, (Cal.) 5 Pac. Rep. 364.

(d) *Regarding Railroad Men.* It has been held that a statement that a general passenger agent of a railroad company "has grown rich by making his local ticket agents, or some of them, divide their commissions with him," is libelous. *Shattuc v. McArthur*, 25 Fed. Rep. 133.

(3) *Words Respecting Public Officers and Candidates for Public Offices.* A publication which charges that a person, while formerly holding the office of sealer of weights and measures, and inspector of scales, for a certain city, "tampered with" or "doctored" such weights, measures, and scales for the purpose of increasing the fees of his office, is actionable *per se*. *Eviston v. Cramer*, (Wis.) 3 N. W. Rep. 392. See *Russell v. Anthony*, 21 Kan. 450.

(4) *Words Spoken or Written by Mercantile Agencies.* A statement made in good faith by a mercantile agency to one of its subscribers, interested in the information, respecting the responsibility and business standing of a merchant, is not actionable *per se*. *Erber v. Dun*, 12 Fed. Rep. 526; *Trussell v. Scarlett*, 18 Fed. Rep. 214. But statements made respecting the business or character of a merchant in the "daily notification sheets" sent out to the subscribers of a mercantile agency, irrespective of their interest therein, are. *Erber v. Dun*, 12 Fed. Rep. 526.

(5) *Malice, Hatred, Ill Will, etc.* Willful publication of injurious statements involves the design to produce whatever injury must necessarily follow, and when done purposely, knowingly, and for no good purpose, is not justifiable, and it is malicious in the sight of the law, even if done without any personal ill will, and actionable. *Maclean v. Scripps*, (Mich.) 17 N. W. Rep. 815; *Maclean v. Scripps*, (Mich.) 18 N. W. Rep. 209. A false and injurious publication in a public journal "for sensation and increase of circulation" is, in a legal sense, malicious. *Maclean v. Scripps*, (Mich.) 18 N. W. Rep. 209. A communication otherwise privileged, if made with malice in fact, or through hatred, ill will, and a malicious design to injure, is not privileged, and is actionable. *Erber v. Dun*, 12 Fed. Rep. 526. Where a person prints and circulates a statement which imputes to a merchant or other business man conduct which is injurious to his character and standing as a merchant or business man, it is a libel, and implies malice. *Locke v. Bradstreet Co.*, 22 Fed. Rep. 771.

(6) *Construction.* In determining whether words are actionable *per se* they are to be taken in the sense in which they would naturally be understood by those who heard or read them. *Campbell v. Campbell*, (Wis.) 11 N. W. Rep. 456; *Bradley v. Cramer*, (Wis.) 18 N. W. Rep. 268. Innuendo cannot enlarge the meaning of words in publication, but merely point out their application to facts previously alleged. *Bradley v. Cramer*, (Wis.) 18 N. W. Rep. 268.

69 Cal. 552

PEOPLE v. LEE GAM. (No. 20,147.)

(Supreme Court of California. May 24, 1886.)

1. CRIMINAL LAW—TRIAL—EVIDENCE—ALIBI.

Instructions concerning evidence, and effect of proving an *alibi*, reviewed, and held not erroneous.¹

2. HOMICIDE—MURDER—INSTRUCTIONS—MANSLAUGHTER.

On a trial upon a charge of murder, if from the evidence it is clear that the crime of manslaughter is not involved, it is not error for the court to refuse to give an instruction defining "manslaughter."

3. SAME—INSTRUCTIONS—ALIBI—REASONABLE DOUBT.

On a trial for murder, where an *alibi* is set up as a defense, an instruction was not improperly refused that "if you [the jury] believe that the knife and pistol which are said to have been found near the deceased at the time of the arrival of the officers were the property of the deceased, you will give the defendant the benefit of every rational doubt growing out of such circumstances." Such instruction was misleading, and the jury could not understand therefrom whether the rational doubt must be of defendant's guilt or of some other matter of an uncertain nature.

Commissioners' decision.

In bank. Appeal from superior court, county of Santa Clara.

T. D. Riordan and *J. H. Campbell*, for appellant. *Atty. Gen. Marshall*, for the People.

FOOTE, C. The defendant was tried upon a charge of murder. From the judgment of conviction thereof in the first degree, and the order denying him a new trial, he appealed. It is argued by counsel in his behalf that the court erred in its charge to the jury in that part referring to the defense made of an *alibi*, which was as follows: "Upon this point the testimony is in irreconcilable conflict. The defendant could not have been in these two places at the same time; and in this contradiction of witnesses the jury have to determine for themselves where lies the truth. In so judging they will take into consideration the appearance and apparent candor and fairness of the respective witnesses; the probability of their statements; its coincidence with other facts or features of the case which they may deem established; and, generally, those rules of ordinary experience and general observation by which intelligent men decide as to the controverted propositions of fact. The effect of an *alibi*, when established, is like that of any other conclusive fact presented in a case. Showing, as it does, that the party asserting it could not have been present at the time of the homicide, and therefore did not participate in it, is, when credited, a defense of the most conclusive and satis-

¹ See note at end of case.

factory character. The fact, however, which experience has shown, that an *alibi*, as a defense, is capable of being, and has been occasionally, successfully fabricated; that even when wholly false its detection may be matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance,—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court. These are that while you are not to hesitate at giving this, as a defense, full weight,—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant, or as creating the reasonable doubt which entitles the defendant to an acquittal,—still you are to scrutinize the testimony offered in the support of an *alibi* with care, that you may be satisfied that a fabricated defense is not being imposed upon you.”

Taking the charge as a whole, and giving it an unstrained interpretation, it does not appear that the jury were instructed upon the weight of evidence. The part objected to was very similar to that given by the learned judge below in the case of *People v. Wong Ah Foo*, 10 Pac. Rep. 375, and as was said there, so it should be declared here, that, “viewed in the light of good sense, we do not see that the language complained of went beyond a reasonable and fair latitude of observation, permissible from the judge to a jury.” Bish. Crim. Proc. 982, 1064.

From the evidence in the case it was very clear that the crime of manslaughter was not involved therein, and hence the refusal of the court to give the defendant’s twenty-third instruction was proper, as the jury would not have been warranted in rendering a verdict of manslaughter.

Neither do we think that defendant’s fifteenth instruction was improperly refused, it being as follows: “If you believe from the evidence that the knife and pistol exhibited before you, and which are said to have been found near the deceased at the time of the arrival of the officers, were the property of the deceased, you will give the defendant the benefit of every rational doubt growing out of such circumstances,”—for the reason that it was not claimed for the defendant on the trial that he was present at the killing of the man alleged to have been murdered by him, nor did he pretend that he had been there assailed by the deceased. The proposed instruction was calculated to mislead and confuse the jury. It does not inform them about *what* they might entertain a reasonable doubt, from the circumstances presumed to exist, and hence they could not have understood therefrom whether the rational doubt must be of the defendant’s guilt or some other matter of an uncertain character,

The testimony of F. M. Pfister is also objected to. That was to a certain extent corroborative of other testimony introduced for the people, tending to prove that the defendant and two other Chinamen were in his office as a justice of the peace on the fourteenth of January, and was admissible. But even granting such evidence had not been relevant, as claimed, the fact that the witness in his testimony did not identify the defendant as present at that time, could have worked no disadvantage or prejudice to him.

The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

The evidence of an *alibi* cannot avail unless it preponderates. *State v. Reed*, (Iowa,) 17 N. W. Rep. 150; *State v. Hemrick*, (Iowa,) Id. 594.

The burden of proof is on the defendant to establish the defense of an *alibi* by a pre-

ponderance of evidence. *State v. Hamilton*, (Iowa,) 11 N. W. Rep. 5; *State v. Krewsen*, (Iowa,) Id. 7.

An *alibi* must be established by a preponderance of evidence. This rule is not in conflict with the doctrine of reasonable doubt. *State v. Red*, (Iowa,) 4 N. W. Rep. 831.

The burden of proving an *alibi* is on the defendant, but he is not bound to prove it beyond a reasonable doubt; and if, upon the whole case, the testimony raises a reasonable doubt that defendant was present when the crime was committed, he should be acquitted. *State v. Fry*, (Iowa,) 25 N. W. Rep. 738.

A prisoner is not bound to prove an *alibi* beyond a reasonable doubt. *Landis v. State*, 70 Ga. 652.

An instruction to a jury in a criminal case that an unsuccessful attempt to prove an *alibi* is an attempt to manufacture evidence, which always bears against the prisoner, is erroneous. *Turner v. Com.*, 86 Pa. St. 54.

In a criminal case the burden of proof is upon the defendant to prove an *alibi*. *State v. Rivers*, (Iowa,) 27 N. W. Rep. 781.

69 Cal. 569

PRYCE v. JORDAN. (No. 9,362.)

(Supreme Court of California. May 24, 1886.)

PROMISSORY NOTE—ACTION ON—REAL PARTY IN INTEREST.

A complaint, in an action by an indorsee or holder of a promissory note, alleging the payee "indorsed, assigned, and delivered the note to the plaintiff," that no part of the same has been paid, and demanding judgment, sufficiently states a cause of action without further alleging that since the indorsement, assignment, and delivery of the note to him, plaintiff continued to be the owner and holder of the note, and that he was the owner and holder thereof at the commencement of the action. *Ross and McKinstrey, JJ.*, dissent.

In bank. Appeal from superior court, county of Santa Cruz.

Underwood McCann, for appellant. *Goldsby & Jeter*, for respondent.

McKEE, J. In this case the defendant interposed a demurrer to the complaint in the action, on the ground that the statement of facts was insufficient to constitute a cause of action. The demurrer was overruled, and that is assigned as error. The statement in the complaint shows that on the fifteenth of December, 1879, defendant made and delivered to Charles E. Russel the promissory note upon which the action is founded; that the note was payable to Russel or order; that Russel, on the tenth of July, 1881, "indorsed, assigned, and delivered the note to the plaintiff;" that no part of the same has been paid; and that there was due and owing thereon, at the commencement of the action, the amount of the principal and interest, for which plaintiff demanded judgment. The complaint was filed the sixth March, 1882.

It is objected that the statement is insufficient to constitute a cause of action, because it does not show that the plaintiff, since the indorsement, assignment, and delivery of the note to him, continued to be the owner and holder of the note, or that he was the owner and holder thereof at the commencement of the action. But it shows that the plaintiff acquired title to the note from the original payee by the "indorsement, assignment, and delivery." As matter of law, therefore, the title to the note passed to the plaintiff; and the legal presumption is, also, that he continued to be, and was, at the commencement of the action, the owner and holder of the note, and, as such, the real party in interest, and entitled to sue. These legal conclusions, deducible from the facts averred in the complaint, constitute no part of the allegations of facts necessary to constitute a cause of action. On the admitted facts, as stated in the complaint, the plaintiff was entitled to judgment. *Wedderspoon v. Rogers*, 32 Cal. 569; *Poorman v. Mills*, 35 Cal. 121; *Hook v. White*, 36 Cal. 302; 1 Abb. Forms, 228, and notes.

Judgment affirmed.

We concur: **MORRISON, C. J.**; **SHARPSTEIN, J.**; **MYRICK, J.**; **THORNTON, J.**

Ross, J. I dissent. The cases are conflicting upon the point in question, but I think that those holding that the complaint must show by positive aver-

ment that the plaintiff is the owner of the note sued on, at the time of commencing the action, are right on principle, and should be followed. *Facts* should be alleged in pleading. As was said by this court in *Forbes v. County of El Dorado*, 12 Pac. Coast Law J. 343, "the rule that a *status* or condition which existed in the past is *presumed* to continue, is a rule of evidence, not of pleading."

I concur: MCKINSTRY, J.

69 Cal. 556

WILLIAMS v. MECARTNEY. (No. 11,008.)

(Supreme Court of California. April 27, 1886.)

1. MUNICIPAL CORPORATIONS—ACTION ON STREET ASSESSMENT—JURISDICTION—SUPERIOR AND JUSTICE'S COURTS.

The justice's court has jurisdiction of an action to recover a sum of money less in amount than \$300, due on an assessment for street work, in a municipality, unless the legality of the assessment is questioned, when the superior court acquires jurisdiction; but such question can only be raised by answer, verified by oath of the defendant, and unless so raised no evidence of such legality can be received, and the justice's court retains jurisdiction. The question cannot be raised in the superior court on an appeal from the justice's court.

2. SAME—STREET ASSESSMENT CASES—JURISDICTION OF SUPREME COURT ON APPEAL.

The supreme court in California has no jurisdiction of an appeal, in an action on a street assessment, which originated in the justice's court, unless the question of illegality of the tax or assessment was raised by oath in the justice's court.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco. *E. W. Ashby*, for appellant. *H. C. Firebaugh*, for respondent.

SEARLS, C. This is an appeal from a final judgment, entered in the superior court in and for the city and county of San Francisco, in favor of plaintiff, for \$123.50, and costs. A motion is made to dismiss, upon the ground that the amount of the judgment being for less than \$300, and no jurisdictional question having been made by the pleadings, the appeal does not lie. The suit was brought in justice's court to recover \$123.50 on account of a contract by plaintiff with the superintendent of streets in and for the city and county of San Francisco, under which contract plaintiff paved the southerly half of the roadway, and constructed granite curbs for the sidewalk, all in front of the property of the defendant, on Post street, in the city and county of San Francisco. The complaint sets out facts showing the defective condition of the street; a service of notice by the superintendent of streets upon defendant requiring him to make necessary repairs; his neglect and refusal to make such repairs; the adoption of a resolution of the board of supervisors directing the superintendent of streets to contract for the repairs, etc. The answer denies the allegations of the complaint, and is not verified. Plaintiff had judgment in the justice's court, from which an appeal was taken upon both the law and facts, and after a trial *de novo* in the superior court, judgment was again rendered in favor of plaintiff, from which this appeal is prosecuted. Written findings were waived, and the case is presented on the judgment roll.

By the third subdivision of section 114 of the Code of Civil Procedure jurisdiction is conferred upon justices' courts to recover fines, penalties, or forfeitures, not amounting to \$300, "given by statute, or the ordinance of an incorporated city and county, city, or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine." By the third subdivision of section 76 of the same Code original jurisdiction is expressly conferred upon the superior courts "in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine," etc., without reference

to the sum demanded. Section 838 of the Code of Civil Procedure provides that "the parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of * * * the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action, and certify the pleadings * * * to the clerk of the superior court of the county." And thereupon the latter court acquires the same jurisdiction as if the action had been originally brought therein.

From these several statutory provisions it appears (1) that a justice's court has jurisdiction of an action to recover a sum of money less in amount than \$300, for a fine, penalty, or forfeiture, given by statute or ordinance of a municipal corporation, provided no question of the legality of any tax, impost, assessment, toll, or municipal fine is raised; (2) that if any such question is made it must be by answer, verified by the oath of the defendant; and (3) unless so raised, no evidence as to such legality can be received.

As the answer in the present case raised no question touching the legality of the municipal ordinance, or proceedings under which the indebtedness accrued, we must, for all the purposes of the cause, presume there was, in fact, no controversy on that subject. It was, then, simply an action to recover \$123.50 in a case where the justice's court had jurisdiction, and in which the superior court acquired jurisdiction, by virtue of the appellate jurisdiction conferred upon it, and not under section 76 of the Code of Civil Procedure, which confers original jurisdiction only in such cases of this character as involve the *legality* of taxes, fines, etc. As the legality of the proceedings were not made an issue, and could not be inquired into in the justice's court, so, upon the same pleadings in the superior court, on an appeal from the former court, no such inquiry could be had. *Schroeder v. Wittram*, 6 Pac. Rep. 737. Causes originating in justice's court cannot be brought by appeal to this court, except cases of forcible entry and detainer, cases involving the title or possession of real property, or the legality of a tax, impost, assessment, toll, or municipal fine; and, save in cases of forcible entry and detainer, these questions are not involved unless raised in the justice's court by a sworn answer.

It follows that this appeal should be dismissed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the appeal is dismissed.

(69 Cal. 559)

MULLALLY v. IRISH-AMERICAN BEN. SOC. (No. 9,014.)

(Supreme Court of California. May 24, 1886.)

COSTS—COST-BILL—TIME FOR FILING.

Under section 1033 of the California Code of Civil Procedure, providing that "the party in whose favor judgment is rendered, and who claims his costs, must deliver

to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court or referee. * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc., a cost-bill is not filed in time if filed on the fifth day after judgment was entered; such entry of judgment being made more than five months after the decision was filed where the party claiming the costs had full knowledge of the decision, as evidenced by his action upon such knowledge in contesting the plaintiff's right to a new trial, and the like.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco. *M. C. Hassett*, for appellant. *H. A. Powell* and *E. M. Wilson*, for respondent.

BELCHER, C. C. The court below struck out the defendant's memorandum of costs, and whether it erred in so doing or not is the only question presented for decision. It appears from the bill of exceptions that the case was tried by the court, and its findings of fact and conclusions of law were filed with the clerk on the twenty-third day of May, 1882. The decision was in favor of the defendant, and on the third day of August following the plaintiff served upon the defendant's attorney and filed a notice of intention to move for a new trial, designating therein, as the grounds for the motion, "the insufficiency of the evidence to justify the findings and decision, and that the decision is against law," and also that the motion would be made upon a statement of the case. The plaintiff, also on the same day, served on the defendant's attorney her proposed statement of the case, and specified therein the particulars in which the evidence was alleged to be insufficient to justify the decision. To this statement the defendant prepared amendments which were served on the plaintiff's attorney on the eleventh day of September.

The statements and amendments were presented to the judge of the court for settlement, and after a prolonged hearing, in which defendant's attorney took an active part, the statement was settled and allowed on the fourteenth day of October. The motion for new trial was argued, submitted, and denied on the twenty-seventh day of October, both parties, by their attorneys, participating in the argument. Judgment was entered in pursuance of the decision, and more than five months after the decision was filed, on the ninth day of November, and on the fourteenth day of that month, the defendant served and filed its memorandum of costs. On motion of plaintiff the court struck out this memorandum of costs, upon the ground that it was not filed within the time required by law, and the defendant appealed from the order.

Was the cross bill filed in time? It is claimed for the appellant that it was, because—*First*, it was filed on the fifth day after the judgment was entered; and, *second*, that no notice of the decision was ever served by the plaintiff on the defendant or its attorney, and the defendant was not required to file its cross-bill until such notice was given.

Section 1033 of the Code of Civil Procedure provides as follows: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court or referee, * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc.

In *Porter v. Hopkins*, 63 Cal. 53, it was held that the "decision" referred to in the foregoing section "is the finding of facts and conclusions of law, signed by the court and filed with the clerk as the basis of the judgment." And in *O'Neil v. Donahue*, 57 Cal. 231, it is said: "The object of the provisions of section 1033, [Code Civil Proc.,] as to the costs, was to give the successful party who claimed such costs five days after he had knowledge of the verdict or decision to file and serve his memorandum. If the successful party

had knowledge of such decision beyond all doubt, as she did in this case, why require the defendant to serve notice of that fact on her?" And it was held in that case, the memorandum of costs having been filed more than 90 days after the plaintiff had knowledge of the decision, though no notice of it had been served upon her, that the memorandum was filed too late, and should have been struck out.

In this case, it is clear that the defendant had knowledge "beyond all doubt" of the decision in its favor months before it served and filed its memorandum of costs. It acted upon this knowledge while contesting the plaintiff's right to a new trial, and, if written notice was required, must be held to have waived it. *Barron v. Delaval*, 58 Cal. 95.

Biagi v. Howes, 6 Pac. Rep. 100, was upon a different section of the Code from the one involved here, and the ruling in this case is not necessarily in conflict with what was held in that.

It follows that the order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

69 Cal. 608

Ex parte LAWRENCE. (No. 20,111.)

(*Supreme Court of California*. May 25, 1886.)

1. MUNICIPAL CORPORATIONS—POWER TO IMPOSE LIQUOR LICENSE TAX.

Under the California constitution the legislature has power, by general laws, to vest in the corporate authorities of counties, cities, towns, or other public or municipal corporations, the power to assess or collect license taxes for the purpose of regulating the sales of vinous and spirituous liquors, and that power to impose a tax includes the power to provide for its collection by designating some person to whom the taxes shall be paid.

2. INTOXICATING LIQUORS—LICENSE TAXES—VALIDITY OF.

The fact that a person has, under a valid ordinance of the city of Modesto, paid a license tax as a liquor dealer, which ordinance was authorized to be enacted under the California Statutes of 1885, p. 127, by the corporate authorities of said city, the same being of the sixth class, does not exempt him from paying a tax also of such kind to the county of Stanislaus, properly levied by the board of supervisors thereof.

Commissioners' decision.

In bank. Application for discharge on writ of *habeas corpus*.

P. D. Wigginton and *S. W. Geis*, for petitioner.

FOOTE, C. The petitioner was arrested on a warrant issued from a justice's court of Stanislaus county, on a charge of misdemeanor, under section 435 of the Penal Code, and is held in custody under that warrant by the sheriff of said county. He was alleged to be carrying on the business of a liquor dealer without having first procured a license authorizing him so to do, as required by an ordinance of the board of supervisors of said county. It is admitted that he is carrying on that business in the city of Modesto and county aforesaid, and that he has not paid the license required by said county ordinance. He contends that having paid a license tax as liquor dealer to the corporate authorities of said city, by virtue of an ordinance thereof, that he cannot legally be required to pay any to the county.

The board of supervisors of Stanislaus county passed an ordinance in due form, on the sixth day of October, 1884, which, among other things, declared that "every person who sells spirituous, malt, or fermented liquors or wines, in less quantities than one quart, must obtain a license from the collector, as prescribed in this order, and make therefor the following payments: Those making sales to the amount of \$2,500 and over constitute the first class, and

must pay a license tax of \$40 per quarter; those making sales of less than \$2,500, as a monthly average, constitute the second class, and must pay a license tax of \$20 per quarter. Every person who, at any fixed place of business, sells any goods, wares, or merchandise, wines or distilled liquors, drugs or medicines, * * * must obtain from the tax collector of this county, and for each branch of such business, license, and pay quarterly therefor an amount to be determined by the class in which such person is placed by the tax collector. * * * All licenses herein provided for (except as otherwise provided) must be procured from the tax collector for not less than three months in advance."

It does not, therefore, appear at all doubtful that the ordinance designated the tax collector of Stanislaus county as the officer to whom license taxes could be paid, and from whom licenses could be obtained by those obligated to do so, under and by virtue of the provisions of that ordinance. The power of boards of supervisors, under section 12 of article 11 of the constitution of California, and the Statutes of 1883, p. 299, to impose a license tax, and to provide for its collection, has been held by this court to include the power to appoint a suitable person to collect such taxes, and therefore, if it chose to designate the tax collector of the county as such person, it had the legal and constitutional right to do so. *People v. Ferguson*, 65 Cal. 288; S. C. 4 Pac. Rep. 4.

In the case of *Ex parte Wolters*, 65 Cal. 269, S. C. 3 Pac. Rep. 894, it was declared that, under section 11 of article 11 of the constitution of California, the board of supervisors of a county had the right to regulate the sales of vinous and spirituous liquors within the county by the imposition of a license tax.

In the case of *People v. Martin*, 60 Cal. 153-155, it was said, in relation to a license tax, that "the power to impose such taxes, for such purposes, in our opinion, no longer remains with the legislature; but the constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public or municipal corporations, the power to assess and collect taxes for those purposes."

The fact that the petitioner here has, under a valid ordinance of the city of Modesto, paid a license tax as a liquor dealer, which ordinance was authorized to be enacted under the Statutes of 1885, p. 127, by the corporate authorities of said city, the same being of the sixth class, does not, in our judgment, exempt him from paying a tax also of such kind to the county of Stanislaus, properly levied, as in this case, by the board of supervisors thereof, under the constitutional provisions cited *supra*, and the act of 1883, p. 299. The ordinance under which he was obligated to pay this tax was a "*law of this state*" in the sense in which those words are used in section 435 of the Penal Code, and therefore, under that statute, the petitioner could be prosecuted for a misdemeanor.

The writ should be dismissed, and petitioner remanded.

We concur: BELCHER, C. C.; SEARLS, C.

MORRISON, C. J., MYRICK, SHARPSTEIN, and THORNTON, JJ. For the reasons given in the foregoing opinion the writ is dismissed, and petitioner remanded.

69 Cal. 606

HASTINGS v. KELLER. (No. 11,227.)

(*Supreme Court of California.* May 25, 1886.)

APPEAL—CHANGE OF VENUE—CONFLICTING AFFIDAVITS.

Where, on a motion for change of venue, the evidence as to defendant's residence is conflicting, the finding of the court thereon will not be disturbed on appeal. Ross, J., dissents.

In bank. Appeal from superior court, county of Lake.
Tyler & Tyler, for appellant. *E. W. Britt*, for respondent.

MYRICK, J. This case is before us on appeal from an order refusing to change the place of trial, and on motion to stay proceedings pending the appeal. The motion for stay was made and argued, and on the argument the case on the appeal was also submitted. From the view we take of the case on the merits of the appeal, it is unnecessary now to determine the question as to the stay. The action was commenced in Lake county, and the defendant was served with summons. The defendant demurred, filed an affidavit of merits, and an affidavit that at the time of the commencement of the action, and for several years prior thereto, and then, she resided in the city and county of San Francisco, and demanded that the place of trial of said cause be changed to the said city and county of San Francisco. In opposition the plaintiff filed an affidavit, in which he stated that the defendant was, at the commencement of the action, and is, a resident of this state; but that he did not then and does not know in what county she resided when the action was commenced; that the county in which she then resided was unknown to him; that, as he believed, she had no fixed or settled place of abode, and, for several years, it had been her custom to frequently shift her place of abode, at times domiciling temporarily in the city and county of San Francisco, in others in Lake county, and in others in Alameda and other counties. The court denied the motion of the defendant. We see no error. The court below, in denying the motion, must have determined upon the conflict in the affidavits that the defendant did not reside in the city and county of San Francisco. Where the evidence as to defendant's residence is conflicting, the finding of the court below will not be reversed. *Creditors v. Welch*, 55 Cal. 469. If, as suggested by counsel, a refusal to change the place of trial would work a hardship, the remedy is with the legislature.

The order is affirmed.

We concur: MORRISON, C. J., SHARPSTEIN, J., MCKEE, J., THORNTON, J.

ROSS, J. I dissent.

69 Cal. 631

TRIPP v. SANTA ROSA ST. R. CO. and others. (No. 8,498.)

(*Supreme Court of California*. May 26, 1886.)

1. APPEAL—JURISDICTION—ORDER OF DISMISSAL, APPEALABLE.

The supreme court will not take jurisdiction of an appeal from an order refusing to set aside a judgment or order which is itself appealable. An order of dismissal of an action, when entered, is a final judgment in the cause, which is itself appealable, and an appeal should be taken from such order, and not from an order refusing to set aside such order.

2. SAME—REMOVAL OF CAUSE—ORDER REFUSING, REVIEWABLE.

On appeal from a final judgment an order refusing to transfer the cause to a United States court may be reviewed as an intermediate order, the facts being made to appear on the record as required by law.

In bank. Appeal from superior court, county of Sonoma.

P. G. Galpin and *C. C. Tripp*, for appellant. *J. T. Campbell* and *Jas. H. McGee*, for respondent.

THORNTON, J. This is an appeal from an order of the thirteenth of February, 1882, made after final judgment in the above-entitled action. The order appealed from is a denial of a motion made by the plaintiff to set aside certain orders made in the cause on the fifteenth day of December, 1881. Of the orders of December 15, 1881, referred to, one denied plaintiff's motion to transfer the cause for trial to the circuit court of the United States held at

San Francisco, and the other dismissed the action, which was ejectment, as to certain defendants named in the order.

As to the order of dismissal, when entered, it was a final judgment in the cause, which was itself appealable. The appeal should have been prosecuted from such judgment. This court, as it is well settled, will not take jurisdiction of an order refusing to set aside a judgment or order itself appealable. *Henly v. Hastings*, 3 Cal. 342; *Holmes v. McCleary*, 63 Cal. 497; *California South. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 295; S. C. 4 Pac. Rep. 13. The appeal should be prosecuted from the judgment or order which the court has refused to set aside.

On an appeal from the final judgment, the order of refusal to transfer to the United States circuit court might have been reviewed, as an intermediate order, under section 956, Code Civil Proc.; the facts being made to appear in the mode required by law to put them on the record. But, as there is here no appeal from the final judgment, we do not see how we can review the order refusing the transfer. The course of procedure above indicated is the proper one, and it should not be disregarded, as we should do if we were to allow a party to neglect to prepare the matter complained of for review on appeal from the judgment, and resorting to a method unknown to the law, by a motion to set aside the order complained of, and then taking an appeal from the order denying such motion. The proper steps should have been taken to review the order made in December on appeal from the judgment. The order of December, 1881, cannot be reviewed on appeal from an order made in February, 1882, refusing to set it aside.

The above disposes of the case, as it results in a dismissal of the appeals. The other points discussed on the argument and in the briefs of the counsel, become, therefore, mere moot questions, which this court is not called on and declines to decide. The like conclusion must follow if the order of dismissal had not been entered as a judgment; for in that case the order appealed from would not be an order made after final judgment.

The appeal must be dismissed; and it is so ordered.

We concur: MORRISON, C. J.; MYRICK, J.; ROSS, J.; MCKEE, J.; SHARPSTEIN, J.; MCKINSTRY, J.

2 Cal. Unrep. 656

In re Estate, etc., of HAWES and another, Minors. (No. 11,304.)

(*Supreme Court of California.* May 24, 1886.)

EXCEPTIONS—BILL OF EXCEPTIONS, PROOF OF, IN SUPREME COURT—REQUISITES OF PETITION.

A petition for leave to prove a bill of exceptions, and to have the same certified as correct, in the supreme court, under section 652 of the California Code of Civil Procedure, sufficiently "sets forth the exceptions taken, and the evidence in support thereof," if it has annexed to it, and made a part of it, as an exhibit, a writing containing the evidence, rulings, and exceptions taken on the hearing in the court below.

Commissioners' decision.

In bank. Petition for leave to prove bill of exceptions, and have the same certified as correct.

J. C. Bates, for petitioner.

FOOTE, C. The original petition in this case for leave to prove a bill of exceptions, and to have the same certified as correct, under section 652, Code Civil Proc., was heretofore held insufficient by this court, and leave given to file an amended petition. That petition as filed has annexed thereto, and made a part thereof, as an exhibit, a writing containing the evidence, rulings, and exceptions taken on the hearing of the application for letters of guardianship of the minors in the court below. In the former opinion of this court

the first petition was adjudged insufficient for the reason that it did not "set forth the exceptions taken, and the evidence in support thereof," in the court below. 9 Pac. Rep. 456. The petition now under consideration appears to contain all that which this court has declared requisite, and due notice of the application has been given to the trial judge. Hence the demurrer herein filed should be overruled, and the respondents given leave to answer.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the demurrer is overruled, with leave to respondents to answer.

69 Cal. 541

In re GANNON. (No. 20,194.)

(Supreme Court of California. May 22, 1886.)

1. JURY—GRAND JURY—CONTEMPT BY WITNESS—APPEAL.

A grand jury is a part of the court by which it is convened, and is under its control, and witnesses who appear before it are subject to the lawful authority and control of the court in the same manner as are witnesses before a trial jury. The court has, therefore, jurisdiction to deal with a witness who defies the authority of the grand jury, and to adjudge him guilty of contempt of court for such conduct, and punish him therefor, and if no excess of jurisdiction appears in the proceedings which resulted in the conviction and punishment, the judgment rendered is final and conclusive, and not the subject of review.

2. SAME—DISSOLUTION BY ADJOURNMENT OF COURT.

Under the California constitution of 1879 the district courts were abolished, and superior courts substituted, and the old system of terms of court and final adjournments for the term were abolished, and the superior courts declared to be always open; and it follows that, under the new system, neither an end of the session of the court, nor a final adjournment for the year, will have the legal effect of dissolving a grand jury which has been selected to serve for a term of the court, or until its final adjournment, or until new lists of grand jurors are selected.

3. SAME—TERM OF SERVICE.

Section 241 of the Code of Civil Procedure of California, which provides for the drawing and impaneling each year of one grand jury in each county having less than three superior court judges, and of two grand juries in each county having more than three superior court judges, and which was passed in pursuance of section 8, art. 1, of the California constitution, providing that a grand jury shall be summoned at least once a year in each county, while it fixes the time within the year for the court to order the selection and return of grand jurors liable to serve in the capacity of a grand jury, and limits the time in which they shall serve for the purpose of the drawing and impaneling of a grand jury, prescribes no specific time for the drawing of the grand jury, or for its official existence after it has been drawn and impaneled, but leaves these matters to the judicial discretion of the court.

4. SAME—DISSOLUTION OF, AND TERM OF SERVICE.

A grand jury cannot dissolve itself, and therefore if a grand jury whose authority is challenged, where not impaneled for any length of time prescribed by law, has not been discharged by the court in which it was acting, it still exists as an original body, with power to perform its duties.

5. CRIMINAL LAW—INDICTMENT BY GRAND JURY DE FACTO—VALIDITY.

An indictment found by a *de facto* grand jury is regular as one found by a *de jure* grand jury. The title of one is not collaterally assailable any more than that of the other.

6. JURY—GRAND JURY—DE FACTO GRAND JURY—CONTEMPT OF.

The validity of the *de facto* grand jury cannot be called into question in a collateral proceeding to punish a party as a contumacious witness for defying its authority.

MYRICK, J., dissents.

In bank. Petition for a writ of *habeas corpus*.

Davis Louderback, for petitioner.

MCKEE, J. In the petition in this proceeding for *habeas corpus* the petitioner alleges that he is illegally imprisoned by and under an unlawful judgment of conviction of contempt of court, rendered against him by the superior court of the city and county of San Francisco, from which he asks to be discharged. The judgment was rendered upon facts about which there was no dispute.

Admittedly, the petitioner appeared on the twenty-sixth of March, 1886, before a body of men, sitting as a grand jury, in department Eleven of the superior court of said city and county, in obedience to a subpoena regularly issued and served upon him, by which he was commanded to be and appear before the grand jury to testify to certain matters then under investigation. But while the petitioner appeared in obedience to the process of the court, he refused to be sworn as a witness or to testify; and for this act of contumacy

he was, by regular proceedings taken against him in the superior court, adjudged guilty of contempt of court, and punished by fine and imprisonment.

There is no doubt that a grand jury is part of the court by which it is convened, and that it is under the control of the court; and there is just as little doubt that a witness who appears before it is subject to the lawful authority and control of the court in the same manner and to the same extent as are witnesses before a trial jury. The court has, therefore, jurisdiction to deal with a witness who defies the authority of the grand jury, and to adjudge him guilty of contempt of court for such conduct, and punish him, (section 166, Pen. Code; section 1209, Code Crim. Proc.;) and if no excess of jurisdiction appears in the proceedings, or which resulted in the conviction and punishment, the judgment rendered is final and conclusive, and not the subject of review, (section 1222, Code Crim. Proc.)

It is claimed, however, that the refusal of the petitioner to testify before the grand jury was not a contempt of court, because the so-called jury was not a legally constituted grand jury, and had no authority to require the petitioner to be sworn as a witness. In *Levy v. Wilson*, 10 Pac. Rep. 272, we held that the same body was legally organized as a grand jury in the superior court of the city and county of San Francisco, on the fourteenth July, 1885. It was therefore a valid grand jury, and an appendage of the court in which it was organized. That being the fact, the individual members of the jury must be deemed to be officers of the court in which they were regularly appointed, and qualified to exercise judicial functions in the investigation of offenses cognizable by the grand jury; and as officers of the court they continue to act until the jury of which they are members shall be dissolved by operation of law or order of the court. Until then neither their duties nor their offices end.

But it is contended that the grand jury was dissolved by operation of law in the year 1885, or at the expiration of that year, because the grand jurors were selected to serve for a term of the court which expired on the first Monday in October, 1885, or until the final adjournment of the court at the expiration of its July session, in 1885, or until new lists of grand jurors were selected and returned for the year 1886, as provided by sections 204-211, Code Crim. Proc. The basis of the contention is that the superior court in which the jury was convened works under a system of terms and final adjournments of the court, by which its jurisdiction as a court to transact business is temporarily suspended by the end of its term, or by the final adjournment of the court; and until the reconvening of the court at the commencement of a new term, its authority to hear and determine causes ceases, and the authority of a jury in attendance upon the court ends also, and the body is dissolved by law. Such a system was, undoubtedly, part of the constitution of the courts which formerly existed in the state before the adoption of the present constitution; and many of the provisions of the Codes by which the system was established are still to be found upon the statute books. But the constitution of 1879 abolished, not only the former courts, but also the system of terms and final adjournments under which the judges thereof opened courts for the transaction of judicial business, and substituted superior courts, which it ordained should be "always open," legal holidays and non-judicial days excepted, (article 6, § 5, Const.,) and this command of the constitution was enforced by the legislative enactments 73, 74, Code Crim. Proc.:

"Sec. 73. The superior courts shall always be open, (legal holidays and non-judicial days excepted,) and they shall hold their sessions at the county-seats of the several counties, or cities and counties, respectively. They shall hold regular sessions, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof: provided, that in the city and county

of San Francisco the presiding judge shall prescribe the times of holding special sessions.

"Sec. 74. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time."

By the term "sessions" of the court, as used in these sections of the Code, is meant the time during which the court is, in fact, holding court at the place appointed, and engaged in business; and by the term "recesses" is meant the times in which the court is not actually engaged in business. There is, therefore, no such thing as a division of time into certain periods of the year, known as "terms of court," during which a court may sit to hear and determine causes. The superior court of each county in the state is an organized, judicial institution, competent for the transaction of business at all times, without reference to terms or adjournments; so that notwithstanding an order for adjournment entered on the minutes of the court, the court may sit and exercise its jurisdiction in the trial of causes, or in the transaction of any legal business, at any time, (*Stewart v. Mahoney*, 54 Cal. 149;) and it follows that neither an end of the session of the court, nor a final adjournment of the court for the year, would have the legal effect of dissolving the grand jury.

But it is further contended that the law requires two grand juries to be drawn and impaneled in each year, and as there was only one drawn and impaneled in 1885, it must have ceased to exist on or before the expiration of 1885. The argument seems to be that as the grand jury which was drawn and impaneled in July, 1885, was drawn from the grand jury box which contained the names of the regular jurors selected and returned for the year 1885, under an order made by the court in January, 1885, it had no official existence as a grand jury after the year 1885, because it was made by law the duty of the superior court, in the month of January of each year, to order the selection and return of a sufficient number of grand jurors to serve for one year, and until other persons are selected and returned; and as that duty has been performed, the names of new grand jurors have been selected and returned for the year 1886, from which, if the public interest requires it, a new grand jury for 1886 must be drawn; so that thereby the grand jury of 1885 ceased to exist.

Section 8 of article 7 of the constitution provides that a grand jury shall be drawn and summoned at least once a year in each county; and section 241, Code Crim. Proc., provides for the drawing and impaneling each year of one grand jury in each county having less than three superior court judges, and of two grand juries in each county having more than three superior court judges. But while the statutory law fixes the time within the year for the court to order the selection and return of grand jurors liable to serve in the capacity of a grand jury, and limits the time in which they shall serve for the purpose of the drawing and impanelment of a grand jury, it prescribes no specific time for the drawing of the grand jury, or for its official existence after it has been drawn and impaneled. These the law seems to have left to the judicial discretion of the court; for it provides that "every superior court, whenever, in the opinion of the court, the public interest must require it, may make an order directing a jury to be drawn," (section 241, Code Crim. Proc.;) and when the proceedings, put in motion by an order made for the purpose, result in the drawing and impanelment of a grand jury, it is, as an organized body, in the exercise of its functions, and in its official existence, subject to the control of a court that is "always open," and may at any time, in the exercise of its jurisdiction, order it to be discharged, (section 906, Pen. Code.)

A grand jury cannot dissolve itself, (*Clem v. State*, 33 Ind. 418;) and as the grand jury whose authority is challenged was not impaneled for any par-

ticular time prescribed by law, and has not been discharged by the court in which it is acting, it still exists as an original body, with power to perform its duties. Besides, even if we were to assume that for which counsel for the petitioner contends, namely, that the time for which the grand jury was drawn ended with the year 1885, and that a new grand jury for 1886 ought to have been drawn, and the old jury discharged, that, of itself, would not, in the absence of proof that a new grand jury for 1886 was in fact *drawn*, dissolve the old, nor affect its authority to perform the duties of such a body. As an organized grand jury it would be competent to act under color of lawful authority. Having been appointed to office, and having taken the oath of office, the individual members are officers of the court, not only *de jure*, but *de facto*, and their acts are valid, so far as public rights are concerned, although the title under which they perform those acts may be questionable. It is therefore sufficient, to maintain the authority of a grand jury, that it has acted under color of lawful authority. An indictment found by a *de facto* grand jury is as regular as one found by a *de jure* grand jury. The title of the one is not assailable collaterally any more than that of the other. *Com. v. McCombs*, 56 Pa. St. 436.

The panel of either may be challenged for irregularities in its formation by any person held to answer for a public offense, (chapter 2, tit. 4, Pen. Code;) or a person indicted by it may move, after indictment found, to set aside the indictment upon any of the grounds specified in section 995, Id. *People v. Earnest*, 45 Cal. 29. But the authority of such a body, whether *de facto* or *de jure*, cannot be legally assailed, or called in question, by a witness summoned before it. The authority of such a body, exercising its powers as instrumental to the court of which it is a part, must be respected and obeyed.

In *Plymouth v. Painter*, 17 Conn. 585, a person who had been chosen a grand juror refused to take the oath of office, but subsequently, no one having been selected to his place, qualified by taking the oath, and thereafter joined in presentments made by the grand jury. The authority of the grand jury was challenged, but the supreme court said: "According to all the authorities, here was, undoubtedly, a fair color of right in the person acting as a grand juror to exercise that office, whether he was legally qualified to do so or not. * * *. He was legally appointed to the office, and was eligible to such appointment, and, claiming a right to act under it, took in due form the oath prescribed by law for the office. These would confessedly be sufficient to confer on him a perfect legal title to the office. * * *. It is a well-settled principle that the acts of an officer *de facto* are valid as far as the rights of the public are concerned, and that the title of such an officer, or the validity of his acts as such, cannot be indirectly called in question to a suit to which he is not a party. This doctrine has been established from the earliest period, and repeatedly confirmed by an unbroken current of decisions down to the present time." See, also, *Carpenter v. People*, 64 N. Y. 483.

It follows that the validity of the grand jury cannot be drawn in question in a collateral proceeding to punish the petitioner as a contumacious witness for defying its authority. The petitioner is therefore legally held in custody, under a valid judgment rendered by a court of competent jurisdiction, and is not entitled to be discharged.

Writ dismissed, and petitioner remanded.

We concur: MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; ROSS, J.

MYRICK, J., (*dissenting*.) By the statutes of this state it is required that in January of each year there shall be selected a list of persons to serve as grand jurors during the ensuing year, or until a new list shall be provided Section 204, Code Crim. Proc. The persons whose names are so selected shall

serve for one year, and until other persons are selected. Section 210, Id. In the city and county of San Francisco there shall be two grand juries drawn and impaneled in each year. Section 241, Id. My construction of these provisions is that the list of names is to be selected in January of each year, and if a grand jury be drawn and impaneled during the year, its functions as such body cease, at least when the list in the succeeding January shall be selected. The court may dismiss the grand jury at any time, but may not, either by non-action or by order, continue it in existence beyond the selection of the succeeding list. The language of the statute is that the persons selected "shall serve for one year," etc., and "to serve as grand jurors during the ensuing year." I do not think that the word "serve" has the signification that they are liable to be "drawn" during the year, and serve afterwards, but, rather, if they serve at all, it shall be within the year. A list was selected in January, 1885. From that list a grand jury was drawn and impaneled in July, 1885. A new list was selected in January, 1886; but the body drawn in July, 1885, continued to sit as such, and was in session in March, 1886, when the petitioner was called before it, no jury being drawn from the list of 1886. It seems to be an object of the statute that grand juries shall come from the body of the people at frequent intervals. If the body impaneled in July, 1885, could be retained or sit beyond the succeeding selection, I know of no limit of time for its retention; for if it may be retained one month, it may ten years, even though in the mean time ten lists shall have been selected.

I dissent from the judgment.

2 Cal. Unrep. 655

KELLY v. WILSON, Judge, etc. (No. 11,595.)

(Supreme Court of California. May 22, 1886.)

JURY—GRAND JURY—CONTEMPT.

Writ of prohibition denied, on authority of *In re Gannon*, ante, 240.

In bank. Application for writ of prohibition. The facts are the same as in the case of *In re Gannon*, (No. 20,194,) ante, 240.

Davis Louderbach, for petitioner. *P. G. Galpin*, for respondent.

By THE COURT. Upon the authority of *In re Gannon*, (No. 20,194,) ante, 240, this day filed, the application for a writ of prohibition is denied.

69 Cal. 550

COLLINS v. DRISCOLL. (No. 9,084.)

(Supreme Court of California. May 24, 1886.)

1. PROMISSORY NOTES—PLEADING—DEMURRER—STATUTE OF LIMITATIONS.

The allegations of a complaint must, for all the purposes of a demurrer, be considered as true; and therefore, in an action on a promissory note, where the complaint sets forth the note, and alleges that it was antedated, which complaint is demurred to on the ground that the action is barred by the statute of limitations, if the allegation that the note was antedated will save the action from being barred by the statute of limitations, such allegation must be taken as true, and the demurrer overruled.¹

2. SAME—DATING OF.

In general, it is not essential to a note that it should be dated, and, if there be no date, it will be considered as dated at the time it was made. If it be dated, the date will be *prima facie* evidence of the time when the note was made, but not conclusive. A note may be antedated or postdated, and, where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument.¹

¹For a full discussion of the question of the statute of limitations, and when the statute begins to run, see *German Sav. & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 628, and note, 629-641; *Glenn v. Saxton*, (Cal.) 9 Pac. Rep. 420, and note, 423; and *Bohm v. Bohm*, (Colo.) 10 Pac. Rep. 790.

3. STATUTE OF LIMITATIONS—TIME FOR SUING ON NEGOTIABLE INSTRUMENT.

Under the California statute one has four years within which to bring suit upon a promissory note after his right of action accrues, and his action is never barred until that time has elapsed.¹

Commissioners' decision.

In bank. Appeal from superior court, county of Monterey.

D. M. Delmas and Wm. Shipsey, for appellant. *S. F. Geil and H. V. Morehouse*, for respondent.

BELCHER, C. C. The controlling question in this case relates to the statute of limitations. The action was commenced on the twenty-fourth day of October, 1882, and was based on a promissory note dated May 1, 1878, and payable one day after date, with interest. In the complaint it was alleged that the note was not in fact made or delivered to plaintiff until the fifteenth day of July, 1879; that during the year 1878 the plaintiff loaned to the defendant sums of money, which amounted in the aggregate to the sum named in the note as principal, and which he verbally promised to repay, but made no written promise to do so; that on the fifteenth day of July, 1879, "the defendant, at his own instance, and without any request from plaintiff, caused said note to be prepared, and he signed and delivered the same to plaintiff without being thereto requested or required by the plaintiff; that said note was antedated as aforesaid, at defendant's own instance, for the reason that defendant wished to pay interest on said principal from the first day of May, A. D. 1878, and at the rate in said note specified." The defendant demurred to the complaint, upon the ground that the cause of action was barred by the statute of limitations. The court at first overruled the demurrer, but afterwards reconsidered its ruling, and sustained it, and then entered judgment in favor of defendant.

In our opinion, the first ruling was right and the second wrong. "In general, it is not essential to a note that it should be dated; and if there be no date, it will be considered as dated at the time it was made. If it be dated, the date will be *prima facie* evidence of the time when the note was made, but not conclusive." 1 Pars. Notes & Bills, 41. A note may be antedated or postdated, and "where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument." Story, Prom. Notes, § 48; *Paige v. Carter*, 64 Cal. 489; S. C. 2 Pac. Rep. 260. And, whatever may be its date, a note takes effect only on delivery. Until it is delivered it is not made, in a legal sense, and by it no obligation is imposed on the maker. If the delivery be subsequent to the date, it becomes a valid and binding note on the day of its delivery, and not before. "If it be made payable in so many days or weeks or months from the date, this period must begin from the date which the paper bears, without reference to the day of actual delivery; for it is perfectly competent for the parties to agree that the money should be payable when they please, and they express their agreement on this point by making it payable in so many days from a certain day. Thus, if a note payable in three months from date were delivered four months after date, it would be payable on demand." 1 Pars. Notes & Bills, 49.

Here, according to the averments of the complaint, which must be taken as true, the note was delivered on the fifteenth day of July, 1879. It was due at that time, and a cause of action at once accrued upon it. Until then there was no cause of action, because there was no note. But the statute of limitations begins to run when the right of action accrues, and never before. This is a general rule, and applies to all actions. Under our statute one has four years in which to bring suit upon a promissory note after his right of action accrues, and his action is never barred until that time has elapsed. As this action was commenced within four years after the plaintiff's cause of action accrued, it is clear the court erred in sustaining the demurrer.

¹ See note, *ante*, 244.

The judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer, and permit the defendant to answer.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer, with leave to defendant to answer.

2 Cal. Unrep. 658

HEYWOOD, Ex'r, etc., v. BERKELEY LAND & TOWN IMP. ASS'N and others.
(No. 8,296.)

(*Supreme Court of California.* May 26, 1886.)

1. APPEAL—FINDINGS—EVIDENCE.

Findings held not sustained by the evidence.

2. LANDLORD AND TENANT—LEASE—BREACH OF COVENANT.

A covenant in a lease that premises should be "used in good faith, continuously, during the existence of the lease, for the usual and ordinary business of a ferry, (a boat having theretofore made regular daily trips therefrom,) held to be broken by failure to operate the ferry during a period of 29 days.

Commissioners' decision.

In bank. Appeal from superior court, county of Alameda.

H. A. Powell, for appellant. *Edward J. Pringle*, for respondent.

BELCHER, C. C. This is ejectment to recover certain leased premises, upon the ground that the lease had become forfeited and void. It appears from the record that on the fourth day of April, 1877, Z. B. Heywood leased to the defendant the Berkeley Land & Town Improvement Association, a corporation, the Berkeley Ferry wharf, with two strips of land, on one of which the wharf was constructed, for the term of 10 years, at the rental of one dollar per year, payable in advance, with an agreement at the end of the term to execute "a new lease, similar in all respects to this, and to run the same period of ten years," and "that this renewal clause shall be inserted in said new lease *verbatim*." In consideration of receiving the lease the lessee covenanted and agreed, among other things, "that said leased premises shall be used in good faith, continuously, during the existence of this lease, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and shall not be used for any other purpose whatever." The lease further provided as follows: "And it is distinctly understood and agreed by and between the parties hereto that if default be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its successors or assigns, to be paid, kept, and performed, in any particular, as to time or circumstance, then and from thenceforth this indenture of lease shall be forfeited and become void, and it shall and may be lawful for the said party of the first part to re-enter in and upon said leased premises, and the same to have again, repossess, and enjoy."

Immediately upon the execution of the lease the lessee put upon the route a steam ferry-boat, which continued to run, making daily trips, and carrying freight and passengers, between West Berkeley and the city of San Francisco, until the first day of April, 1880. On that day the boat was libeled and seized by the United States marshal for money due its officers from the improvement association, and it remained tied up in the custody of the marshal until the twenty-ninth day of the month, when it was sold by him, under judicial process, to the defendant R. P. Thomas. The improvement association then assigned its lease to Thomas, and on the evening of the day of sale the boat resumed its trips, and thereafter continued to make them daily up to the time of trial.

Between the first and the twenty-ninth of April no ferry-boat was run between the leased wharf, or any point at or near West Berkeley and the city of San Francisco, and no other boat, except a small schooner four feet deep and twenty years old, which was owned and operated by other parties. The schooner made occasional trips, in all seven or eight, as wind and weather would permit, but, as her master testified, "sometimes she would be gone a week, and sometimes she would come back in half a day, according to how the weather was. She had to go with the wind and weather, and she could not possibly go regularly." The rent of one dollar per year reserved in the lease was nominal; the answer admitting that the rental value of the leased premises was \$300 per year, and some of the witnesses testifying that it was \$1,200. The real consideration that moved Heywood to make the lease was the fact that he owned a large amount of property at West Berkeley besides the leased premises, and believed that that property would be greatly enhanced in value if a regular ferry could be established and maintained between that place and the city of San Francisco. Heywood died in 1879, and this action was commenced by the executor of his estate in May, 1880.

The case was tried by the court, and its findings and judgment were in favor of the defendants. The plaintiff moved for a new trial, and, his motion being denied, appealed from the judgment and order. The court found that the leased premises "have, since the first day of April, 1880, been used in good faith, continuously, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and for no period since the first day of April, 1880, were the said leased premises not used for the business or the purposes of a ferry."

The principal question presented for our determination is, was this finding justified by the evidence, the substance of which we have stated, and in which there was no material conflict? We do not think it was. There is no pretense that the ferry was operated at all between the first and the twenty-ninth of April, and we are unable to see how the ferry wharf could have been used in good faith, continuously, for the usual and ordinary business of a ferry, when no ferry-boat went from or to it during all of that time. A ferry requires a ferry-boat, and the usual and ordinary business of a ferry is the transportation of passengers and freight between the ferry landings. How, then, can it be said that a ferry wharf has been used continuously for ferry business when the ferry-boat has been tied up, and its trips discontinued, for 28 consecutive days.

We attach no importance to the fact that the small schooner sometimes went over and took freight from West Berkeley, as it was owned and operated by other parties, who never undertook or were even requested to do the ferry business.

The parties to the lease expressly stipulated that the lease should be forfeited and become void, and the lessor should have the right to re-enter and repossess the property, whenever the lessee, its successors or assigns, should fail, in any particular as to time or circumstance, to keep and perform the covenants of the lease. In our opinion, the covenant that the premises should be "used in good faith, continuously, during the existence of this lease, for the usual and ordinary business of a ferry to and from the city and county of San Francisco," was broken by the failure, under the circumstances disclosed by the evidence, to operate the ferry from the first to the twenty-ninth of April. When the breach occurred the plaintiff had the right to re-enter upon the property, and to maintain an action of ejectment for its possession. Section 793, Civil Code. Courts of equity often relieve against forfeitures, (*Keller v. Lewis*, 53 Cal. 118; *Giles v. Austin*, 62 N.Y. 486;) but whether a court of equity would relieve against this forfeiture is a question which, as the case is now presented, does not arise.

The expenditures upon the wharf and boat, relied upon by the respondent

ents, were made before the lease was executed, and therefore cannot aid them.

The one dollar rent for the year commencing April 4, 1880, was paid in March. It was not necessary that that should be returned in order that the plaintiff might maintain his action.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

69 Cal. 625

HOLLIS v. MEUX. (No. 9,038.)

(Supreme Court of California. May 26, 1886.)

LIBEL AND SLANDER—PUBLICATION IN JUDICIAL PROCEEDING PRIVILEGED.

The publication in an insolvency proceeding by an attorney, in the course of his employment as such, of facts of which he was informed by his client, to the effect that the insolvent, while acting in a fiduciary capacity, committed acts of fraud in contracting debts for which he became insolvent, it being his duty, in resisting for his client as an opposing creditor the application of the debtor, to publish the facts, constitutes an absolutely privileged publication, of which malice cannot be predicated, no one being permitted to allege that what was rightly done in a judicial proceeding was done with malice.¹

In bank. Appeal from superior court, city and county of San Francisco. *W. H. Fifield*, for appellant. *Arthur Rodgers* and *Safford & Meux*, for respondent.

MCKEE, J. A demurrer was sustained to the complaint in this case, on the ground that it did not contain facts sufficient to constitute a cause of action. The plaintiff declined to amend. Judgment was entered against him, and from the judgment this appeal is taken. The object of the action was to recover damages for a libel. On the face of the complaint it appears that the plaintiff had filed in the superior court of the city and county of San Francisco his voluntary petition in insolvency to be discharged from his debts and liabilities as an insolvent debtor under the insolvency law; that a corporation existed which was known as "The Real-estate & Building Association;" that there was another corporation known as "The Real-estate Association," of which plaintiff was the president and business manager; that the last-named corporation had proven a claim against the estate of the insolvent debtor, and opposed his discharge; that in connection with the claim the defendant acted as attorney for the corporation creditor on the occasion of filing its opposition to the discharge of the debtor; and that, in the specifications of opposition which were filed, the defendant maliciously published concerning the plaintiff certain false and scandalous matters, with intent to impute to him the crimes of embezzlement and perjury.

Under the insolvent law "any creditor" is authorized to oppose the discharge of a debtor by filing specifications in writing of the grounds of his opposition, and the law provides "that no discharge shall be granted * * * if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, inventory, * * * in relation to any material fact concerning his estate, or his debts, or to any other material fact, * * * or if * * * he has been guilty of fraud contrary to the true intent of this act," etc. Section 49, Ins. Act 1880. The law also provides: "No debt created by fraud or

¹ See note at end of case.

embezzlement of the debtor, * * * or while acting in a fiduciary character, shall be discharged." Section 52, Id.

The grounds set forth in the specifications are (1) that the insolvent debtor had been privy to the making of a false and fraudulent entry upon the books of the Real-estate & Building Association with the intent to defraud his creditors; (2) that he swore falsely, upon an examination in the course of the proceedings in insolvency, in relation to a material fact concerning his estate and indebtedness; (3) that the indebtedness of the debtor to the Real-estate Association was created by him while acting in a fiduciary capacity, namely, as its president, director, manager, and trustee; and (4) that while acting in such capacity he fraudulently converted to his own use a large amount of real and personal property of the said corporation.

Upon these grounds the creditor opposed the discharge of the debtor; and as the specifications were prepared and filed under the insolvent law by the defendant as the attorney of the opposing creditor, in the course of the judicial proceedings commenced to obtain his discharge, it is claimed that their publication was privileged.

"A privileged publication one made (1) in the proper discharge of an official duty; (2) in any legislative or judicial proceeding, or in any other official proceeding authorized by law; (3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; (4) by a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof." Section 47, Civil Code.

In *Kidder v. Parkhurst*, 3 Allen, 393, where a libel was alleged to have been published on the occasion of presenting a complaint to a grand jury, it is said: "The complaint appears to have been made in the regular course of justice, and the decisions, ancient and modern, are uniform, that no proceeding in a regular course of justice is to be deemed an actionable libel. * * * In *Hill v. Miles*, 9 N. H. 14, it was said by PARKER, C. J., that an action for a libel cannot be sustained for a proceeding before a court having jurisdiction of the subject-matter, if the process was instituted under a probable belief that the matter alleged was true, and with the intention of pursuing it according to the course of the court, even if the matter turns out to be wholly false."

The rule of the English law is that such a publication is absolutely privileged. That is to say, that a defamatory statement, made by writing or in words, in the course of an inquiry regarding the administration of the law, is privileged whether it was or not made in bad faith, or was or not relevant to the inquiry. Thus, in an action brought against a solicitor for words spoken by him before a court of justice, while he was acting as advocate for a person charged in a court with an offense against the law, the court of appeal, on appeal from a judgment of the court of queen's bench, held that the action was not maintainable. "No action of any kind," says the court, "will lie for words spoken in a course of law, even if they were spoken from an indirect motive, and to gratify malice." "This rule," it adds, "is founded upon public policy, which requires that a judge in dealing with the matter before him, counsel in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. The question of malice, *bona fides*, and relevancy cannot be raised. The only question is whether what is complained of has been said in the course of the administration of law. If that be so, the case against a counsel must be stopped at once." *Munster v. Lamb*, 23 Amer. Law Reg. 12.

The rule is not carried to that extent by the American courts. Generally a privileged publication is conditional or limited, and not absolute. Says Chief Justice GRAY, in delivering the opinion of the court in *Hoar v. Wood*, 3 Mete. 198: "The privilege is limited by this: that a party or counsel shall not avail himself of his situation to gratify private malice, by uttering slanderous expressions either against a party, witness, or third person, which has no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes, and advocating and sustaining the rights, of their constituents." So, in *Gilbert v. People*, 1 Denio, 43, BEARDSLY, J., says: "Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor, or counsel therein, if pertinent and material to the matter in controversy, is privileged, and consequently lays no foundation for a private action or a public prosecution. The general language of elementary writers is that whatever occurs in the regular course of justice is privileged, (1 Hawk. P. C. c. 73, § 8; 3 Chit. Crim. Law, 869; 1 Saund. 131, [1]; 1 Russ. Cr. 307; Bac. Abr. liber A, 4;) and by which they intend to indicate the practice I have stated. If what is said or written is pertinent and material to the controversy, the protection to the parties, and those who represent them, (for all stand on the same ground,) is absolute and unqualified, and no one shall be permitted to allege that it was done with malice. But this is the extent of the privilege; for if a party or his agent will pass beyond the prescribed limit to asperse and villify another by word or writing, he is without protection, and, as in other cases, must abide the consequences of his own misconduct. If slanderous words are used, he is a slanderer, and if he offends in writing, he is a libeler, and he may be prosecuted both civilly and criminally as such. *Hastings v. Lusk*, 22 Wend. 410; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; *Ring v. Wheeler*, 7 Cow. 725; *Thorn v. Blanchard*, 5 Johns. 508." And in *Wyatt v. Buell*, 47 Cal. 624, where it appeared that the occasion of an application to this court for an extension of time to file a transcript on an appeal was availed of to publish in the petition filed for that purpose scandalous matters which was wholly foreign to the application, this court held that the publication was not privileged.

Whether the legislature intended to change the rule, as announced in *Wyatt v. Buell*, by the amendment of section 47 of the Civil Code, which took effect on the first of July, 1874, is not necessary to be determined; for in the view that we take of the case as presented by the complaint, the words, written in the course of plaintiff's proceedings in insolvency, though they were such as imputed to the plaintiff crimes, and if spoken elsewhere would import malice and be actionable, are not actionable under either an absolute or conditional rule of privilege. If the publication was absolutely privileged, the action was not maintainable. If it was conditionally privileged, then the only question arising upon the complaint is reduceable to this: Does it appear by the complaint that the grounds of opposition, as published in the specifications, to the discharge of the plaintiff as an insolvent debtor, were pertinent and material to the cause or subject of inquiry before the court in which the specifications were filed? We think the question must be answered in the affirmative. The question to be tried was whether the plaintiff was entitled to be discharged from his debts under the insolvent law. The matters contained in the specifications of opposition had certainly a bearing upon the question. If the defendant, in the course of his employment as attorney for his client, was informed that the plaintiff acted in a fiduciary capacity, or committed the acts of fraud, as charged in the specifications, in contracting any of the debts for which he became insolvent, it was his duty, in resisting for his client as an opposing creditor the application of the debtor, to publish the facts. Their publication on the occasion was absolutely privi-

leged. Malice cannot be predicated of it. No one is permitted to allege that what was rightly done in a judicial proceeding was done with malice. *Warner v. Paine*, 2 Sandf. 201; *Suydam v. Moffat*, 1 Sandf. 462; *Garr v. Sel-den*, 4 N. Y. 94.

Judgment affirmed.

We concur: MORRISON, C. J.; THORNTON, J.; ROSS, J.; SHARPSTEIN, J.; MCKINSTRY, J.

NOTE.

For a full discussion of the question of libel and slander, and therein of privileged communication, see *Solverson v. Peterson*, (Wis.) 25 N. W. Rep. 14, and note, 16-17.

Statements made in affidavits to pleadings and papers used in a court of justice are privileged, provided they are not irrelevant and impertinent. *Hart v. Baxter*, (Mich.) 10 N. W. Rep. 198.

Statements contained in an affidavit presented to a superintendent of schools for the purpose of preventing a teacher's license being granted to a particular person, charging such person with improper conduct, are privileged, and not actionable, unless untrue and maliciously made. *Weiman v. Mabie*, (Mich.) 8 N. W. Rep. 71.

In proceedings by R., as the next friend of a female infant, to remove the guardian of such infant, the petition alleged as a reason for such removal that the guardian kept in his family B., a girl whose "reputation is ruined, and she is now an example of shame and prostitution." It was held that the statement was conditionally privileged, although B. was not a party to the record, and that to render R. liable to B. for libel, malice must be shown. *Ruohs v. Backer*, 6 Heisk. 395.

(69 Cal. 622)

O'DONNELL v. JACKSON. (No. 8,903.)

(*Supreme Court of California*. May 26, 1886.)

SPECIFIC PERFORMANCE—CONTRACT TO PURCHASE LAND—LACHES—EJECTMENT.

A party to an agreement for the purchase of lands, after obtaining possession, cannot lie by for more than three years, take no steps in the matter of purchase, until sued for the possession, and then defend by a cross-action for a specific performance. A party is not entitled, under such circumstances, to have the agreement for the purchase of the lands executed by a court of equity.

In bank. Appeal from superior court, county of Lake.

R. W. Crump, for appellant. *Welch & Brett*, for respondent.

THORNTON, J. We are of the opinion that a valid contract in writing was made between plaintiff and defendant on or about the tenth of December, 1878, for the sale by the former to the latter of the land in controversy, for the sum of \$1,130, to be paid in cash on the execution of a deed by plaintiff.

At the time of the contract the land was under administration in the probate court for the city and county of San Francisco, as part of the estate of Hugh O'Donnell, deceased. The decedent died intestate. The land descended to the heirs of decedent, who resided in Ireland. The plaintiff was not an heir of decedent, and the records in the recorder's office of Lake county, where the land was situated, showed no conveyance by the heirs to the plaintiff. This defendant ascertained about December 27, 1878. The defendant then objected to the title on the grounds above mentioned. It appears that plaintiff was the owner of an undivided moiety of three-fourths of the land when the contract was executed, and that he has acquired the title to the other fourth since this action was commenced. On or about the twentieth of April, 1879, the plaintiff repudiated the contract, of which on the date just above mentioned defendant was informed. The repudiation was based on the ground that the sale was for cash, and that he (plaintiff) would not go to the expense of getting the land out of probate to effect a sale of so small a tract.

We are of opinion that the improvements made on the land were made without the sanction or approval of the plaintiff. Matthew's authority from plaintiff only extended to making the sale, and he had no power to authorize

defendant to make any such improvements. As they were made without authority, they may be laid out of the case.

The court finds, and there is evidence to sustain it, that the defendant had the money on hand to make the payment from the tenth of December, 1878, to the thirtieth of April, 1879. The evidence showed that he had borrowed the money at $1\frac{1}{2}$ per cent. per month, and had paid the interest on it during the period above mentioned. He testifies that he never paid, or offered to pay, the purchase money, because O'Donnell did not make him a deed, and because about December 27, 1878, he found out that plaintiff's title was not good. Thus the matter stood until this action was commenced on the twenty-third of March, 1882, by the plaintiff, to recover possession of the land described in the complaint, as a defense to which the defendant set up the contract above mentioned, and asked that it be specifically executed. This he did in a cross-complaint filed July 5, 1882. The defendant did nothing for more than three years after he knew that plaintiff had refused to abide by the contract. He did not pay, or offer to pay, anything, and never seems to have urged the consummation of the contract, though during the whole time he was enjoying the possession of the land without paying anything for it.

Under these circumstances is a party entitled to have an agreement for the purchase of land executed by a court of equity? Can he lie by, as defendant did, for more than three years, take no steps in the matter of the purchase, until sued for the possession, and then defend by a cross-action for a specific performance? We are of opinion that there is such a manifest lack of diligence on the part of the defendant as to preclude all claim to a recovery. The uncontradicted evidence in the case, we think, shows an abandonment of the contract by the defendant. The significant circumstance appears in the testimony that the defendant had to borrow the money to pay for the land; that the lender kept the money for him from about the first of December, 1878, until about the middle of April, 1879, during which period the defendant paid interest on it, and no longer. The testimony on this point is uncontradicted. The borrowed money, it thus appears, was given up about the middle of April, 1879, about which time the plaintiff informed him, through one Matthews, that he would no longer abide by the contract. Why was this borrowed money surrendered at the time mentioned to the control of the lender, unless the defendant had abandoned the contract? A court of equity will not execute a contract in favor of a purchaser, under such circumstances. *Brown v. Covillaud*, 6 Cal. 572; *Green v. Same*, 10 Cal. 317.

In considering this cause we have taken the uncontradicted testimony, and based our conclusion on it.

We think that the judgment and order denying a new trial should be reversed, and the cause remanded for a new trial. So ordered.

We concur: MORRISON, C. J.; ROSS, J.; MCKEE, J.; SHARPSTEIN, J.; MYRICK, J.; MCKINSTRY, J.

(69 Cal. 633)

REMINGTON v. SUPERIOR COURT. (No. 11,457.)

(Supreme Court of California. May 27, 1886.)

1. HUSBAND AND WIFE—DIVORCE—JURISDICTION OVER PROPERTY.

In an action for divorce, where the issues do not embrace the disposition of property, the court has no jurisdiction to enjoin the defendant from disposing of his property until the determination of the suit.

2. SAME—PLEADING—DISPOSITION OF PROPERTY BY PARTY.

If, in an action for divorce, a disposition of property is sought, there should be some pleading (either by the original complaint or by supplemental pleading) by which an issue as to such property would be tendered.

Department 2. Application for a writ of prohibition.

Manuel Eyre, for petitioner. *H. H. Lowenthal*, for respondent.

BY THE COURT. Prohibition. In an action for divorce, the court made an order that the defendant show cause why he should not be restrained from seeking to collect the amount of a judgment which he had recovered against a third party. The petition herein averred, in effect, that the issues in the divorce suit did not embrace the disposition of property. Such being the case, the demurrer to the petition is overruled.

The answer filed to the petition does not traverse the averment above noted. It states that the respondent, in making the order to show cause, did not profess that it would determine the title to the money due on the judgment, but simply enjoin the disposition thereof until the determination of the divorce suit. We apprehend that in an action for divorce, if a disposition of property is sought, there should be some pleading (either by the original complaint or by supplemental pleading) by which an issue as to such property would be tendered. It appearing in this cause that no such issue was tendered, the court had no jurisdiction to make the restraining order. Writ granted.

2 Cal. Unrep. 657

CRESCENT CITY MILL & TRANSP. CO. v. HAYES. (No. 8,948.)

(Supreme Court of California. May 25, 1886.)

INJUNCTION—PLEADING—DEPRIVATION OF WATERS OF LAKE.

In an action for equitable relief by way of injunction to restrain defendant from draining the waters of a certain lake into the ocean, the complaint averring, in substance, that plaintiff was a corporation engaged in the manufacturing, transportation and sale of lumber; that its mills were located on the banks of said lake, and that it was necessary that a certain depth of water in such lake, which now exists there, should be maintained, the same being essential to the conduct of plaintiff's business; and that a decrease of its depth, or destruction of its navigability, would result in great and irreparable injury to plaintiff. Defendant, in answer to the complaint, denied that plaintiff owned or possessed the mill mentioned in the complaint; that the mill was situate upon said lake; that the lake was navigable; or that the destruction of its navigability would injure plaintiff; or that the defendant intended to obstruct or impair plaintiff's alleged rights therein. Held, that the answer raised issues entitling defendant to a trial on the merits, and that a demurrer thereto should not be sustained. THORNTON, J., dissenting.

In bank. Appeal from superior court, county of Del Norte.

This was an action for equitable relief by way of injunction to restrain defendant from draining the waters of a certain lake into the ocean, the complaint averring, in substance, that plaintiff is a corporation engaged in the manufacturing, transportation, and sale of lumber; that its mills are located on the bank of said lake, and that it is necessary that a certain depth of water in such lake, which now exists there, should be maintained, the same being essential to the conduct of plaintiff's business, and that a decrease of its depth, or destruction of its navigability, would result in great and irreparable injury to plaintiff. Defendant, in answer to the complaint, denied that plaintiff owned or possessed the mill mentioned in the complaint; that the mill was situate upon said lake; that the lake was navigable, or that the destruction of its navigability would injure plaintiff; or that defendant intended to obstruct or impair plaintiff's alleged rights therein. Plaintiff demurred to defendant's answer on the ground that it did not raise issues entitling defendant to a trial. The demurrer was sustained, and defendant appealed.

W. A. Hamilton, J. J. De Haven, and J. D. H. Chamberlain, for appellant. R. G. Knox and L. F. Cooper, for respondent

BY THE COURT, (THORNTON, J., *dissenting*.) The amended answer filed in this cause raised issues entitling defendant to a trial upon the merits. The order sustaining plaintiff's demurrer to the amended answer was therefore erroneous.

Judgment reversed, and cause remanded, with directions to the court below to overrule the demurrer.

REMNANT v. HOFFMAN. (No. 8,325.)

(Supreme Court of California. May 26, 1886.)

JUDGMENT—BY DEFAULT—SETTING ASIDE—TIME FOR ANSWER NOT EXPIRED.

A judgment by default, entered in favor of plaintiff, before the time for answering has expired, may properly be set aside. McKEE, J., dissenting.

In bank. Appeal from superior court, county of Santa Cruz.

Judgment was entered by default in favor of plaintiff, and subsequently the default was set aside, on the petition of defendant, on the ground that the default had been erroneously entered before the proper time for answering had expired.

J. M. Lesser and C. B. Younger, for appellant. Z. N. Goldsby and W. C. Burnett, for respondent.

BY THE COURT, (McKEE, J., *dissenting*.) There was no abuse of discretion on the part of the court below in setting aside the default entered against the defendant, for which reason the order is affirmed.

70 Cal. 3

McNALLY v. CONNOLLY. (No. 8,864.)

(*Supreme Court of California. May 28, 1886.*)

1. FIXTURES—LANDLORD AND TENANT—MACHINERY, WHEN A FIXTURE.

Machinery attached to a building with bolts and screws is a fixture, within the meaning of section 660 of the California Civil Code.¹

2. SAME—EXECUTION AGAINST LANDLORD.

Machinery having the character of a fixture may be taken on execution against the owner of the property to which it is attached, notwithstanding it belonged to, and was attached to the realty by, a tenant whose lease has not expired, and who, under the lease, has a right, upon the expiration thereof, to remove such machinery.

3. SAME—CONVERSION—DEMAND.

No demand is necessary before bringing suit for the recovery of property which constituted a fixture, and which was wrongfully severed and removed.

In bank. Appeal from superior court, city and county of San Francisco. *Chas. F. Hanlon* and *W. C. Flint*, for appellant. *M. Mullany*, for respondent.

ROSS, J. Whether the title to the property in question passed to the plaintiffs in the present action depends upon its character at the time of the levy of, and sale under, the execution issued in the case entitled *McNally and others v. Connolly and Wheat*; that is to say, whether, as between the plaintiffs, who were the creditors, and Connolly and Wheat, who were the debtors, the property was realty or personalty.

The facts of the case are these: In 1876 the defendant took a lease of a certain lot of land in the city of San Francisco for a term which was to expire January 1, 1881. Upon the lot there was a brick building, which covered most, but not all, of it. Connolly paid the rent for the term in full, formed a partnership with Charles D. Wheat, and the copartners, under the firm name of Connolly & Wheat, thereupon proceeded to place upon the lot an engine, boiler, and machinery for a flouring-mill. It is this machinery that forms the subject-matter of the present action.

The engine and boiler were erected in a wooden building adjoining the brick structure, and the motive power was communicated therefrom to the machinery by means of a shaft or shafts extending into and through the brick structure. The foundation of the engine and boiler was made by sinking timbers in the ground from six inches to two feet, upon which a brick foundation was built, and the bed of the engine was placed upon the brick-work, and fastened to the wooden foundation beneath by bolts and screws. The millstones were bolted fast to the floor. Pieces of timber were put in the brick walls, and bolted through in the upper part of the building, to which the machinery was attached. The whole machinery seems to have been securely attached to the building, and to have been solid and substantial, but was secured and fastened usually by bolts and screws, which could be removed without material injury to the building, while some bridges were bolted directly to the walls. The principal difference in securing the machinery from that ordinarily pursued, consisted in using bolts with screws instead of nails. It was placed in the building with the understanding between the lessor and the lessee that the latter should be at liberty to remove it, and it was with that end in view that it was attached as above stated, in order that it might be severed with the least possible injury to the realty.

In 1877 plaintiffs herein brought an action against Connolly & Wheat to

¹See note at end of case.

recover \$2,966.16, and caused a writ of attachment to be duly issued in the action, which was levied upon the right, title, and interest of the defendants to the suit in and to the lot of land and premises so leased as aforesaid. The sheriff, also, by direction of the plaintiffs, at the same time attached the machinery as personal property. Plaintiffs had judgment in the action, and thereafter caused an execution to issue, under which the sheriff levied upon the lot of land having the mill and machinery thereon, and afterwards, on the nineteenth day of October, 1877, sold the same, in due form, as *real estate*, plaintiffs becoming the purchasers; and, no redemption being had, on the fourth day of May, 1878, they received a sheriff's deed, in due form, of said land and premises. Just prior to the expiration of the lease—that is to say, in December, 1880—Connolly detached and removed the mill and machinery; whereupon the present action was brought against him to recover its possession, or, in the event its delivery cannot be had, its value.

The fact that, as against the lessor, Connolly & Wheat had the right, upon the expiration of the lease, to remove the machinery, is unimportant. The question here is, how does the law regard it as between debtor and creditor? It is provided by statute in this state that "a thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Civil Code, § 660. It is clear that under this definition the mill and machinery in question constituted fixtures. It does not admit of doubt, we think, that had Connolly & Wheat, on the day of the execution sale against them, executed to the plaintiffs a deed of all their right, title, and interest in and to the lot of land upon which the mill and machinery were erected, that the latter would have passed by the deed to the plaintiffs. We know of no principle by which a different result can be held to follow a forced sale against them, from which no redemption was had.

It results from these views that the title to the property in question vested in the plaintiffs upon the execution of the sheriff's deed. That being so, the subsequent severance and removal of the property by the defendant, Connolly, was a conversion of it into personalty. *Sands v. Pfeiffer*, 10 Cal. 259. And as the severance and removal by defendant was wrongful, no demand before bringing suit was necessary.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; THORNTON, J.; MORRISON, C. J.; SHARPSTEIN, J.

NOTE.

The annexation of machinery to a building, and the ease or difficulty of severance, are not controlling as to its *status*. Its character as a chattel or part of the realty is largely to be determined by the intent of the parties. *Manwaring v. Jenison*, (Mich.) 27 N. W. Rep. 899.

A party who has erected a house on land under a contract to purchase the land, and rented the house, cannot treat the house as personal property, and maintain an action of trover for the conversion thereof by a third party. *Bracelin v. McLaren*, (Mich.) 26 N. W. Rep. 533.

Machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil. *Carpenter v. Walker*, (Mass.) 5 N. E. Rep. 160.

Machines which have been separately constructed, and are adapted for use in any building, when placed in a mill and secured in position in such a way that they may be removed without injury to themselves or the building, do not necessarily become part of the realty, but may continue to be treated as personal property. *Maguire v. Park*, (Mass.) 1 N. E. Rep. 750.

It was recently held in the case of *Deane v. Hutchinson*, (N. J.) 2 Atl. Rep. 292, that where a building is erected by a tenant on the leased land, in fulfillment of a covenant

in the lease, a breach of which would have forfeited it, and which the tenant, under the terms of the lease, has no right to remove, that such building is not a trade fixture on which the lessee can execute a chattel mortgage to secure a creditor.

In *Schmitz v. Scheifele*, (N. J.) 1 Atl. Rep. 698, it is held that certain machinery in a brewery, such as steam-engine and boiler, a copper beer-kettle, and all the copper and iron pipes connected therewith, iron flat-cooler, malt-mill, mash-tub, pumps and apparatus, wind-mill and necessary attachments, plunger, and iron elevator, are fixtures, and, as such, pass with a mortgage on the real estate; and that all gearing and shafting, and all machinery immediately connected therewith and operated thereby, and not operated by belting, is a part of the realty.

Where a lessee fails to remove fixtures during his term, he cannot, after surrender, remove them, except by agreement with the lessor reserving such right. *Josslyn v. McCabe*, (Wis.) 1 N. W. Rep. 174.

It was held in *Ferris v. Quimby*, (Mich.) 2 N. W. Rep. 9, that where machinery, put in for the purposes of manufacturing specified articles, was treated by the successive purchasers and owners as personalty, and not a part of the realty, it was held to be personalty, and not realty, and not to pass to mortgagees.

Where the owner of a woolen-mill mortgaged such mill, and the machinery therein, describing the latter as personalty, and on foreclosure the machinery was offered first as personal property, but was not sold for want of bidders, and was afterwards sold with the mill as a part of the realty, it was held that such machinery was realty, and properly sold under the mortgage as such. *Lyle v. Palmer*, (Mich.) 3 N. W. Rep. 921.

The owner of machinery, or other things in the nature of fixtures, which may be easily severed from the realty, may treat them as such, and by the execution of a chattel mortgage on them, estop himself from asserting, as against the mortgagee, that they are part of the real estate. *Corcoran v. Webster*, (Wis.) 6 N. W. Rep. 513.

The parties concerned may, by agreement in due form, give to fixtures the legal character of realty or personalty, at their option, and the law will respect and enforce their understanding whenever the rights of third persons will not be prejudiced. Thus, a house constituting a part of the realty may be mortgaged or sold separate from the land, and the mortgage or sale be perfectly valid if made in the proper form to satisfy the statute of frauds. *Myrick v. Bill*, (Dak.) 17 N. W. Rep. 268.

It is said in *Conard v. Saginaw Min. Co.*, (Mich.) 20 N. W. Rep. 39, that, as between landlord and tenant of a mining lease, engines and boilers erected by the tenant on brick and stone foundations, and bolted down solidly to the ground, and walled in with brick arches; and dwelling-houses erected by the tenant for the miners to live in, standing on posts or dry stone walls piled together,—where such machinery and buildings were intended to be merely accessory to the mining operations under the lease, and where there was no intention in affixing them to the realty to make them accessory to the soil, and where they can be removed without material disturbance to the land, are regarded as "trade fixtures," and may be removed at or before the termination of the lease.

It has been said that the casks or hogsheads and fermenting tubs and copper coolers used in a brewery were held to be personal property and not fixtures, and not covered by a mortgage upon the land. *Wolford v. Baxter*, (Minn.) 21 N. W. Rep. 744.

The United States circuit court for the Eastern district of Louisiana say in *Weill v. Thompson*, 24 Fed. Rep. 14, that machinery attached to a plantation, and used for plantation purposes, though included in a mortgage, if purchased and removed, even during the pendency of a suit to enforce the mortgage, was withdrawn from the operation of the mortgage; and that where machinery is removed from a plantation it again becomes a movable, and as such could not be susceptible of mortgage, even if the purchaser acted in bad faith; that is, purchased with knowledge of the mortgage. See *Citizens' Bank v. Knapp*, 22 La. Ann. 117.

In *Central Branch R. Co. v. Fritz*, 20 Kan. 430, where B. had purchased a lot of A., and covenanted to erect buildings and make improvements which were to remain until the contract was fulfilled, and, in case of failure to carry out the contract, to become the property of A., B. assigned his contract to C., who erected a frame building on blocks of wood. He afterwards removed the building into the road, and then assigned the lease to D., and sold him the building, which D. removed to another piece of land. It was held that A. might maintain replevin for the house.

It is said in *State Sav. Bank v. Kercheval*, 65 Mo. 682, that, in determining whether an improvement to real estate is a fixture, the intention of the party placing it, and the manner of placing it, are not conclusive; but that much depends on its object and use; and that, as between mortgagor and mortgagee, a frame building, resting on wooden blocks laid on the ground, designed as an office in connection with a mill, but detached therefrom, and intended by the mortgagor to be removed, is a fixture, although erected after the execution of the mortgage.

As between mortgagee and mortgagor, platform scales, fastened to sills laid upon a brick wall set in the ground, for weighing stock and grain, and intended for permanent use, are part of the realty. *Arnold v. Crowder*, 81 Ill. 56.

It is said that a mortgage on a woolen-mill passes, as part of the realty, the engine by which the machinery is propelled, the shafting, pulleys, belts, carders, spinning-jacks, looms, and other machinery properly belonging to the woolen-mill, although only attached to the building by cleats or screws to keep them in place. *Ottumwa Woolen-mill Co. v. Hawley*, 44 Iowa, 57.

In *Pierce v. George*, 108 Mass. 78, the owner of a machine-shop gave a chattel mortgage on the machinery therein before it was set up, but in contemplation that it should be set up and attached to the building. He afterwards, and after it was set up, gave a mortgage on the land and building, and it was held that the second mortgagee could hold the machinery against the first mortgagee. See *Green v. Phillips*, 26 Grat. 752.

As between mortgagor and mortgagee, the machinery for the business of lead smelting, consisting of boiler, engine, pump, fan, water-tank, pulleys, air-drums, and basins, affixed to the premises in the usual way, is a fixture. *Thomas v. Davis*, 76 Mo. 72.

In *Adams v. Beadle*, 47 Iowa, 439, a mortgagor planted nursery trees on the mortgaged premises, and mortgaged them by a chattel mortgage, which was duly recorded. Afterwards the real mortgage was foreclosed, and the premises were sold, and it was held that the purchaser at such sale took title to the trees.

(70 Cal. 3)

PEOPLE v. FONG AH SING. (No. 20,074.)

(*Supreme Court of California.* May 31, 1886.)

1. CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

In cases of conflicting testimony, newly-discovered evidence, merely cumulative, will not furnish ground for a new trial.

2. JURY—CHALLENGE FOR CAUSE—EXCEPTION.

A challenge to a juror on the ground that he is not a resident of the county where the trial of a criminal case is had, is a general challenge for cause, and no exception to the action of the court in disallowing such a challenge is permitted by statute.

3. WITNESSES—EXAMINATION OF—PRACTICE.

On the examination of a witness, counsel is not authorized to insert in a question a statement as having been made by the witness which had not in fact been made by him.

4. SAME—LEADING QUESTIONS.

The allowance of a question to a witness, against the objection of the adverse party that it is leading, improper, and incompetent, cannot be assigned as error on appeal, the matter of the form of a question being in the discretion of the trial court.

5. EVIDENCE—DYING DECLARATIONS—EVIDENCE EXPLAINING.

Testimony relating to the condition of a witness when his alleged dying declaration was made, is not testimony adding to or contradicting the written statement.

6. SAME—DYING DECLARATIONS—WHAT ADMISSIBLE.

Dying declarations are restricted to the act of the killing, and to circumstances immediately attending it, and forming a part of the *res gestæ*.

7. CRIMINAL LAW—ERROR—EVIDENCE—EXCLUSION OF—ERROR WITHOUT INJURY.

The action of a court in sustaining the objection to a certain question cannot be assigned as error, if elsewhere in the course of the trial the question has been fully answered.

8. EVIDENCE—CREDIBILITY OF WITNESSES.

On a trial for murder, it is not error to refuse to admit a question put to a witness as to whether he knew of the defendant's arrest for arson, and at whose instigation such arrest was made, if no offer was made to prove that the arrest for arson was instigated or brought about by any witness for the prosecution, or any organization or society hostile to the defendant with which any witness for the prosecution was connected; as in the absence of evidence, or any offer thereof, connecting the witnesses for the prosecution with such arrest, the answer to the question could not have tended to destroy the credibility of any of them.

In bank. Appeal from superior court, city and county of San Francisco.

L. Quint, for appellant. *The Attorney General*, for the People.

MCKINSTRY, J. The defendant was found guilty of murder of the first degree, and his motion for a new trial was denied. He has appealed from the judgment and order.

The motion for a new trial was based on the ground, among others, of newly-discovered evidence. The defendant has been twice tried and convicted, and the new evidence was discovered, as is alleged, after the second trial. One of the affidavits is to the effect that the defendant was known to the affiant,

that affiant was present when the deceased was shot, and is quite certain the shot was not fired by the defendant. Another affidavit corroborates many of the principal statements of the first. A third states certain circumstances tending to support the averments contained in the others.

Kwong Ah Him, Leong Ah Ngow, and Harm Ma Look, witnesses for the prosecution, swore at the trial that they saw the defendant fire the shot which killed the deceased. Hoong Ah Karng testified to the defendant's retreat from the place where the shot was fired, and that he threw away a pistol, which the witness picked up. The deceased, in her dying declaration, identified the defendant as her slayer. At the trial, Chum Sun, a witness for the defense, testified positively that the defendant was not the person who fired the shot; that such person was dressed differently from the manner in which other evidence tended to show the defendant was dressed on the evening when the killing occurred, and was about a head shorter than defendant. Edward Durham, called by the defense, testified that the person who fired the shot was smaller and shorter than the defendant. Both he and Chum Sun swore that the person who fired the shot fled towards Pacific street, therein differing from other witnesses for defendant, and from the affidavits of the newly-discovered witnesses, which state that he went in another direction. The defendant testified that he was not present when the shot was fired.

The evidence alleged to be newly discovered was strictly cumulative. It is well settled that, in cases of conflicting testimony, newly-discovered evidence, merely cumulative, will not furnish ground for new trial. Even if a case can be supposed where, although the evidence be merely cumulative, a new trial should be granted, the circumstances here presented cannot be justly claimed to constitute an exception to the rule. We cannot say but that the court below was justified in its action with reference to the alleged newly-discovered evidence.

Appellant contends that the juror Prentis Selby was not qualified to serve as such. The challenge to the juror was on the ground that he was not a resident of the city and county of San Francisco when the trial was had. A challenge for cause is an objection to a particular juror, which is either general, that he is disqualified from serving in any case; or particular, that he is disqualified from serving on the action on trial. Pen. Code, 1071. The Penal Code provides for no exception to the action of the court in disallowing a general challenge for cause to an individual juror. Pen. Code, 1170.

We must assume that Louis Locke possessed the necessary knowledge of the English and Chinese language, and that he discharged the duties of interpreter fairly and impartially; that he was a witness for the prosecution did not of itself disqualify him.

Appellant claims that the court below erred in not permitting that portion of the following question to the witness Hong Ah Kwong which is inclosed in brackets: "Do you say you saw Fong Ah Sing run down the street, heard a shot, and you saw him throw that pistol away, [and you heard a woman was shot;] and that you heard nothing more, or knew nothing more, about the case?" The court said: "That part where 'you heard the woman was shot' is unauthorized and improper. The witness testified he did not know of it for a long time after." And the witness then said: "It was over a week after that I first learned that Choy Cum, the woman on Cum Cook alley, had been shot," etc. When the question was put to the witness, and before the remark of the judge, counsel for the prosecution said: "He did not say he heard the woman was shot, but on the trial [*sic*] he did not hear it until a long time after." We think the court was justified in holding that counsel for defendant was not authorized to insert in a question a statement as having been made by the witness which had not in fact been made by him. But even if the remark of the judge was irregular, defendant did not except to the remark, but to the disallowance of part of the question.

During the examination of the witness Louis Locke he testified that before the taking down of the dying declaration of the deceased she was asked if she thought she would live? She replied: "No, I am dying now. Don't you see I am dying?" And afterwards the witness Locke was asked: "And then she was asked; 'Do you expect to live?' and she said, what?" This question was objected to by counsel for defendant as leading, improper, and incompetent. The objection having been overruled the witness answered: "'Do you think you will live?' She said: 'No, I am dying now. Don't you see I am dying?'" Here was no error. The matter of the form of a question is in the discretion of the trial court. Moreover, the witness had made the same statement in response to a question *not* leading. Nor, as suggested, was this adding to or contradicting the written statement. The testimony related to the condition of the witness when the alleged dying declarations were made.

There was sufficient foundation in the evidence for the admission of the declaration in writing.

Counsel objected to the introduction of the written statement unless the whole of it was introduced, or unless that portion of it should be given to the jury which reads: "I don't know any reason that Fong Ah Sing had for shooting me." When the case was here on the former appeal it was held that the following portion of the dying declaration was inadmissible: "I don't know of any reason that Fong Ah Sing had for shooting me, *unless it was* that a few days before the shooting I was bathing my feet upstairs over a room in which Fong Ah Sing was sitting, and spilled a little water on the floor, and it leaked through, and fell upon Fong Ah Sing. Fong Ah Sing was very angry thereat, and told the proprietor of the house that I must apologize, and make him some present, to prevent bad luck coming upon the house. The proprietor did make some little present to Fong Ah Sing, and I supposed the matter was settled." 64 Cal. 255, 256. It would seem manifest that as the whole of the foregoing is connected, and, when taken together, is a statement that deceased did know of a fact which might have constituted a cause for the shooting, a portion of it, which, taken separate from the context, would imply that she knew of no reason for the shooting, was not admissible. Besides, dying declarations are restricted to the act of the killing, and to the circumstances immediately attending it, and forming a part of the *res gestæ*. *Id.*

During the examination of the defendant as a witness he was asked by his counsel: "What society, or what branch of the Chinese societies, were arraigned [*sic*] against your society?" The court sustained an objection to the question. The witness, however, testified that there was a feud between the Duck Kong Tong society, to which he belonged, and the Gee Gong Tong society. And in another place: "I never stay very much in Chinatown, except walk along, because I have lots of enemies against me, because I am the interpreter of the society. The Gee Gong Tong society is against ours." The question was fully answered.

The witness Morton, called by the defendant, testified that he was a resident of Vallejo, and a constable. Counsel for defendant asked of him: "Do you know of defendant being arrested and charged, there in Vallejo, with arson." To which the witness answered affirmatively. He was asked: "At whose instigation?" The prosecution objected to the last question. The court sustained the objection, and the defendant excepted to the ruling. *Prima facie* the question was irrelevant. Counsel for defendant did not offer to prove that the arrest for arson was instigated or brought about by any witness for the prosecution; or any organization or society hostile to the defendant with which any witness for the prosecution was connected. It would be difficult to say that, if this had been shown, it would have tended to establish a conspiracy to pursue the defendant upon a false charge of murder; and in the absence of evidence, or offer of evidence, connecting any witness

for the people in this action with the arrest at Vallejo, the answer to the question could not have tended to destroy the credibility of any witness herein.

Judgment and order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; ROSS, J.; MYRICK, J.; THORNTON, J.; MCKEE, J.

70 Cal. 22

Estate of TANNER, Insolvent. (No. 9,350.)

(Supreme Court of California. June 17, 1886.)

APPEAL—RECORD—INSOLVENCY PROCEEDINGS.

A paper, in the record of a case on appeal to the supreme court from an order settling the account of an assignee in insolvency, which is certified by the judge of the court below as containing "an abstract of the evidence given on the hearing of the settlement of the account of said assignee," is not authorized by law, and will not be noticed by the appellate court.

Department 2. Appeal from superior court, city and county of San Francisco.

Robt. Ash, for appellant. *A. D. Splivalo*, for respondent.

THORNTON, J. This is an appeal from an order of the superior court of the city and county of San Francisco, settling the final account of Julius Buhlert, assignee of the estate of the insolvent above named. There is in the transcript a paper certified by the judge of the court below as containing "an abstract of the evidence given on the hearing of the settlement of the account of said assignee." We know of no law authorizing this court to notice the contents of this paper. It must therefore be disregarded.

We find nothing erroneous in the record. Order affirmed.

We concur: MCKEE, J.; SHARPSTEIN, J.

70 Cal. 34

PEOPLE v. JANUARY. (No. 20,168.)

(Supreme Court of California. June 22, 1886.)

BAIL AND RECOGNIZANCE—BAIL PENDING APPEAL—APPLICATION IN SUPREME COURT.

The power to admit a prisoner to bail, pending an appeal taken by him from a judgment of conviction of felony, will not be exercised by the supreme court in the first instance, nor until after the determination upon its merits of an application for bail before the judge who tried the cause.

In bank. Appeal from superior court, county of Sacramento.

Henry Edgerton, *N. Greene Curtis*, and *J. H. McKune*, for appellant. *The Attorney General*, for the People.

MCKINSTRY, J. This is an application to this court that the defendant be admitted to bail pending an appeal. It does not appear that any like application has been made to the superior court, or the judge thereof. The power to admit a prisoner to bail, pending an appeal taken by him from a judgment of conviction of felony, ought not to be exercised by the supreme court in the first instance, nor until after the determination upon its merits of an application for bail before the judge who tried the cause. *People v. Perdue*, 48 Cal. 552.

Motion denied.

We concur: THORNTON, J.; MCKEE, J.; SHARPSTEIN, J.; MYRICK, J.

(70 Cal. 33)

PEOPLE v. BELL. (No. 20,118.)

(Supreme Court of California. June 22, 1886.)

CRIMINAL LAW—APPEAL—RECORD—NOTICE TO ADVERSE PARTY.

Notice of appeal to the supreme court must be served on the attorneys of the adverse party, and the transcript must show such service, and in the absence thereof the appeal will be dismissed.

In bank. Appeal from superior court, city and county of San Francisco. *Geo. H. Perry*, for appellant. *The Attorney General*, for the People.

BY THE COURT. The transcript herein does not show that the notice of appeal was served on any one. The law requires that it shall be served on the attorneys of the adverse party, (Penal Code, § 1240,) and the transcript on appeal must show it. *People v. Phillips*, 45 Cal. 44; *People v. Clark*, 49 Cal. 455. This not being the case, the appeal cannot be considered.

Appeal dismissed.

(69 Cal. 637)

DYER v. SCALMANINI and others. (No. 11,180.)

(Supreme Court of California. May 27, 1886.)

1. APPEAL—HARMLESS ERROR—SUIT PENDING.

A party cannot complain, on appeal, of a refusal to dismiss the action on the ground of the pendency of a prior suit between the same parties, for the same cause of action, if it appears that such first suit would have been ineffective, and had actually been dismissed, in pursuance of stipulation of the parties prior to the trial of the second suit.

2. MUNICIPAL CORPORATIONS—STREET ASSESSMENT—VALIDITY—CORRECTION OF ERROR.

A street assessment, which includes the cost of more work than that authorized, is not void so far as it includes that provided for in a valid contract, and such an error may be corrected on appeal to the board of supervisors.

3. SAME—STREET ASSESSMENT, ACTION ON—ESTOPPEL.

Where defendants, in an action for street work, obtain a dismissal thereof on the ground that it is based on a void assessment, and a second assessment is then made, and action brought thereon, the defendants are estopped from saying that the action on the second assessment should be dismissed because the first assessment was valid and binding.

4. SAME—STREET WORK—SECOND ASSESSMENT WHERE FIRST INVALID.

The time within which a superintendent of streets may make assessments for street work is not prescribed by statute, and therefore he may make a second assessment, valid in all respects, upon which an action could be maintained, if his first assessment for the cost of the work was valid in part and void in part, and such first assessment would then be entirely superseded by the last valid assessment.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Campbell & Campbell and *D. H. Whittemore*, for appellants. *J. M. Wood*, for respondent.

FOOTE, C. This action was initiated for the purpose of recovering a street tax assessment upon some lots on Greenwich street, in San Francisco. The contract, by reason of which the assessment was made, was awarded to the plaintiff, Dyer's assignor, on the fourth day of November, A. D. 1874. On the twenty-ninth day of July, 1875, that which the defendant contends was a valid assessment was made for the purpose of paying the contractor for his work. This assessment was for macadamizing part of Greenwich street, as well as sidewalks, and angular corners thereon. On that assessment suit was brought by the plaintiff on the twenty-eighth day of October, A. D. 1875, which was afterwards dismissed under a stipulation between the parties. On the twenty-third day of November, 1877, another assessment was made, which was for macadamizing said street at the same point as in the

former assessment, except that it did *not* include any assessment for sidewalks or angular crossings of said street. On the seventh day of August, 1876, the trial court ordered judgment for the plaintiff on the first alleged assessment for the sum of \$316.43, interest, costs, and attorney's fees. The conclusions of law of the judge stated, among other things, that the contract under which the assessment was made was only invalid so far as it referred to sidewalks of Greenwich street, and that the cost of the work for macadamizing said street could be separated from that for the sidewalks and angular corners thereof. The present action was brought to foreclose the lien of the assessment last made. The plaintiff obtained judgment, and from that, and an order denying a new trial, the defendants appeal, and one of the grounds upon which they base their contention for reversal thereof is that at the time the last action was begun there was another pending between the same parties, and for the same cause of action. They further complain that the court below erred in finding that the assessment sued on was valid and binding; for they aver that a former valid assessment, which included the work of the latter assessment, was proved to have been made, and that the last assessment was levied without authority of law, and was void, and as a consequence that the judgment here is not shown to be based on a sufficient cause of action.

From the record it appears that the order of the board of supervisors, by virtue of which the contract to macadamize Greenwich street was entered into, did *not* authorize the macadamizing of those parts of it set aside by the ordinance for sidewalks and angular corners thereon. But the assessment first made by the superintendent of streets, highways, and squares did include that for such sidewalks and corners, and was, of course, for a sum of money in excess of that authorized by the said board of supervisors. But the defendants contend that said superintendent having once made an assessment under the contract, and for the same work as that included in the second assessment, his power was exhausted, and that, whether the first assessment was in all respects correct or not, he could make no other.

The pendency of a prior suit between the same parties, for the same cause of action, was good ground for the abatement of the second suit at common law. And this rule is based upon the supposition that the first suit was effective, and afforded an ample remedy to the party, and hence that the second was unnecessary, and as a consequence vexatious. This being the reason for the rule, it would seem that when the former ceased the latter should also. In this state pleas in abatement are not favored, and in a case somewhat similar to the one in hand, with reference to the matter of the identity of the causes of action in both suits, such a plea was not sustained. *Thompson v. Lyon*, 14 Cal. 39-43.

It further appears from the record here that the first suit which is pleaded as pending, was, in fact, dismissed on the eighteenth day of April, A. D. 1883, in pursuance of a stipulation made between the parties thereto on the twenty-fifth day of September, 1880; that the judgment thereon should abide that of the supreme court of California in the case of *Dyer v. Ryan*, (No. 3,947,) 11 Pac. C. Law J. 253, which was rendered on the date of the dismissal above mentioned. This having been done, and the trial of the action under consideration having (according to the statement on motion for new trial) come on before the court below, sitting without a jury, on the twenty-ninth day of May, 1883, it would seem that, as the action first brought was dismissed before the second was tried, the reason for filing a plea in abatement, on the ground that it was vexatious, oppressive, and unnecessary, no longer existed, and the court below was right in finding that no action between the same parties, for the same cause of action, was pending, for which the last suit should be abated. *Hixon v. Schooley*, 26 N. J. Law, 461, 462.

The record of the action pleaded as pending shows that the defendants here

were all sued therein, and that they set up in their answer as a bar to any recovery against them the invalidity of the first assessment, by reason of the fact that the superintendent of streets, squares, etc., had included therein the cost for work which the board of supervisors had never authorized. If it were true, as a matter of law, that such first assessment was void, then the superintendent aforesaid could have made another assessment for the work actually authorized, and if in doing so he complied with the statute, as was the case in the assessment in controversy here, that would have been valid, since the law under which he made it does not prescribe the time within which it must be done after the work was performed. St. 1871-72, p. 813, § 9; *Himmelmänn v. Cofran*, 36 Cal. 411.

It has been held, however, by this court, that a street assessment which includes the cost of more work than that authorized is not void so far as it includes that provided for in a valid contract, and that such an error may be corrected on appeal to the board of supervisors. *Himmelmänn v. Hoadley*, 44 Cal. 276-279. And while, therefore, it may be that the plaintiff, in this case, could have maintained his action had he obtained (on appeal to the board of supervisors) the correction thereof, and had then made a demand upon the owners of the property assessed for its payment in accordance with the statute, and the corrected assessment, and the valid part of the cost of the improvement or work, could have been separated from that which was invalid, (*Beaudry v. Valdez*, 32 Cal. 276; *Himmelmänn v. Hoadley*, *supra*; *Dyer v. Chase*, 52 Cal. 440; *Dyer v. Ryan*, 11 Pac. C. Law J. 253, upholding *Dyer v. Chase*.) yet in this case the question arises, are not the defendants now estopped from denying the invalidity of the first assessment?

An action was brought upon the original assessment, which included work not authorized in the notice, or by the order of the board of supervisors. In that action the defendants, by their answer, averred the invalidity of such assessment, and by their opposition thereto procured the dismissal of the action. The street superintendent, upon the alleged invalidity of the first assessment, made a second assessment, covering the work ordered by the board of supervisors, and upon such second assessment this action is brought. Defendants now seek to uphold the first assessment as valid, and, as a sequence, contend that the street superintendent had no authority to make the second assessment. This they cannot be permitted to do. Having obtained a dismissal of the first action upon their contention that it was based upon a void assessment, and having thus obtained all the advantages which could flow from such a condition, they are now estopped from saying that such first assessment was valid and binding. "Suppose one, by words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Pickard v. Sears*, 6 Adol. & E. 469; *Dezell v. Odell*, 3 Hill. 219; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Davis v. Davis*, 26 Cal. 26-41.

It is true than an estoppel *in pais*, in accordance with the rules of equity practice, should be pleaded as a defense. *Davis v. Davis*, *supra*. But in this case the complaint was based upon the second assessment. The defendants set up the first assessment as a bar to the plaintiff's right of recovery. It was then the latter's right to show by evidence, which was introduced without objection, that the defendants' right to maintain and prove the truth of such plea was estopped by their previous course of action. *Flandereau v. Downey*, 23 Cal. 354. And in view of the fact that the time within which the superintendent of streets may make such assessments is not prescribed by statute, we see no sufficient reason why he should be prohibited from making a second assessment, valid in all respects, upon which an action could be maintained. If his first assessment for the cost of the work was

valid in part and void in part, it would be entirely superseded by the last valid assessment. In no event, under proper pleadings, could the plaintiff have been permitted to recover but once upon the same cause of action; and, as we have seen in the present instance, no harm could arise to the defendants, since the suit upon the first assessment, which they pleaded as invalid, has been dismissed under stipulation. It is therefore evident that the trial court, for all the purposes of this action, found properly, and that the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 562

CASTRO v. TEWKSBURY and others. (No. 8,285.)*(Supreme Court of California. May 24, 1886.)***1. FORCIBLE ENTRY AND DETAINER—ESSENTIALS TO MAINTENANCE OF.**

In California, in order to maintain an action of forcible entry, the plaintiff must show (1) that he was in the actual and peaceable possession of the property entered upon; (2) that the defendant, by some kind of violence or circumstance of terror, entered into or upon the property, and so turned the plaintiff out, and took and held possession of it himself; or (3) that after making a peaceable entry the defendant, by force, threats, or menacing conduct, turned the plaintiff out, and took the possession.

2. SAME—SUFFICIENCY OF POSSESSION TO MAINTAIN.

Possession sufficient to maintain action of forcible entry must be actual, and of sufficiently long standing to become, to a legal intent, peaceable; that is, it must be actual, peaceable, and exclusive; and a mere scrambling or interrupted possession, or the exercise of casual acts of ownership over the premises, is not sufficient.

3. SAME—DOES NOT LIE FOR MERE TRESPASS.

The action of forcible entry does not lie for a mere trespass.

Commissioners' decision.

In bank. Appeal from superior court, county of Contra Costa.

Wm. Leviston and W. S. Brooks, for appellant. *W. S. Tinning, J. C. Martin*, and *J. M. Rosborough*, for respondents.

BELCHER, C. C. This is an action of forcible entry. The premises involved are situated in Contra Costa county, and consist of a hundred acres of land with a dwelling-house thereon. The plaintiff recovered a verdict for restitution of possession, and damages in the sum of \$700, which were trebled in the judgment. The defendants moved for a new trial, which was denied, and then appealed from the judgment and order.

Two questions only need be considered:

1. The alleged entry, whatever may have been its character, was made on the ninth day of June, 1880, and was into the dwelling-house, and not upon any other part of the premises. Did the plaintiff, at the time of the entry, have such possession of the house as was necessary to enable him to maintain an action of this character? In this state, in order to maintain an action of forcible entry, the plaintiff must show (1) that he was in the actual and peaceable possession of the property entered upon; (2) that the defendant, by some kind of violence or circumstance of terror, entered into or upon the property, and so turned the plaintiff out, and took and held possession of it himself; or (3) that, after making a peaceable entry, the defendant, by force, threats, or menacing conduct, turned the plaintiff out, and took the possession. Sections 1159, 1172, Code Civil Proc.

Speaking of what was a sufficient possession to maintain the action, this court said in *Hoag v. Pierce*, 28 Cal. 188: "If the possession of the plaintiff was not actual, and of sufficiently long standing to become, to a legal intent, peaceable, then he was not in a condition to maintain his action." In *Treat v. Stuart*, 5 Cal. 113, the court said: "The plaintiff, in an action of forcible entry and unlawful detainer, must show an actual, peaceable possession in himself at the time of the entry;" and in *House v. Keiser*, 8 Cal. 500, which was an action brought under the act concerning forcible entries and unlawful detainers, the court said that "a party who desires to avail himself of the summary remedy provided by this act must bring himself clearly within its provisions. He must show a possession, actual, peaceable, and exclusive; a mere scrambling or interrupted possession, or the exercise of casual acts of ownership over the premises, is not sufficient." And in that case it was held that one who in the morning entered upon a portion of a tract of land in the possession of another, and inclosed it with a fence, and put a house on it before sundown, did not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor, who, at sundown of the same day, destroyed the house and fence, and drove him away. So in *Voll v. Butler*, 49 Cal. 74, it was held that an action of forcible entry and detainer cannot be maintained upon a scrambling possession. As between two parties struggling for possession, neither can maintain an action of forcible entry and detainer against the other until he has acquired an actual possession which has ripened into a peaceable occupation.

Here it clearly appears from the record that the defendant Emily S. Tewksbury claimed, and had claimed for several years, that the whole property was the property of the estate of her deceased husband, of which she was the executrix; that one Alberto, with his family, had occupied the dwelling-house, with about an acre of land surrounding it, by permission of Mrs Tewksbury, since 1877, and that a few days before the ninth of June he notified her that he was going to leave because Castro was troubling him, and that he wished her to send some one to take possession; that she requested him to remain till the 9th, when she would send some one, and he did so; that between 7 and 8 o'clock on the morning of the 9th the plaintiff went to the house,

and asked Alberto if he was going to move, and, being answered in the affirmative, said the house was his, and he was going to put his things there. According to the plaintiff's testimony, Alberto then told him, "he knew I was the owner of the place, and to take it, as he was going for a wagon. No one was present then except Moitozo." Moitozo contradicted the plaintiff. He certified that when the plaintiff said the house was his, "Alberto replied that, if it was, he didn't know it; that he got possession through Mrs. Tewksbury, and was going to give possession to her. He did not say that Castro could have the house, or anything to that effect." And this statement was confirmed by both Alberto and his wife.

The plaintiff then went away, but shortly after returned, bringing some articles of furniture, and followed by his wife and six daughters. They all went into the house, and remained in or about it, but did not interfere with Mrs. Alberto, who was engaged in her household work, nor with Alberto, who was there most of the time, getting his things ready to remove. At about 11 o'clock in the forenoon the defendants Cashman and Rollins arrived at the house, being sent there by Mrs. Tewksbury to take possession for her. They found Castro outside, and Alberto, his wife and children, and some of the Castro family inside. Alberto then formally turned over possession of the house to them for Mrs. Tewksbury, and began to move out his furniture. From that time until 8 o'clock in the evening of the same day Castro and his family and the men remained at the house. There was some wrangling, and, according to the plaintiff's testimony, some demonstrations of violence towards him; but this was denied by the defendants. At 8 o'clock in the evening a constable appeared at the house, and told Castro that he had a warrant, issued by a justice of the peace at San Pablo, for the arrest of him, and all his family. "Then I went in," the plaintiff says, "and told my family that we were arrested, and to go out. The constable said there was a wagon, but I said we would rather go on foot, and he said all right." They then went to the office of the justice of the peace, the constable not accompanying them, and when arrived there were permitted to go away on their own recognizance. They then returned to their own house, and found the articles which had been carried to the Alberto house lying in front of it. The complaint on which the warrant was issued was for a forcible entry, and was written by the attorney of Mrs. Tewksbury, but without her knowledge, and it did not appear who signed or swore to it. Castro never returned to the Alberto house, and he had no possession of it except as briefly above stated.

In our opinion, the testimony fell far short of showing such actual and peaceable possession of the house in the plaintiff as was necessary to enable him to maintain an action of forcible entry.

2. Was the plaintiff entitled to maintain an action for a forcible entry upon the hundred acres of land, and to recover as damages the value of the wheat and barley crops standing thereon? As to this land the record shows that it was the northern half of a tract of 200 acres, which was inclosed as one field many years before by the husband of Mrs. Tewksbury, and was claimed by him during his life, and afterwards by her as the property of his estate. Mrs. Tewksbury leased the whole tract to one Peter Davis, and he occupied and cultivated it in 1879. He lived on the southern half, and cultivated that in 1880. He plowed a part of the northern half in December, 1879, but afterwards Castro entered, and replowed where Davis had plowed, and also plowed the balance of the hundred acres, and then sowed it with wheat and barley. Prior to June 9th, Castro had cut for hay 10 to 15 acres of the crop planted by him, and the hay was then lying on the ground. Afterwards he entered without interference, and raked the hay, and moved it away. On the twelfth of June two actions were commenced in the superior court against Peter Davis, one by the defendant Emily S. Tewksbury, and the other by one L. M. Tewksbury. In both actions attachments were issued,

and on the same day levied by the sheriff upon the crop grown upon the hundred acres occupied by Davis. On the sixteenth of the month, by the direction of the attorney for the plaintiffs, the sheriff levied the attachment upon the crop still standing upon the land in controversy. He then placed the defendant Martin in charge of the crop as keeper, and employed the defendant Green to cut and harvest it. By direction of the sheriff, Green cut and baled the crop for hay, and the sheriff, under an order of court, sold it at public auction, and paid the proceeds into court. When the crop was removed, the sheriff and his employes left the land, and had nothing more to do with it. When Green first commenced to cut the crop Mrs. Castro and some of her daughters went out, and objected to his cutting it, saying it was their crop.

The above is the substance of all the testimony tending to show an entry, either forcible or otherwise, by any of the defendants upon the land. Does it show a forcible entry? We think not. At most, it was a mere trespass, for which the plaintiff might have had an action against every one who instigated or authorized the wrong, as well as against those who actually participated in its commission. But for a mere trespass the action of forcible entry does not lie. This is settled law in this state. In *Frazier v. Hanlon*, 5 Cal. 156, the court said: "Facts which might constitute a mere trespass upon property have never been held to sustain the action of forcible entry, or forcible and unlawful detainer. The offense being *quasi* criminal in its character, and force or menaces being necessary to constitute it, something more must be shown than a mere wrongful entry upon, or wrongful detention of, property, to sustain an action under the statute regulating forcible entries and unlawful detainers." The court refers to *Willard v. Warren*, 17 Wend. 257, in which Judge COWEN, after reviewing the authorities, says: "The result seems to be that there must be something of personal violence, or a tendency to or threat of personal violence, unless the entry or detainer be riotous. In all cases there must be something beyond a mere trespass upon the property." * * * A mere naked trespass to land or outhouses never yet was helden sufficient." In *Merrill v. Forbes*, 23 Cal. 380, the defendant, Forbes, entered upon land in the possession of plaintiff for the purpose of cutting and carrying away a crop of hay on it, and he cut and carried it away, and then left. When he went on the premises with his workmen and mowing-machine to cut the grass, the plaintiff was not at home, but his employe went and told them they must not cut the hay, and as soon as the plaintiff returned he went and forbade them, but Forbes replied that he was going to cut it. The court held this to be only a trespass, and not a forcible entry or detainer, and said: "The rules of law respecting the acts necessary to sustain an action for a forcible entry, or a forcible and unlawful detainer, require something more than a mere trespass upon the property. The entry of the defendants was evidently not for the purpose of taking possession of the land, but merely to cut and take away the grass growing thereon, and when this was completed the defendants quit the premises entirely. Indeed they do not appear to have resided on the land even while they were at work. There is no conflict of evidence upon these points, and it is clear that the facts are entirely insufficient to maintain this kind of action." See, also, *Polack v. McGrath*, 25 Cal. 55; *Janson v. Brooks*, 29 Cal. 214; *Hodgkins v. Jordan*, Id. 577.

In our opinion, the evidence did not justify the verdict, and the court erred in refusing to grant the defendants' motion for a new trial.

It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed; and cause remanded for a new trial.

69 Cal. 586

ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO, (a Sole Corporation,)
v. SHIPMAN and others. (No. 9,047.)

(Supreme Court of California. May 25, 1886.)

EQUITY—JUDGMENT—EXECUTION SALE—BILIS QUIA TIMET.

One who is not a party or privy to a judgment is not affected by it, and, as to him, the judgment, and all proceedings under it, are void; and therefore neither the judgment, nor an execution sale of land affected by it, can change his rights in the land, or create a cloud upon his title, nor would a deed resulting from such a sale be valid, or work any mischief. Fears of such an injury would be, therefore, unreal; and a court of equity never interferes to enjoin a sale of land upon an idle or groundless suspicion, an unreal fear, or the mere possibility of its casting a cloud over the title of one in actual possession of the land under an unchallenged title.

Department 2. Appeal from superior court, city and county of San Francisco.

J. C. Bates, for appellant. *Wilson & Wilson* and *M. C. Hassett*, for respondents.

MCKEE, J. On the twenty-first of November, 1879, Alice Dorland recovered a judgment in the district court of the Twenty-third judicial district, for the city and county of San Francisco, against J. S. Alemany and the Hibernia Savings & Loan Society, for foreclosure of a lien upon a certain tract of land, to secure satisfaction of the sum of \$5,902, and costs of suit. The present constitution abolished the district courts, and created superior courts to succeed them. As the successor of the district court of the city and county of San Francisco, the superior court of said city and county, on the eighth of August, 1882, issued, upon the judgment recorded in the district court, an order of sale, commanding the sheriff of the city and county to sell the tract of land charged with said lien for satisfaction of the money ascertained to be due. In obedience to the order the sheriff advertised the land to be sold on the thirtieth of October, 1882, in accordance with the terms of the judgment and order of sale; but before the day of sale the plaintiff herein commenced the action in hand against the judgment creditor, and a claimant under her of some interest in the judgment, and the sheriff, to restrain them from selling the land under the order of sale, upon the ground that the plaintiff, a corporation sole, created and working under the laws of the state, known by the name and style of "The Roman Catholic Archbishop of San Francisco," was the owner in fee of the land, and was not a party to the judgment.

Upon filing the complaint in the action a different judge of the court issued an interlocutory injunction restraining the sale, and another judge of the same court made the injunction perpetual; so that the judgment creditor has been forever enjoined from enforcing her judgment because the plaintiff herein was not a party to it; yet it is an undeniable fact that J. S. Alemany was a party to the judgment, and, admittedly, he was, at the time of the judgment, and long prior thereto, the Roman Catholic archbishop of San Francisco. But it is urged that he was a party to the judgment *only* in his individual, and not in his corporate, capacity. Nevertheless it was alleged in the original complaint that J. S. Alemany and the Hibernia Savings & Loan Society were owners of the land, and that the land was charged with a lien in favor of the plaintiff, and so the court found and adjudged. Now, the original cause of action was merged in that judgment,—*transit in rem judicatam*; and the law declared the judgment conclusive as to the parties to it, and their successors in interest, by title subsequent to the commencement of the action. Section 1908, Code Civil Proc. As to the matters determined by the judgment, the litigation between the parties and their successors in interest, therefore, ended, and the judgment was conclusive and binding upon whatever interests in the land the judgment debtors possessed at the creation of the lien adjudged in favor of the plaintiff. The interest to which the lien

attached may not have constituted a valid title,—it may not, in fact, have been of any value; but, whatever it was, the party in whose favor the right to it was adjudged, was entitled, as matter of right, to have her judgment against it enforced by legal process. Neither the parties to a judgment, nor their successors in interest, have any right, in law or equity, to hinder the enforcement of a valid, unsatisfied judgment against them, except for causes which would warrant the court in which it was given to set it aside or enjoin its execution. But, before the preventive remedy of injunction can be invoked for that purpose, there must be some special circumstances attending the enforcement of the judgment which will make out a case remediless at law, and which comes under some recognized head of equity jurisdiction. In favor of parties to a judgment, equity may interfere to stop the execution of a judgment, where it has been obtained by imposition upon the court, or by fraud practiced upon the parties, (*California Beet Sugar Co. v. Porter*, 9 Pac. Rep. 313,) and it will interfere in favor of one who was not a party to the judgment, where it is made to appear that its enforcement would work irreparable injury to land of which he is owner and in possession, or deprive him of its use and enjoyment, or create a legal cloud upon his title.

It is not claimed that the judgment which has been perpetually enjoined was obtained by any imposition upon the court, or any fraud practiced upon the parties, or that its enforcement would work irreparable injury to the land of the plaintiff, or interfere with the plaintiff's enjoyment and use of the same. Indeed, the validity of the judgment, and of the process issued upon it, as to the parties to it, are not questioned. The allegations of the complaint are that the corporation plaintiff "has been, and still is, the owner, seized in fee, and in the actual possession and occupation, of the land" affected by the judgment; "that the judgment itself is a cloud upon the title of the corporation plaintiff, and, if a sale be allowed to be made, it will still more cloud the title;" therefore, as it was not a party to the judgment, the plaintiff asks that the judgment creditor be perpetually enjoined from enforcing the judgment by a sale of the land under the order of sale. The cause of action is therefore in the nature of an action *quia timet*. Bills *quia timet* are in the nature of writs known at the common law as *brevia anticipantia*, or writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischief, and not merely to redress them when done. The party asks the aid of the court because he fears some future probable injury to his rights or interests, and not because an injury has already occurred which requires compensation or other relief. Story, Eq. Jur. 826; Will. Eq. Jur. 393. That is the character of the complaint in this action. The corporation plaintiff, although it admits that it is in possession of the property in controversy under the true title to it, is afraid that a sale of the land under the judgment, to which it claims to be a stranger, will cloud its title.

The question whether the plaintiff was a party or privy to the judgment, and therefore bound by it, is one which, in the view that we take of the action, does not necessarily arise, and we express no opinion upon it. But assuming it to be true, as the plaintiff alleges in its complaint, that it was not a party, and not bound by the judgment, then it is of no concern to the plaintiff. One who is not a party or privy to a judgment is not affected by it. As to him the judgment, and all proceedings under it, are void. Neither the judgment, nor an execution sale of land affected by it, can change his rights in the lands, or create a cloud upon his title. A deed resulting from such a sale would be void as to him, and a void deed cannot work mischief, (*Fonda v. Sage*, 48 N. Y. 173,) nor afford reasonable ground for apprehending injury to rights or interests in the real property which it purports to convey. Fears of such an injury would be, therefore, unreal; and a court of equity never interferes to enjoin a sale of land upon an idle or groundless

suspicion, an unreal fear, or the mere possibility of its casting a cloud over the title of one in actual possession of the land under an unchallenged title. *Hartman v. Reed*, 50 Cal. 485; *Schroeder v. Gurney*, 73 N. Y. 430; *Sanders v. Village of Yonkers*, 63 N. Y. 489; *Pettit v. Shepherd*, 5 Paige, 493.

And as a deed, in consummation of a sale under an execution issued upon a judgment void as to him, although valid as between the parties to it, would also be void as to him, it could not be used as a basis for the issuance of a writ of *habere facias possessionem* to dispossess him of the property; nor as evidence of title upon which to maintain ejectment upon it against the owner in possession. Therefore, as neither the judgment nor proceedings under it would affect his title, nor disturb his enjoyment of the land of which he is in possession, there would be nothing in the proceedings to disturb his rights, or which would develop into a cloud over his title. To constitute a cloud upon title such as warrants the interference of a court of equity, it is necessary to show, by proof of extrinsic facts, the invalidity of proceedings apparently valid on their face. *Scribner v. Allen*, 12 Minn. 148, (Gil. 85.) Thus, if in an action of ejectment founded upon a judgment, execution sale, and sheriff's deed, it would devolve upon the owner in possession of the land sought to be recovered to prove the invalidity of the proceedings resulting in the deed, or to show a superior title in himself from the same source of title, the proceedings would be held to cast a cloud upon the title. But it is only where such proof is necessary that a cloud should exist. Where such proof is unnecessary no shade would be cast by the proceedings. (*Pixley v. Huggins*, 15 Cal. 128; *Hickman v. O'Neal*, 10 Cal. 293; *Cohen v. Sharp*, 44 Cal. 29;) and a court of equity will not interfere to enjoin them, (*City and County of San Francisco v. Beideman*, 17 Cal. 444; *Hollister v. Sherman*, 63 Cal. 38; *Taylor v. Underhill*, 40 Cal. 471; *Schuyler v. Broughton*, 3 Pac. Rep. 870.)

Shattuck v. Carson, 2 Cal. 588; *Guy v. Hermance*, 5 Cal. 74; *Hickman v. O'Neal*, 10 Cal. 293; *Alverson v. Jones*, Id. 10; *Pixley v. Huggins*, 15 Cal. 128; *Hager v. Shindler*, 29 Cal. 55; *Ramsdell v. Fuller*, 28 Cal. 38, —are not in conflict with these views. Those cases constitute a class of cases in each of which equity interposed to enjoin a sale of land under an execution issued upon a money judgment recovered against the person from whom the plaintiff in the action derived title to the land before the recovery of the judgment, and the relief was granted upon the ground that the sale, if consummated, would result in a deed, which would create a legal cloud upon the plaintiff's title; because, in an action of ejectment against him founded upon such a deed, it would be necessary for him to prove that he had acquired the title of the judgment debtor before the recovery of the judgment. The case in hand does not belong to that class of cases. From the statement in the complaint the plaintiff is in the actual possession of the land under what it claims to be an unchallenged title, which, so far as appears from anything in the complaint, is not derived from any of the parties to the judgment, nor from the same source of title from which a purchaser at the sale which is asked to be enjoined would claim if he asserted any claim of title to the land. That being the case as presented in the complaint, if an action of ejectment should be commenced by such a purchaser against the plaintiff in possession, founded upon a deed resulting from a sale under the judgment, it would be necessary for the purchaser, as plaintiff in the action, in order to recover, to prove the judgment and execution under which the sale took place, (*Sullivan v. Davis*, 4 Cal. 292; *Quirk v. Falk*, 47 Cal. 453;) but such proof would not avail against one who was not a party to the judgment, and the action would fall of its own weight, without any proof in rebuttal, for on the face of the proceedings they would be void as to a stranger; and the owner in possession could not be disturbed in his possession by them, nor would they create a legal cloud upon his title, (*Pixley v. Huggins*, *supra*; *Fulton v.*

Hanlow, 20 Cal. 484, 485; *Curtis v. Sutter*, 15 Cal. 264; *Cohen v. Sharp*, 44 Cal. 80; *Marriner v. Smith*, 27 Cal. 650.)

Besides, if, as the result of the sale sought to be enjoined, any attempt should be made under the proceedings to dispossess the plaintiff, the law affords ample and complete remedies for prevention or redress in the court that issued the process for the enforcement of the decree, by refusing a writ of *habere facias possessionem*, or superseding it if it should be issued, (*Tevis v. Ellis*, 25 Cal. 515; *Long v. Neville*, 36 Cal. 455;) or by an original action in that or any other court of equity to enjoin its execution for matters subsequent to judgment, (*Goodnough v. Sheppard*, 28 Ill. 81;) or to have determined any adverse claim to the land predicated upon the sheriff's deed, (section 738, Code Civil Proc.;) and where adequate and complete remedies exist at law or equity for any injuries which may happen in the future, a bill *quia timet* cannot be resorted to, (*White v. Pratt*, 13 Cal. 521; *Ketchum v. Crippen*, 37 Cal. 223; *Curtis v. Sutter*, 15 Cal. 265.)

The complaint fails to state a case cognizable in equity.

Judgment and order reversed, and cause remanded, with directions to the court below to sustain the demurrer.

We concur: THORNTON, J.; SHARPSTEIN, J.

69 Cal. 593

KALIS and others v. SHATTUCK and others. (No. 8,607.)

(Supreme Court of California. May 25, 1886.)

1. NEGLIGENCE—LANDLORD AND TENANT—LIABILITY FOR NUISANCE.

A landlord is not liable for the consequences of a nuisance in connection with his building, which is in the possession and control of his tenants, unless the nuisance occasioning the injury existed at the time the premises were demised, or the building was defectively constructed, or was in such a condition, at the time of the demise of the building, that it constituted a nuisance, or would be likely to become such in the ordinary uses for the purposes for which it was constructed.

2. SAME—FALL OF AWNING, LIABILITY FOR—LANDLORD AND TENANT.

A landlord is not liable for an injury caused to a by-stander by the fall of an awning belonging to his building, which is in the possession of tenants, if the fall of the awning was attributable to an improper and negligent use of the awning by the tenant in permitting crowds of people to go upon it, when the only purpose of the awning was as a protection from sun and rain, and when, but for such crowd upon it, it would not have fallen.

In bank. Appeal from superior court, county of Alameda.

J. C. Martin, *A. A. Moore*, and *Sidney V. Smith & Son*, for appellants. *J. B. Lamar*, for respondent.

McKEE, J. Pauline Kalis, the wife of her co-plaintiff, while passing along the sidewalk in front of a building on the west side of Broadway, in the city of Oakland, received personal injuries from the fall of a wooden awning, which extended, with a slanting direction, from the second story of the building for about 20 feet over the sidewalk; and, to recover damages for the injuries sustained, she brought the action in hand against "F. K. Shattuck, Maria Hillegas, administratrix of the estate of Wm. Hillegas, deceased," and seven other defendants, "for knowingly, negligently, and carelessly suffering the awning to remain rotten and insufficiently supported," in consequence of which, and of the "negligence and carelessness of the defendants in maintaining and using it in that defective condition," it fell upon the plaintiff while lawfully passing on the sidewalk, and inflicted upon her painful and permanent injuries. On the trial of the case nonsuits were granted in favor of all the defendants except Shattuck and Maria Hillegas. Against them a verdict and judgment for \$3,000 were rendered, and from the judgment and an order denying their motion for a new trial they have appealed.

The statement of the case upon which the motion was heard and decided, shows that the awning was constructed "about twelve years ago," by F. K. Shattuck and William Hillegas, who were owners of the building. Hillegas, being a tenant in common of the building, died in 1876. As constructed, the awning consisted of a piece of two by twelve inch timber, bolted to the brick wall of the building with bolts which were bedded in the wall. From this, timber-rafters, two inches by twelve inches, extended every twelve feet from the wall over the sidewalk, and were supported by turned posts, in front of which, and to receive the ends of the rafters, a piece of timber, three inches by twelve inches, was halved on the upper part of the posts, and spiked to them and to the rafters. Between the rafters there was laid a two by six inch cross-rafter, which supported the awning covering, made from one by six inch tongued and grooved boards. The awning had a pitch of twelve inches. There was no railing in connection with it; no doors or steps leading to it. The sole purpose of its construction was as a cover for the sidewalk from sunshine and rain.

The awning fell and injured the plaintiff on the ninth of September, 1880. As to the condition of the posts that supported it on that day there was a conflict in the evidence; but the evidence given on the part of both plaintiff and defendants tended to show that the awning fell, not from any inherent defect in its original construction, or from an unsound condition which rendered it unfit for the ordinary use for which it was constructed, but from an unreasonable and improper use of it for a purpose for which it was not constructed; for the uncontroverted facts are that a great number of people were crowded upon it to witness the march of a public procession through Broadway, and they got onto the awning through a hall in the second story of the building to which it was attached. The hall was then occupied and controlled by a political club to whom it had been rented, and the janitor of the club permitted the public to go through the hall, and out of the windows, onto the awning, taking with them the chairs and benches of the hall. The lower story of the building was also at the time rented to different tenants in possession.

The exact time *when* the premises were demised to the tenants in possession does not appear. The only evidence upon the question is the following by the defendant Shattuck: "Previous to the ninth of September, 1880, I leased the hall to the Republican Central Club of Oakland. From July to November, 1880, I had no control over the hall in any way whatever." Nor is it made to appear by any evidence what was the condition of the awning at the time the building, or any part of it, was let to the tenants. The sole ground upon which the verdict and judgment seems to be founded is that the relation of landlord and tenant existed between the appellants and the occupants of the building, and that it was the duty of the landlords to prevent the fall of the awning, although the building was in possession of their tenants at the time. Therefore it is contended that they, as owners and landlords, are liable to the plaintiff for the consequences resulting to her from the fall of the awning.

But there is no proof that Maria Hillegas had any connection with the construction of the awning, or leased any part of the building, or claimed that those in possession were her tenants, or received any rent from any of them. In the complaint she is described as the administratrix of the estate of William Hillegas, deceased, who, in his life-time, was co-owner with the defendant Shattuck of the building. But as she had no connection with the construction of the awning, had not demised any part of the building, never claimed that the persons occupying it were her tenants, or received any rents from them, she cannot be said to have made herself, as administratrix or otherwise, in any way responsible for the continuance of the awning, even if it was a nuisance, or for the consequences to the plaintiff from its breaking

down. As to her the verdict and judgment are therefore unsustained by the evidence. *Oakham v. Holbrook*, 11 Cush. 303.

As to the defendant Shattuck the only question is whether, as owner and landlord of the building, he is liable for the consequences to the plaintiff of a nuisance in connection with the building, in the possession and control of his tenants. It is well settled that a landlord is not liable for such consequences unless (1) the nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it, (*Jessen v. Schweigert*, 4 Pac. Rep. 1188; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; *Hussey v. Ryan*, 2 Atl. Rep. 728; Wood, Nuis. §§ 295, 676; Wood, Landl. & Ten. 918;) or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury.

The rule of law on the subject is thus stated by the English courts: "To bring liability home to the owner of real property," says CROMPTON, J., in *Gandy v. Jubber*, 5 B. & S. 73, 485, "the nuisance must be one which is, in its very essence and nature, a nuisance at the time of the letting, and not something which is capable of being thereafter rendered a nuisance by the tenant." "The nuisance," says BLACKBURN, J., in the same case, "must be, if I may so term it, a normal one." To the same effect will be found the law in cases in the courts of the United States.

In *Owings v. Jones*, 9 Md. 108, the defendant, a landlord, was held liable to the plaintiff for the consequences of an unlawful act, in the original construction of the sidewalk in front of the building, committed by him before he demised the building. The unlawful act was the making of a hole in the sidewalk, which he covered with a sufficient grating, but without obtaining the requisite license from the city authorities. The plaintiff fell through the hole, and was injured, and the court held that, although the premises were at the time of the accident in the possession of the defendant's tenant, the defendant was liable for the consequences of his unlawful act; and while it is true, says the court, if property not then a nuisance is demised, but becomes so only by the act of the tenant, the landlord is not liable, yet where the owner leases premises which are a nuisance, or must in the nature of things become so from their user, and receives rent, he is liable.

On like ground, in *Bellores v. Sackett*, 15 Barb. 96, a landlord was held liable for injury from the drip from a roof built of defective materials, where the injury arose from the ordinary user of the premises. And in *Godley v. Hagerty*, 20 Pa. St. 387, and *Carson v. Godley*, 26 Pa. St. 111, a landlord was held liable for injuries from the fall of buildings defectively constructed for storage, for which purpose they had been let to tenants in possession. The liability of the owner was made to turn upon the question: "Did the landlord permit the buildings to pass from his possession deficient in some particular essential to their future safety when reasonably used in the business and for the purposes for which they were constructed?" It was admitted that if a building, constructed with ordinary care, falls from the tenant's misuse, or if the tenant had ordered the construction, inspected and accepted it, then he alone would be liable for injuries from its fall. "But," says the court, "if the catastrophe results from occult defect, * * * as if the materials be inferior, etc., the landlord, and not the tenant, would be liable. * * * The wrong consisted * * * in building and renting a store for a specific purpose for which it was unfit."

So, in *Swords v. Edgar*, 59 N. Y. 28, a lessor was held liable for injuries to a third person, caused by the fall of a wharf which was unsafe and defective at the time he leased it, although it was in the possession of the tenant at the time of the accident.

But it is maintained that, whatever may have been the time of the demise to the tenants in possession, the awning was a nuisance *per se*, because it was constructed over the sidewalk without license or leave of the corporate authorities, and without the sanction of the legislature. Dill. Mun. Corp. § 521; Wood, Nuis. § 502. That, however, is the assumption of a fact which nowhere appears in the case. No such issue was raised by the pleadings, or proved at the trial. The complaint contains no allegation which expresses, or from which it could be implied, that the awning was constructed without license or authority. On the contrary, seemingly assuming that it had been lawfully constructed, liability for the injuries occasioned by its fall was sought to be enforced against the defendants on the sole ground of negligence on their part in suffering it to be in such an unsound and unsafe condition that it fell and injured the plaintiff. To the maintenance of that allegation, as the ground of her cause of action, all the evidence given for the plaintiff was directed. We must therefore presume that those who constructed the awning acted under authority of law. Yet, even upon that assumption, the law would impose upon them the obligation to keep in repair what they were authorized to erect and maintain; and if they, by neglect, unskillfully constructed it, or negligently maintained it, so that it was, or became, a nuisance, they would be answerable *civilliter* in damages to a person injured by their neglect to perform their obligation to properly erect and sufficiently maintain it. It was upon that principle that the plaintiff's cause of action was founded and tried.

But there was no such cause of action made out against the appellants; for there was no evidence that the awning was defectively constructed, or that it was in such a condition, at the time of the demise of the building, that it constituted a nuisance, or would be likely to become such in the ordinary uses for the purposes for which the awning was constructed. On the contrary, it was shown by evidence, in which there was no substantial conflict, that the fall of the awning was attributable to an improper and negligent use of the awning by the tenant. It did not fall in consequence of the negligence of the owner to keep in repair, as in the cases of *Jessen v. Swetgert*, 4 Pac. Rep. 1188, and *Burke v. Schwerdt*, 6 Pac. Rep. 381. It would not have fallen if it had not been for the people that crowded upon it by the permission of the tenant. It broke down because subjected to a weight too heavy for it to bear. Permitting it to be used in that way was the wrongful act which made of it a nuisance, and as a nuisance it was created by the tenant, and the tenant alone is liable; the landlord is not, unless he is shown to have participated in the wrongful act by authorizing or permitting it to be done. "A landlord," says the supreme court of Massachusetts, "is not responsible to other parties for the misconduct or injurious acts of his tenants to whom his estate has been leased for a lawful and proper purpose, when there was no nuisance or illegal structure upon it at the time of the lease." *Saltonstall v. Banker*, 8 Gray, 195. See, also, *Mellen v. Merrill*, 126 Mass. 545; *Leonard v. Storer*, 115 Mass. 86; Wood, Nuis. 79, 80, 142.

Judgment and order reversed; and cause remanded for a new trial.

We concur: MORRISON, C. J.; ROSS, J.; MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J.

70 Cal. 32

MORGAN v. McDONALD. (No. 9,374.)

(Supreme Court of California. June 18, 1886.)

JUDGMENT—BY DEFAULT—SETTING ASIDE—AFFIDAVIT OF MERITS—REQUISITES OF.

An affidavit of merits must show that the defendant has fully and fairly stated the facts of the case to his counsel. An affidavit showing merely that defendant has stated the facts of his "defense" to his counsel is not sufficient.

Department 2. Appeal from superior court, city and county of San Francisco.

Clement, Osment & Clement, for appellant. *James Waymire*, for respondent.

THORNTON, J. In this case issues were joined by complaint and answer. The cause was, on the fifteenth of August, 1883, regularly called for trial. When so called no one appeared for the defendant. The counsel for plaintiff proceeded with the trial, and introduced some documentary evidence, and called and examined the plaintiff on his own behalf. The court on the day above named rendered judgment for the plaintiff, which judgment was entered on the same day. Defendant soon afterwards gave notice of motion to set aside the judgment aforesaid as one taken against him by surprise, inadvertence, and excusable neglect. The affidavit of defendant, read at the hearing of the motion, stated that he did not know the cause had ever been set for trial; that his attorney had never informed him of it. The defendant also presented at the hearing an affidavit of merits in the following form: "I have recently substituted James A. Waymire as my attorney, have stated the facts of my defense fully to him, and am advised by him that I have a good defense on the merits."

Conceding that the showing was otherwise sufficient, the affidavit of merits was not. It was not in accordance with the rule laid down by this court in bank in *Nickerson v. California Raisin Co.*, 61 Cal. 268. It was there held that the affidavit must show that the defendant has fully and fairly stated the facts of the case to his counsel. The statement in this case is that defendant has stated the facts of his defense to his counsel. This was the statement in the case just above cited, where the affidavit was held defective. The rule of court, submitted on the hearing of the motion in this case, presents the essential requirements of the law in regard to an affidavit of merits. We would suggest that it be followed.

The court erred in setting aside the judgment. The affidavit of merits was insufficient. The court had no authority to waive a proper affidavit. The order must therefore be reversed. Ordered accordingly.

We concur: **McKEE, J.; SHARPSTEIN, J.**

70 Cal. 19

LOW v. WARDEN. (No. 11,083.)

(Supreme Court of California. June 17, 1886.)

PROMISSORY NOTES—PROOF OF INDORSEMENT—NONSUIT.

Where, in an action on a note, plaintiff made out his case by putting the note in evidence, and rested, and the defendant then moved for a nonsuit on the ground that there was no proof of the indorsement of the note, plaintiff's counsel contending that no such proof was necessary, the court, upon deciding that proof of the indorsement was necessary, should have allowed plaintiff's request for leave to open the case, and introduce testimony concerning the indorsement, and a refusal so to do, and granting of a nonsuit, where the effect thereof would be to compel plaintiff to commence a new action to which the statute of limitations would be a bar, is error.

Department 2. Appeal from superior court, county of San Luis Obispo.

W. H. Spencer, for appellant. *E. and Wm. Graves & J. N. Turner*, for respondent.

THORNTON, J. This is an action on a promissory note. The complaint averred the execution of the note, and that it had been sold and assigned to the plaintiff by the payees, "D. Low and Brother," and that plaintiff was the owner and holder thereof. The defendant, by his answer, admitted the execution of the note, but denied every other allegation of the complaint. The plaintiff's counsel proved by oral testimony that on December 10, 1880, defendant was indebted to D. Low & Bro. in the sum of \$762 on his promissory note to them; that on that day he paid them \$400, and gave to them a new note for \$362. A copy of this new note, on which this action was brought, is set forth in the complaint. Plaintiff further proved that no part of this note had been paid. He did not then offer the note, which it appears was in his possession. The defendant moved for a nonsuit on the ground that the note on which the suit was brought had not been offered in evidence. Plaintiff was then allowed by the court to offer the note in evidence. When it was offered, the defendant objected to its introduction on the ground, among others, that the note was not properly indorsed. It does not appear that the indorsement was at that time offered, nor was the attention of the court called to it, though it subsequently appeared that the note had written on the back of it, "D. Low and Brother." The plaintiff rested, without any proof of the indorsement. The defendant then moved for a nonsuit on the ground that there was no proof of the indorsement of the note. The plaintiff's counsel contended that no such proof was necessary. The court, after hearing argument, intimated that proof of the indorsement was necessary. Upon this plaintiff's counsel asked leave to open the case, and introduce testimony concerning the indorsement. This the court refused to allow, granted the motion for a nonsuit, to which rulings plaintiff excepted.

We are of opinion that justice to the plaintiff demanded of the court that he should have been allowed to introduce testimony to prove the indorsement. The views of plaintiff's counsel in regard to the questions presented were novel and peculiar, and the course pursued by him singular, but we do not think that this justified the court in refusing to allow the plaintiff to prove that the note had been indorsed to him. The request was simply to prove the handwriting of the payees of the note. It was not an offer to prove something which rested in parol merely, as to which a wider discretion in granting or refusing it might be conceded to the court below. If the nonsuit were allowed to stand, the plaintiff would be compelled to bring a new action, to which the statute of limitations would be a bar. The plaintiff would thus suffer the loss of money justly due to him. Under the circumstances this should not be allowed. We think the court erred in refusing to permit the plaintiff to introduce testimony as to the indorsement, for which the judgment must be reversed.

There is nothing in the other ground on which the motion for a nonsuit was based, viz., that the note was barred by the statute of limitations.

The judgment is reversed, and cause remanded for a new trial.

We concur: **McKEE, J.**; **SHARPSTEIN, J.**

71 Cal. 481

BRALY v. HENRY. (No. 11,521.)

(Supreme Court of California. May 27, 1886.)

PROMISSORY NOTES—DEFENSES—PROOF OF PAROL CONTEMPORANEOUS AGREEMENT.

In an action on a promissory note by the payee, or by one taking it with full knowledge of the facts, the defendant maker may, by way of defense, prove a contemporaneous agreement that though the face of the note showed a sum certain, the note having been given for the price of a stack of hay, if the value of such hay, at a fixed price per ton, did not amount to the face of the note, a rebate and credit was to be made in defendant's favor of the difference between the actual value of the hay and the face of the note, and that, under such agreement, a less sum is due than that sued for.

Department 1. Appeal from superior court, county of Fresno.

Nourse & Church, for respondent. *Grady & Merriam* and *E. E. Calhoun*, for appellant.

MCKINSTRY, J. The appeal is by the defendant. In his answer the defendant averred: "Defendant alleges that said note was made in consideration of hay purchased of said T. E. Hughes by the defendant; that said Braly was, at the time of such purchase, interested with said T. E. Hughes in said hay, and part owner thereof, and was and is interested in the transaction of which said note forms a part, and is not an innocent purchaser, before maturity, for value of said note; that at the time said note was given the quantity of hay purchased by the defendant, as aforesaid, was not known by any of the parties, but was by plaintiff estimated to be of the value of said note, and said note was given under an agreement between the parties to said transactions, at the time said note was given, that if said hay, when the number of tons should be ascertained, should not amount in value to the face of said note, at a fixed price per ton, that then a rebate and credit would be made in favor of defendant herein of the difference between the actual value of the hay, ascertained as aforesaid, and the face of said note; that the quantity and value of said hay was ascertained in accordance with said agreement to be \$321.15 less than the face of said note."

The defendant offered evidence of the facts alleged in the answer, which the court below refused to admit, and, in effect, charged the jury to find for the plaintiff. In *Carter v. Hamilton*, Seld.'s Notes, 251, the court of appeals of New York held that where there was a sale of a field of wheat called 105 acres, but sold subject to measurement, for which the purchaser gave his note, estimating it at 105 acres, and the measurement fell short, the purchaser had a clear right to deduct for the deficiency, on the ground of the failure *pro tanto* of the consideration of the note. We think the defendant here should have been allowed to prove the oral contract alleged in the answer. The evidence, if admitted, would not have varied or contradicted the terms of the writing as expressed in the promissory note.

The defendant does not deny in his answer that he made just such a contract as that on which the plaintiff seeks to recover, but alleges that the assignor of plaintiff at the same time entered into an engagement on his part which was subsequently broken. For his damage arising from a breach of the contract of the vendor of the hay the defendant is entitled to recoup in an action brought upon his note. In *Batterman v. Pierce*, 3 Hill, 171, it was held, a promissory note having been given on sale of wood, that, in an action on the note, the payor was authorized to prove a verbal contemporaneous agreement of the payee (seller of the wood) that if the wood was burned by his setting fire to his fallow, he would guarantee the purchaser against any damages the consequence of the firing of his fallow. In *Johnson v. Oppenheim*, 55 N. Y. 280-293, the cases of *Morgan v. Griffith*, L. R. 6 Exch. 70, and *Erskine v. Adeane*, 8 Ch. App. 756, were said to be within the rule which allows a "collateral agreement made prior to or contemporaneous

with a written agreement, but not inconsistent with or affecting its terms, to be given in evidence. The question is very fully gone into in *Chapin v. Dobson*, 78 N. Y. 74. The plaintiff had sold to the defendants certain machines, being "breaker feeders." A contract was reduced to writing and signed by both parties. By its terms the plaintiffs agreed to sell the machines of certain sizes, and the writing contained a clause: "Terms, cash on delivery, 5 per cent. commission to be allowed on each machine; five 60-inch and four 48-inch to be delivered as soon as possible, the balance in thirty days thereafter." The amended answer of the defendant set forth a parol guaranty to the effect that the machines should be so made that they would do the defendant's work well and satisfactorily, or that, in case of failure, they should be taken back, and not paid for. The answer also averred that the machines were so badly constructed that they could not be made to do the defendant's work well or satisfactorily. There was evidence on the part of the defendant to sustain the averments. The court held that the facts alleged and proved constituted a defense, and that the oral agreement did not contradict or vary the written contract.

In the case at bar there is nothing to indicate that the promissory note was intended to express the whole contract of the parties. The entire contract, as alleged in the answer, was that the vendor should deliver the stack of hay, estimated to contain a certain number of tons; that the vendee should give his note for the amount to which the hay would come, assuming the estimate to be correct; but the vendor agreed that if the hay should fall short he would give the vendee credit, or release him from the payment of a proportionable sum. If all the promises of the parties had rested in parol; if the vendee had agreed orally to pay a certain sum at a certain time if the hay should be in quantity as estimated, but should pay ratably less if there should be a deficiency,—he could not be compelled to pay the whole sum named if the quantity did not hold out. And so, if the whole contract of both parties had been reduced to writing. "Nor [as was said in *Batterman v. Pierce, supra*] can it make any substantial difference that the undertaking of one party has been reduced to writing while the engagement of the other party remains in parol."

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MYRICK, J.

69 Cal. 647

COUNTY OF SAN MATEO *v.* OULLAHAN. (No. 11,329.)

ROONEY *v.* MARSHALL. (No. 11,330.)

(*Supreme Court of California.* May 28, 1886.)

STATES AND STATE OFFICERS—MONEYS COLLECTED BY ATTORNEY GENERAL BELONG TO STATE.

Moneys received by the attorney general, (as the representative of the people of a state, in actions by the comptroller for delinquent taxes,) in pursuance of stipulations of the parties, and of judgments and orders of court, on payment to him become part of the public revenue of the state, and must be paid by him into the state treasury, notwithstanding such sums are not the full sum sued for, but constitute merely a payment of part which is admitted to be due, without prejudice to the rights of either party as to the balance.

In bank. Applications for writs of mandate.

J. M. Allen, for petitioner in No. 11,329. *McKune & George*, for petitioner in No. 11,330.

Ross, J. These cases will be considered together. Each is an application for a writ of mandate, directed to the respondents in their official capacity, requiring of them the performance of certain acts demanded of them by

the law, if the money in question is a part of the public revenue. The money is now in the hands of the attorney general of the state, and is \$803,582.93 in amount. Of this sum \$140,685.20 was received by him from the defendants in certain actions instituted by certain counties of the state against certain railroad corporations for the recovery of delinquent taxes for the fiscal years 1880-81, 1881-82, and 1882-83. The remaining \$662,897.73 was received by him from the defendants in certain actions instituted by the state against the same corporations for delinquent taxes for the fiscal years 1883-84 and 1884-85. In the first class of cases the suits were brought under the act of the legislature approved April 23, 1880, authorizing any county, or city and county, where taxes are delinquent, to sue in its own name for the recovery thereof, "whether the same be for county, or for city and county, and state, purposes or taxes, or either of them." St. 1880, p. 136. In the second class of cases the suits were brought under that provision of the Political Code as amended in 1883, declaring that, "after the first Monday of February of each year, the comptroller must begin an action in the proper court, in the name of the people of the state of California, to collect the delinquent taxes upon the property assessed by the state board of equalization. Such suit must be for the taxes due the state, and all the counties, and cities and counties, upon property assessed by the board of equalization, and appearing delinquent upon the duplicate record of apportionment of 'railway assessments.' The demands for state and county, and city and county, taxes may be united in one action. * * *" Pol. Code, § 3670.

Pursuant to statute, the actions embraced within the first class above alluded to—in number 63—were commenced by the district attorneys of the respective counties, in the superior court of their respective counties. They were all subsequently transferred to the circuit court of the United States, and there came on regularly for trial, the attorney general appearing for the plaintiffs, and after trial were submitted to the court for decision. On the twenty-eighth of February, 1884, the court ordered that judgment be entered in favor of the defendants in the actions, but before judgment was so entered, and on the next day, (February 29, 1884,) a stipulation was presented to the court in 41 of said 63 cases, signed by the attorney for the defendants, and by the attorney general of the state, for the plaintiffs, agreeing, in effect, that notwithstanding the decision of the court before announced, that judgment should be entered in favor of the plaintiff in the respective actions for the face of the taxes; and the circuit court thereupon, and upon the oral consent of the attorneys for the respective parties, vacated the order theretofore entered for judgment in favor of the defendants, and made and entered a judgment in favor of the respective plaintiffs, in said 41 actions, for the face of the taxes, and therein apportioned the amounts of the respective sums between the state and the respective counties. A similar stipulation and judgment was entered in each of the remaining 22 cases of the 63 originally commenced by the district attorneys. The amounts of the judgments thus rendered and entered by the circuit court of the United States were subsequently paid to the attorney general of the state by the defendants in the actions, and a part of which is the aforesaid sum of \$140,685.20.

Of the actions embraced within the second class, already alluded to, there were pending on the twenty-ninth of September, 1884, in the circuit court of the United States for California, six certain cases, prosecuted by the people of the state of California against the railroad corporations, for the collection of delinquent taxes for the fiscal year 1883-84. Each of said actions was originally commenced in one of the superior courts of the state, by attorneys employed for that purpose by the state comptroller, but the actions were subsequently transferred, on motion of the defendants therein, to the circuit court; and in that court, on the twenty-ninth of September, 1884, the following order was made and entered in each of them: "Whereas, the defend-

ant in the above-entitled action, while denying all liability upon the cause of action stated in the complaint, pleaded that on the ninth day of November, 1883, it had tendered and offered to pay plaintiff the sum of \$——, in United States gold coin, in part payment of the tax claimed, with an agreement that the receipt of said sum should not prejudice the plaintiff in any legal rights; and whereas, the defendant in said answer averred that it had brought said sum into court, and offered the same to plaintiff, and subjected the said sum to such orders or judgments as the court might make in the premises; and whereas, of the sum so tendered, the defendant specially tendered for the benefit of the state, and on the amount claimed by the state, the sum of \$——, and on account of the various county taxes it tendered sums as follows, to-wit: For the county of —— the sum of \$——, (naming the several counties, and the several amounts:) Now, upon motion of attorneys for plaintiff, it is ordered by the court that the defendant, within five days from the date hereof, make said tender good by paying to Edward C. Marshall, attorney general of the state of California, and one of the attorneys for plaintiff herein, the said sum of \$——, U. S. gold coin, (said sum being the amount alleged to have been tendered,) to be by the said Marshall upon the receipt thereof paid into the state treasury of the state of California for the benefit of the state of California, and of the counties above named, and in the respective amounts above specified; and it is further ordered that neither the payment nor the receipt of said sum shall prejudice or affect any right of either party to this action to maintain or defend it as to the balance claimed in the complaint."

The amounts thus ordered to be paid by the circuit court amounted to 60 per cent. of the face of the taxes, and aggregated \$333,377.10, and were paid to the attorney general by the defendants in the actions within the five days mentioned in the order. On or about May 26, 1884, the comptroller substituted Mr. D. M. Delmas for the attorneys originally employed by him, who has since been the only attorney employed by the comptroller. Mr. Delmas did not consent to the order of September 29th, but, on the contrary, at all times resisted it! Subsequently, in each of said six cases, final judgment was entered for the defendants. Of the actions embraced within the second class first herein alluded to, there were pending on the sixteenth of September, 1885, in the circuit court, five certain other cases, prosecuted as were the six cases last referred to, and in which similar proceedings were had, except that the amount ordered to be paid by the circuit court to the attorney general by the respective defendants, and which was accordingly so paid, was the sum of \$329,520.63, and was 50 per cent. of the face of the taxes. The foregoing are substantially the facts as presented by the findings.

It is quite clear, we think, that unless we can treat the judgments of the circuit court in the first class of cases, and the orders of that court in the second class of cases, directing the payments of the respective sums of money, as *void*, we must hold the money paid by virtue of them to the attorney general or the state as a part of the public revenue; for in the one instance it was paid under judgments, and in the other instances under orders, made and entered by the court in actions regularly pending in it, and there prosecuted for the recovery of certain sums of money, to a person who appeared and was recognized as, and adjudicated to be, one of the attorneys for the plaintiffs; that is to say, the attorney general of the state. The jurisdiction of the court over the parties and subject-matter is not questioned. Manifestly, therefore, it cannot be held that any judgment or order made by that court, directing that the plaintiff recover a less sum than that claimed, is *void*; and, not being *void*, it is conclusive upon us. Nor can we consider the right of the attorney general to appear as attorney for the people in the actions commenced by the comptroller. The court in which the cases were heard decided that he had the right so to appear, and recognized him as such

attorney, and its judgment in that regard is as binding as in any other. So, too, with respect to the stipulations upon which the judgments in the one class of cases, and the orders in the other class, were made and entered. It is not for us to say that they were insufficient as a basis upon which to enter the judgments and orders. That was a matter for the court having jurisdiction of the case, subject to correction on appeal, if error was committed. We have, therefore, the case of an attorney who has received certain moneys under judgments and orders recovered by him in actions he was prosecuting. It legally follows, we think, that the money so received is the property of those whom he represented in receiving it.

Let the writs issue as prayed for, in so far as concerns the moneys received by the attorney general under the orders made in the cases prosecuted for the delinquent taxes for the fiscal years 1883-84 and 1884-85, and in so far as concerns the moneys by him received for the state under the judgments rendered in the actions prosecuted for the delinquent taxes for the fiscal years 1880-81, 1881-82, and 1882-83.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.

70 Cal. 28

TURNER v. STRENZEL and others. (No. 9,444.)

(*Supreme Court of California.* June 17, 1886.)

MECHANIC'S LIEN—FORECLOSURE—STATEMENT OF CAUSE OF ACTION.

A material-man is only entitled to be paid from that portion of the contract price which remains due and unpaid to the contractor by the owner when he (the material-man) files his lien; and where, in an action for the foreclosure of such a lien, the complaint fails to allege that anything was due from the owner to the original contractor when plaintiff's lien was filed, it does not contain a statement of a cause of action. Therefore a material-man cannot recover from the owner of property on which a building was erected, on a complaint which shows that the latter wrongfully took the materials; and, ousting the contractor, used them himself in completing the building, if at the time of the filing of the former's lien, nothing was due from the owner to the contractor.

Department 2. Appeal from superior court, county of Contra Costa.

Wm. & Geo. Leviston and W. H. Fifield, for appellant. Pillsbury & Titus, for respondent.

THORNTON, J. Action by the assignee of material-men to foreclose what is alleged to be a mechanic's lien. There was a demurrer by defendant Strenzel to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was sustained. The plaintiff declined to amend, and judgment was entered against him, from which judgment this appeal is prosecuted. The complaint states that the defendant Strenzel was the owner of the premises, on which he contracted with Sylvester & Langabee to erect a building for the sum of \$8,200; that the contractors, Sylvester & Langabee, proceeded, under the contract, to erect this building on the premises aforesaid, and so continued until it was in an advanced stage, and they had earned and received two installments of the contract price, of \$1,500 each; that while so engaged they purchased the material sued for from the assignee of plaintiffs, Turner, Kennedy and Shaw, to be used in the building; that the building has been completed and a lien filed in time; that the defendant Strenzel, from the commencement of the work, interfered with and impeded the contractors in the performance of the contract; and after they had progressed therein to the extent hereinbefore stated, and while they were faithfully performing the same, and had, upon the faith of the contract, purchased from various material-men, including Turner, Kennedy, and Shaw, large quantities of various kinds of building materials, to be used in the

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building, for which they had not and have not paid, defendant Strenzel, without right, and without the knowledge or consent of Turner, Kennedy, and Shaw, compelled the contractors to abandon their work on the building, expelled them from it, refused to allow them to proceed with said work, took possession of the building, completed it, and used the materials purchased by the contractors in completing it, and has withheld and still withholds from the contractors the balance of the contract price, to-wit, the sum of \$5,200, or thereabouts. The other allegations of the complaint are of the assignment of the claim to plaintiff, or subordinate interests of the defendants other than Strenzel, followed by the usual prayer.

A material-man is only entitled to be paid from that portion of the contract price which remains due and unpaid to the contractor by the owner when he (the material-man) files his lien, (*Rosenkranz v. Wagner*, 62 Cal. 154, and cases there cited); and where the complaint fails to allege that anything is due from the owner to the original contractor when plaintiff's lien was filed, it does not contain a statement of a cause of action. This was so held in the cases above referred to. There is no averment of the character just above stated in the complaint herein. It nowhere appears that the owner had not paid to the contractors, prior to the filing of any lien by plaintiff's assignors, all that was due to them. Conceding that Strenzel, by his acts in expelling the contractors and completing the building himself, assumed the place of the contractors, stood in their shoes, and should be regarded as doing the work for the contractors, and that the work done by Strenzel on the building cost less than \$5,200,—the remainder of the contract price,—leaving a balance due to the contractors, still the complaint is not framed in this view. We must assume that the completion of the building cost Strenzel something, but there is no averment of the amount which he had to expend in completing it. It may have cost him more than \$5,200 to complete it, and in such case there would be no balance which the contractors would have a right to. Strenzel by his acts did not become bound to the material-men, or the plaintiff, their assignee, for the price agreed to be paid by the contractors for the materials purchased. The materials, under the allegations of the complaint, had become the property of the contractors. They were not, when Strenzel took possession of them, and used them in completing the building, the property of either of the material-men or their assignee. Such being the case, we cannot see what right the plaintiff has to recover anything of Strenzel by reason of his having taken, even wrongfully, the materials referred to, and used them in completing the building.

It is contended that Strenzel, having wrongfully prevented the contractors from doing the work while they were engaged in doing it, and seizing the materials purchased by them, and using them in finishing the building, is estopped from saying there is no fund, and that his property is not liable. If estopped, how far is he estopped? If there is an estoppel of the character supposed, it would be of no advantage to the plaintiff, unless Strenzel was estopped to deny that the fund was not sufficient to pay off the claim of plaintiff. But we perceive nothing like an estoppel. Admitting the facts in the complaint to be true, he has committed a breach of contract, and has wrongfully converted some property of the contractors, for which he is responsible in damages to them, but not to the plaintiff.

The court below committed no error in sustaining the demurrer to the complaint.

As this disposes of the cause, it becomes unnecessary to consider the ruling of the court below in its order directing a certain portion of the complaint to be stricken out. Judgment affirmed.

We concur: MCKEE, J.; SHARPSTEIN, J.

(70 Cal. 23)

IRVING v. CARPENTIER. (No. 9,368.)

(Supreme Court of California. June 17, 1886.)

ACTION OR SUIT—PARTIES—SUIT AGAINST DEFENDANTS UNDER FICTITIOUS NAMES.

Under Code Civil Proc. Cal. § 474, providing that "when the plaintiff is ignorant of the name of a defendant he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly," it is no ground for setting aside service of summons, and dismissing the action as to parties sued and served under fictitious names, that plaintiff could, by examining public records, have ascertained the actual names of such defendants; and if at the time of suit he actually is ignorant of their names, and makes the proper amendment when he discovers such names, such service will be proper and sufficient.

Department 2. Appeal from superior court, county of Alameda.

Henry P. Irving and T. R. Wise, for appellant. *H. S. Brown*, for respondent.

THORNTON, J. This is an action to quiet title to land in Alameda county. The complaint contains this averment: "That H. W. Carpentier, J. P. Jones, Charles Crocker, Leland Stanford, and others, of whose names plaintiff is ignorant, and whom he designates by the names of Tom Jones, Mary Jones, John Smith, and John Brown, and whose names when discovered he asks leave to insert in an amendment to this complaint, all of whom are in possession of the said land, and claim an interest therein adverse to this plaintiff." The summons in the action was, on the eighth of February, 1883, served on the Pacific Improvement Company, sued as Tom Jones. On the fourteenth of February, 1883, the above-named company, by its attorney, H. S. Brown, gave notice to plaintiff that it would move the court, on the nineteenth of February, 1883, to set aside the service of summons; and to dismiss this action as to the company, on the ground that the plaintiff had notice at the time of the commencement of the action that the company claimed an interest in the premises in controversy adverse to him. The motion was subsequently made, and on the hearing there was filed, on behalf of the company, an affidavit of Frank S. Douty, its treasurer and assistant secretary, to the effect that plaintiff, at the time of the commencement of the action, (which was on the ninth day of February, 1882,) and ever since the fourth day of February, 1881, had legal notice that this company was one of the parties who claimed an interest in the lands described in plaintiff's complaint, in this: that on the fourth day of February, 1881, a deed from Charles Crocker to the company for the undivided two-thirds part of the lands was recorded in the office of the county recorder of the county of Alameda, in Liber 214 of Deeds, 359, as will fully appear by referring to said records; and had plaintiff exercised any care and diligence whatsoever in examining or searching the records of said county he could and would have seen that the company claimed and held in fee-simple an undivided interest in said lands. The affidavit of plaintiff was also read on the hearing, in which he stated that at the time of bringing this suit he did not know that the Pacific Improvement Company was the name of the defendant that claimed an interest in the property; that he knew some one did, but did not know the name, and therefore sued by a fictitious name; that in January last (1883) he first learned from Harvey S. Brown, who appeared as counsel in this case, that the Western Development Company was the true name of the defendant; that when he found out from the records what the true name of the defendant was, that was the first time he knew it; that no person was in possession when the action was brought; that the plaintiff knew of that, and that no one was in the open and visible

occupation of the land. The court granted the motion, to which the plaintiff excepted. Judgment of dismissal was accordingly entered, from which this appeal is prosecuted.

By section 474, Code Civil Proc., it is provided that, "when the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly." In this case the plaintiff did make the averment (it is quoted above) required in the section above referred to. This averment has never been regarded as traversable. It cannot be done by the answer. Then why should it be permitted to be traversed in any other mode? Moreover, the affidavit of Douty does not show that plaintiff was ignorant. It shows that if he had examined a book of records named he would have discovered that a certain deed purported to be there recorded. But this does not show that the plaintiff was ignorant of the fact when he commenced his suit. It merely shows that he failed to examine a certain book, which, if he had examined, would have afforded him some information. His failure to examine tends to establish the fact of ignorance. Further, the record of the deed mentioned was no notice to the plaintiff. It is only notice to subsequent purchasers and mortgagees, (Civil Code, 1213,) and it does not appear that the plaintiff belonged to either of these classes. We know of no law which makes it the duty of a plaintiff to examine the records of a county recorder's office to find out names of parties defendant, the neglect of which will subject him to have the service of his summons set aside, and the cause dismissed, as to a person sued by a fictitious name, whose real name he might have found out by examining the record of deeds of the county in which the land embraced in the action is situated, when he has made the averment in the complaint required by the statute.

The statute above referred to is an enabling one, and should be so construed as to cure the evil it was designed to correct, and advance the remedy. Persons are sometimes compelled to bring suits in haste. They have not time to ascertain the true names of parties to be made defendants. The statute of limitations may, in a day from the time the preparation of the complaint is commenced, effect a bar. Sometimes there is no means readily accessible of ascertaining the true names. The statute above referred to was enacted to afford a remedy in such cases. Should a plaintiff lose his right to have his case tried because of ignorance of the names of parties whom he has a right to sue, and as to whom he may have a good cause of action? How is the party sued by a name not his own injured? He loses no right by allowing a plaintiff to proceed as provided by the statute. He has every opportunity accorded to any other defendant to make his defense. He can demur or file his answer, and set up every defense which he is advised he can rely on. The counsel for respondent herein likens this case to that of a party allowed to bring an action for relief on the ground of fraud, in which case the cause of action is not deemed to have accrued until the discovery by the party aggrieved of the facts constituting the fraud. In construing this rule it has always been held that a party discovers the fraud when, by the use of reasonable diligence, he might have ascertained the facts constituting the fraud. But the rule prescribed by the statute in this case is entirely different. It is when he is actually ignorant of a certain fact, not when he might, by the use of reasonable diligence, have discovered it. Whether his ignorance is from misfortune or negligence, he is alike ignorant, and this is all the statute requires. This is the true meaning of the statute. We adopt it the more readily because the party thus brought in as a defendant loses no rights by it. We think, for the foregoing reasons, that the judgment is erroneous, and should be reversed, and the court below directed to vacate the order setting aside the service of summons.

Rosencrantz v. Rogers, 40 Cal. 489, has no application here. In that case the complaint did not contain the averment as to ignorance required by the statute. The plaintiffs therein did not bring themselves within the provisions of the statute. The defendants appeared on the face of the complaint to be sued by their true names. Further, in that case, there was actual and continued occupancy by the persons claiming the land sued for at the time and long before the suit was commenced. Here it is stated in the affidavit of plaintiff, and is not denied, that there was no actual occupation when the action was begun. It was useless for the plaintiff to offer to amend, as the court below must have ruled that he had not brought himself within the statute.

The judgment is reversed, and the cause remanded, with directions to the court below to vacate the order setting aside service of summons, and to permit the plaintiff to amend his complaint by inserting the name of the Pacific Improvement Company as a party defendant; the company to be allowed 10 days to answer after service of notice of the above amendment.

We concur: MCKEE, J.; SHARPSTEIN, J.

70 Cal. 35

In re BICKERSTAFF. (No. 20,179.)

(*Supreme Court of California.* June 23, 1886.)

1. INTOXICATING LIQUORS—LICENSE LAWS, CONSTITUTIONALITY OF.

A liquor license law, the apparent scope of which is not to prohibit the sale of intoxicants, but to regulate it, with a view to obtaining a revenue, is not unconstitutional, as abridging the right of citizens to pursue a lawful employment.

2. SAME—REGULATION BY MUNICIPALITIES.

The fact that a city council, in regulating the sale of liquor, delegates its authority to issue licenses to the five persons who may sign the certificate, or to the municipal officers who are required to investigate and report as to the character of the applicant, is no objection to the validity of the license, or law providing therefor, as such provision relates only to the mode of applying for a license, and not to the power to issue it.

3. MUNICIPAL CORPORATIONS—LICENSES—REGULATION OF BUSINESS BY.

It is competent for a city council, in passing a license ordinance, to annex, as a condition to granting a license to carry on business, that an applicant for the license shall show himself to be a suitable person to carry on the business, and to provide that it shall be conducted in such a way that the business itself shall not threaten or become dangerous to the social order of the municipality. To that end it is also competent for the council to prescribe causes for which the license would be forfeited.

4. SAME—STOCKTON LIQUOR LAW—VALIDITY.

Stockton liquor license ordinance of May 25, 1885, *held valid*.

Department 2. Application for discharge on writ of *habeas corpus*.

W. M. Gibson, for petitioner. *A. Smith*, for respondent.

MCKEE, J. The petitioner was convicted of keeping a saloon in the city of Stockton without having obtained a license as required by an ordinance passed the twenty-fifth of May, 1885. The ordinance was passed under charter provisions which empowered the municipal legislature, among other things, "to license, regulate, tax, * * * all tippling-houses, dram-shops, saloons, bars, bar-rooms, etc., * * * and to fix and collect a license tax upon all occupations and trades, and all and every kind of business authorized by law, not heretofore specified;" and it provides "that in the business of selling intoxicating drinks, wines, ales, and beers, in less quantities than one quart, or to be drank on the premises where sold, and on any other business, trade, or calling not provided by law to be licensed for state and county purposes, the amount of license shall be fixed at the discretion of the city council, as they may deem the interests and good order of the city may require; also

to prevent and restrain any riot or riotous assemblage, disturbance of the peace, or disorderly conduct, in any place, house, or street in the city."

A grant of power to a legislative body to regulate trades and employment "at its discretion" confers power for that purpose unrestrained and unlimited, except by constitutional or statutory restrictions and limitations; that is to say, where power is given to a municipal legislature to legislate upon a subject, it may be exercised in conformity to fundamental provisions of the constitution, and the general laws of the state applicable to the same subject, and with its exercise courts have no power to interfere; but when legislative action results in municipal law, the validity or invalidity of the law is determinable in judicial proceedings in which the question is directly involved. Here it is contended that the ordinance under which the petitioner has been convicted is unconstitutional and void, because it contravenes, in its eighth section, that part of the constitution of the United States which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Article 14, Const. U. S.

Section 8 of the ordinance reads thus:

"Sec. 8. No license shall be issued for any saloon, bar, bar-room, dram-shop, or tippling-house, or any other place where intoxicating drinks, wine, ale, or beer are sold in less quantities than one quart, or to be drunk on the premises where sold, except upon the order of the city council of the city of Stockton. Whenever any person desires to open, keep, or conduct any of the places enumerated in this section, such person shall petition the city council to order a license issued therefor, and shall present with such petition a certificate, signed by five respectable citizens of said city, residing or doing business in the immediate vicinity of such proposed place, setting forth that the applicant is a person of good moral character, and a sober and suitable person to keep and conduct such a place. No license shall be ordered issued until the next regular meeting of the council after such petition and certificate is received. Upon receiving such petition and certificate the council may refer the same to the mayor, president of the city council, and chief of police, for investigation as to the moral character of the applicant, and whether such applicant is a sober and suitable person to keep and conduct such place, and they shall report to the council at the next regular meeting. If the council finds such person to be of good moral character, and a sober and suitable person to keep and conduct such place, they shall order the clerk to issue a license. If the council shall find that the applicant is not a person of good moral character, or is not a sober or suitable person to keep and conduct such a place, they shall deny the petition. If the petition be denied, no license shall be issued. Should the council at any time determine that any person keeping or conducting any such place is not a person of good moral character, or is not a sober or suitable person to keep and conduct such place, they may revoke such order, and thereupon no further license shall issue."

There is no doubt that the right to pursue a lawful employment is one of the privileges and immunities in which the citizen is entitled to be secured and protected under the constitution and laws. Such a right cannot be abridged by municipal legislation; but, like every other right of person or property, its exercise may be regulated by law, and that is evidently the object of the ordinance whose constitutionality is assailed. Regulation, with a view of revenue, seems to be its scope and subject-matter. It does not prohibit the sale of intoxicants. It contains no provision which abridges the right of any one to engage in the business of selling them; but upon the basis of existence of the right, it provides by section 8 *how* the right shall be exercised. Under the ordinance any one who wishes to carry on a business must procure a license for that purpose. The license is obtainable by an applica-

tion to the city council, founded upon the petition of the applicant, accompanied by a certificate of five respectable citizens of the neighborhood in which the business is to be conducted as to the character of the applicant. Upon complying with this condition the applicant is entitled to an order for the issuance of the license for which he has petitioned, if the city council, in the exercise of its jurisdiction, shall find, from the certificate, and the report made to it by the officers to whom the petition has been referred, that he is qualified to carry on the business.

The condition upon which the license is issuable is not unreasonable. There is no force in the objection that by it the council delegates its authority to issue licenses to the five persons who may sign the certificate, or to the municipal officers who are required to investigate and report as to the character of the applicant. The condition relates only to the *mode* of applying for a license, and not to the *power* to issue it. Jurisdiction to issue is put in motion by the petition and certificate; and upon the petition, fortified by the required certificate and report as evidence, the city council acts judicially in making the order. If the applicant be a suitable person to carry on the business for which he asks to be licensed, and his application conforms to the requirements of the ordinance, the council would be bound to grant the license. But the means prescribed for procuring the license constitute the law of the application to exercise the right to carry on the business, and it is necessary to comply with the law in order to enjoy the right, if the law is valid and reasonable.

It was entirely competent for the city council, in passing the ordinance, to annex, as a condition to granting a license to carry on business, that an applicant for the license shall show himself to be a suitable person to carry on the business, and to provide that it shall be conducted in such a way that the business itself shall not threaten, or become dangerous to, the social order of the municipality. To that end it was also competent for the council to prescribe causes for which the license would be forfeited.

The ordinance is valid, and the conditions prescribed for issuing licenses under it, to persons applying for them, are not unreasonable. Such conditions have been generally upheld by the courts as proper and reasonable. *Ex parte Guerrero*, 10 Pac. Rep. 261; *People v. Meyers*, 95 N. Y. 223; *Metropolitan Board v. Barret*, 34 N. Y. 657; *Whitten v. Mayor*, 43 Ga. 421; *Muller v. Commissioners*, 89 N. C. 171; *Leigton v. Maury*, 76 Va. 865.

Writ dismissed.

We concur: THORNTON, J.; SHARPSTEIN, J.

70 Cal. 40

LATTEMORE v. BALDWIN. (No. 11,432.)

(Supreme Court of California. June 23, 1886.)

MASTER AND SERVANT—VERDICT—EVIDENCE.

Verdict in action for compensation for services rendered, *held* not sustained by the evidence.

Department 2. Appeal from superior court, county of Los Angeles.

Wells, Van Dyke & Lee, for appellant. *Albert W. Stephens*, for respondent.

MCKEE, J. Appeal from a judgment and order denying a motion for a new trial in an action to recover \$339 for wages, at the rate of \$1 per day, alleged to be due and owing for services rendered for the defendant in taking charge of a tract of land, and keeping a ditch on it in repair, from the twenty-first of April, 1884, until the first of April, 1885. The pleadings were verified. The answer of defendant specifically denied the allegations of the complaint. Upon trial of the issue raised by the pleadings a verdict was rendered in favor of the plaintiff for \$337, and it is claimed that the verdict was not sustained

by the evidence. The evidence upon which the verdict was rendered was given by the plaintiff himself, who, on examination as a witness in his own behalf, testified: "Some time in 1884 I was employed by the defendant on a ditch. Baldwin came to me, and said: 'I have bought all this land above you, from the railroad, and all the settlers are now going off, and I want you to take charge of it, and keep the ditch in repair, and keep any one from settling on the land;' and said he would give me a dollar a day; * * * and I said I would do that, and worked from that time (the twenty-first of April, 1884) until the twelfth of July, 1884, under and pursuant to said contract, and I never have been paid, nor have I ever received, anything for said work." This evidence proves that the plaintiff rendered services, under the agreement stated in his complaint, for only about 80 days, Sundays included, and, according to his own proofs, he was not entitled to recover for more than that time, at the price per day for which he agreed to render the services. The verdict of \$337 was therefore not sustained by the evidence, and the court erred in not granting a new trial.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

69 Cal. 616

HARRISON v. McCORMICK and another. (No. 9,215.)*(Supreme Court of California. May 26, 1886.)***1. PLEADING—ANSWER—CROSS-COMPLAINT, REQUISITES OF.**

A pleading is not a cross-complaint which shows on its face that the demand attempted to be asserted thereby, existed in favor of the defendants and a stranger to the original action, and not in favor of the defendants alone, and that, therefore, the parties who ask for judgment against plaintiff are not the parties against whom plaintiff asks for judgment; or that the transaction, as set forth in defendants' pleading, appears to have been separate and distinct, and in no way related to, or dependent upon, the transaction or contract set forth in the original complaint. To constitute a cross-complaint the parties must be identical with those in the original complaint, and defendants' cause of action must be one arising out of, or having reference to, the transaction on which the original action is based, or must affect property to which the original action relates.

2. SAME—CROSS-COMPLAINT—CONSENT TO FILING AS.

Merely naming a pleading a "cross-complaint" will not make it such, nor necessitate a reply from plaintiff, if it is not in fact a cross-complaint; nor will the

fact that plaintiff "consents that the same be filed and stand as and for defendants' answer and cross-complaint" have such effect, but the court will look to the real nature of the pleading.

3. ACTION—JOINT CONTRACT—PARTIES.

Where the contract sued on is joint in its nature, all the parties to it are necessary parties to the action upon it.

In bank. Appeal from superior court, city and county of San Francisco. *H. C. Firebaugh*, for appellant. *Craig & Meredith*, for respondent.

MCKEE, J. This is an appeal from a judgment and order denying a motion for a new trial, in an action brought by plaintiff against defendants, who are designated in the complaint as "John McCormick and Oscar Lewis, partners, doing business under the firm name of McCormick & Lewis," to recover a balance which plaintiff alleged defendants owed and refused to pay, for 50 tons of "Montana lump Lehigh hand-picked coal," which was delivered to them on the first of August, 1882, in the execution of a contract of sale previously made between them and the plaintiff, under which plaintiff shipped the coal from New York, and delivered it to the defendants, at San Francisco.

The pleadings in the case were not verified. The answer of the defendants contains a general denial of the allegations of the complaint, and a statement of new matter, which it is claimed constitutes a cross-complaint. The new matter is substantially this: That on the day of the contract of sale stated in the complaint "these defendants, with one T. A. McCormick, as McCormick, Lewis & Co., were engaged in the business of iron founders in the city of San Francisco," and contracted with the plaintiff for 50 tons of coal, "of the same quality and value as a sample then on hand," which was known as "Montana lump Lehigh hand-picked coal," to be shipped by the plaintiff from New York, and delivered to them at San Francisco, for which they agreed to pay him \$13.50 per ton, and shortage not exceeding 2 per cent.; \$6 per ton payable on receipt of the bill of lading, and the balance on delivery of the coal at 'ship's side,' in San Francisco."

Fifty tons of coal were shipped by the plaintiff from New York, consigned to the defendants, the bill of lading for which was duly received; and, upon receiving it, "these defendants" paid to the plaintiff upon the shipment six dollars per ton, pursuant to their agreement; and soon afterwards, on the arrival of the ship containing the coal at San Francisco, the coal was delivered to them, and they accepted the same; but they refused to pay for it, on the ground that it did not correspond with the sample; "was of a grade, quality, and value inferior to the sample;" "was not worth more than six dollars per ton;" and was "wholly unfitted for use," although it is alleged "they made an effort, in good faith," to use it; and *thereby* suffered damage in the sum of \$300, aside from the \$300 which they had paid the plaintiff under the contract, for which McCormick, Lewis & Co. ask damages against plaintiff in the sum of \$300.

Does the matter partake of the character of a cross-complaint? We think not. A cross-complaint is a pleading, by a defendant to an action, which contains a statement of facts sufficient to constitute a cause of action against the plaintiff in reference to the transaction upon which the original action is founded, or affecting property to which the original action relates. Sections 438, 442, Code Civil Proc. The parties named in the cross-complaint must be parties to the original action, and the complaint itself must contain all the facts necessary to constitute a cause of action in favor of defendant and against the plaintiff in the original complaint. *Doyle v. Franklin*, 40 Cal. 110; *Collins v. Bartlett*, 44 Cal. 380; *Hook v. White*, 36 Cal. 299; *Chase v. Evoy*, 58 Cal. 348; *Belleau v. Thompson*, 33 Cal. 495; *Coulthurst v. Coulthurst*, 58 Cal. 239. Here it is manifest, on the face of the pleading, that the demand, attempted to be asserted by way of cross-complaint, existed in favor

of the defendants and a stranger to the original action, and not in favor of the defendants alone. The parties who ask for judgment against plaintiff are therefore not the parties against whom the plaintiff asks for judgment. Defendants in the original complaint are two persons, partners, doing business under the firm name of McCormick & Lewis. The parties in the so-called cross-complaint are three persons, partners, doing business under the firm name of McCormick, Lewis & Co. McCormick, Lewis & Co. are not McCormick & Lewis, and cannot be legally regarded as such, in the absence of allegations or proof of their identity as one and the same firm. Besides, the transaction as set forth in the cross-complaint appears to have been, not only between parties other than those named in the original complaint, but a separate and distinct transaction, in no way related to or dependent upon the transaction or contract set forth in the original complaint. Section 442, Code Civil Proc. Therefore the new matter of the defendants' answer was wholly insufficient to constitute a cross-complaint.

It is claimed, however, that the pleading was dealt with as a cross-complaint, and that the case was tried upon that theory. It is true that when the pleading was served on the plaintiff's attorneys they indorsed it as follows: "Service of within admitted made this second day of December, 1882, and we consent that the same be filed, and stand as and for defendants' answer and cross-complaint herein." Manifestly, plaintiff's counsel "consented" that the answer might stand as a cross-complaint, yet they neither demurred nor answered to it; and, notwithstanding their consent, they were not bound to answer a paper which was not a cross-complaint, and therefore required no answer. Merely naming a pleading a "cross-complaint" does not make it such, so as to necessitate a reply. The court will look to the real nature of the pleading. *Thompson v. Thompson*, 52 Cal. 154; *Brannan v. Paty*, 58 Cal. 330.

Besides, as the plaintiff did not answer the pleading, the facts stated in it, if it was a cross-complaint, were admitted, and the defendants' attorneys could have moved for judgment upon it. But they did not; they went to trial upon the only issues made by the pleadings in the case, *i. e.*, the issues raised by the original complaint, and the general denials contained in the answer, and the matter set up by way of defense, and upon these issues the court adjudicated in favor of the plaintiff. But the judgment was rendered upon a finding which shows that the defendants John McCormick and Oscar Lewis, designated in the complaint as partners doing business under the firm name of McCormick & Lewis, were not in fact partners under that name; but that, in fact, they, "the defendants, with one T. A. McCormick, were partners doing business under the firm name of McCormick, Lewis & Co.," and that the persons comprising the firm of McCormick, Lewis & Co. were the parties who made the contract upon which the action was brought.

That being the fact, the contract was a joint contract, and the parties to it were necessary parties to an action upon it. The rule is well settled that several persons, contracting together with the same party, for one and the same act, shall be regarded as jointly and not individually or separately liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promissors. Sections 1430, 1431, Civil Code. Especially is this the rule as to the legal liability of partners upon their partnership obligations. Section 2442, Civil Code; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Freeman v. Campbell*, 55 Cal. 197. It is also well settled that parties to a joint contract must all be made defendants. "Of the parties to the action," the Code says, "those who are united in interest must be joined as plaintiffs or defendants." Section 382, Code Civil Proc.

The plaintiff had the right to bring his action on the joint obligation of the parties to the contract against all the parties, or against the firm name by

which they collectively contracted with him. Section 388, Code Civil Proc., provides: "When two or more persons, associated in any business, transact such business under a common name, * * * they may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the property of all the associates in the same manner as if all had been named defendants, and had been sued upon their joint liability." See also, sections 414, 989, Id.; *Gilman v. Cosgrove*, 22 Cal. 358. But the parties to the contract were not sued. T. A. McCormick, one of the contracting parties, was not made a party to the suit, nor were they sued collectively by their firm name; therefore the plaintiff, upon his own showing, was not entitled to recover in the action set forth in his complaint. The allegations and proofs did not correspond. *Cotes v. Campbell*, 3 Cal. 191; *Morrison v. Bradley*, 5 Cal. 503; *Farmer v. Cram*, 7 Cal. 136.

The omission of proper parties in the action was sufficiently set forth in the answer of the defendants. When the court found the fact it ought to have exercised the authority conferred by section 389, Code Civil Proc., and required the omitted party to be brought in, (*Gates v. Lane*, 44 Cal. 396,) and plaintiff's counsel ought to have amended his complaint.

Judgment and order reversed, and cause remanded, with direction to the court to allow parties to amend their pleadings.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.

70 Cal. 51

Ex parte STICE. (No. 20,205.)

(Supreme Court of California. June 24, 1886.)

1. WITNESS—PRIVILEGE—REFUSAL OF WITNESS TO BE SWORN—CONTEMPT.

Refusal of a person to be sworn as a witness, or to obey an order of court that he be so sworn, is a contempt of court, and may be punished as such; and it is no excuse that the person sets up as his reason for the refusal that his testimony would tend to subject him to punishment for a felony.

2. SAME—PRIVILEGE—REFUSAL TO BE SWORN.

A person called as a witness cannot refuse to be sworn on the ground that his testimony would tend to subject him to punishment for a felony, nor can he urge such privilege until a question is put to him, after being sworn, the answer to which would have such tendency; and the court would then decide whether the answer would have such an effect.

3. SAME—COMPETENCY—PRIVILEGE.

Under the California law the state is not prohibited from calling a party proceeded against in one information to testify against a defendant charged in another and different information; the former, when so called as a witness, however, retaining his right to object to answering a question put to him by reason of its tendency to criminate him.

4. SAME—REFUSAL OF WITNESS TO BE SWORN—CONTEMPT.

A refusal to be sworn as a witness on one day, and infliction of penalty and suffering of punishment for contempt in refusing to obey the order of the court to be sworn, will not prevent the court from again inflicting punishment for another and subsequent refusal to be sworn in the same case, on another day, this not being the case of double punishment for one offense; but each refusal being a separate offense, punishable separately.

In bank. Application for discharge on *habeas corpus*.
D. M. Delmas, for petitioner.

THORNTON, J. Petition by Stice for discharge on writ of *habeas corpus*. The return shows that the petitioner, Stice, is in the custody of the sheriff of San Benito county by virtue of a commitment of the superior court of that county, of which the following is a copy:

"IN THE SUPERIOR COURT OF SAN BENITO COUNTY.

"State of California v. J. F. Prewett.

"On this first day of March, 1886, at the hour of 2 o'clock P. M., the above-named cause was upon trial in the above-entitled court, and Richmond Stice was called as a witness for the people, and was ordered by the said court to be sworn as a witness; and thereupon, in the immediate view and presence of the said court, he did refuse to be so sworn as a witness; whereupon it is adjudged that said Richmond Stice is guilty of a contempt of court in refusing to be so sworn as a witness, and as a penalty thereof it is ordered, adjudged, and decreed that Richmond Stice pay a fine of five hundred dollars, (\$500,) and that, in default of the payment thereof, he be imprisoned in the county jail of San Benito county until said fine be fully satisfied, in the proportion of one day's imprisonment for every dollar of the fine; and on the payment of such portion of said fine as shall not have been satisfied by imprisonment, at the rate above prescribed, that the defendant be discharged from custody.

"JAMES F. BREEN, Superior Judge."

That a failure to be sworn as a witness in a cause on trial is a contempt of court, we have no doubt. It is so declared by statute, (Code Civil Proc. § 1209, sub. 10,) and is so at common law. The court also ordered the petitioner to be sworn as a witness in the cause then on trial, which order he declined to obey. The court had power by law to make such order. A refusal to obey it was also a contempt. The court adjudged that petitioner was guilty of contempt in refusing to be sworn, and on such adjudication imposed a punishment within the statute. The court had full power to adjudge the contempt, and affix the penalty therefor. Code Civil Proc. § 1209.

It is no answer to a refusal to be sworn that the petitioner asserted at the time, as a reason for such refusal, that his testimony would have a tendency to subject him to punishment for a felony. Such privilege cannot be urged by the witness until a question is put to him, after being sworn, the answer to which would have the tendency stated above. Whether the answer to such question would be or might be of such tendency, the court in which the trial is proceeding must adjudge,—Whart. Crim. Ev. (9th Ed.) § 469,—and it cannot be called on to do so in advance of the question being put. To hold that the reason stated above would justify a person called in refusing to be sworn would be to make such person, and not the court, the final judge, and exclude the court from any consideration of the matter whatever. Such is not and cannot be the law. On the question presented to the court the reason urged by the petitioner called for no consideration, for the right claimed by petitioner remained to him after he was sworn. He was deprived of no such right by taking the oath as a witness. Under such circumstances, the jurisdiction of the court to adjudge a party guilty of and punish for a contempt was in nowise affected.

But it is said the petitioner was charged, by information, in the same court, with the same murder for which Prewett was then on trial; that the information was then pending untried against him, and that he was in fact a co-defendant with Prewett, the party on trial in said charge; that, by reason of the foregoing, petitioner was incompetent, and could not be called as a witness, and there was no law empowering the court to order him to be sworn. Let it be conceded, for argument's sake, that if the petitioner was incompetent to testify, he had a right to refuse to be sworn, and that the court could not make a lawful rule that he be sworn. It was admitted on the hearing that petitioner was not a defendant in the same information with Prewett, but charged in another and distinct one. By section 1321, Pen. Code, it is provided that "the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code." The rules for determining the competency of

witnesses in civil actions are prescribed by sections 1879, 1880, 1881, Code Civil Proc. We find nothing in these sections making a party to an action, whether civil or criminal, incompetent as a witness. On the contrary, it is expressly declared that they are not excluded, or rendered incompetent, except in the special case mentioned in the third subdivision of section 1881, and that special case does not embrace the cause before us. In the Penal Code there are some express prohibitions in sections 1322 and 1323. Neither of these sections has any application to the case. The first (section 1322) relates to husband and wife, where both are parties to a criminal action or proceeding, and the second (section 1323) relates to a defendant in a criminal action or proceeding, and forbids his being compelled to be a witness against himself. It is manifest that the case before us is not embraced within the two sections just mentioned.

But it is insisted there are certain implied prohibitions in sections 1099 and 1100 of the Penal Code which rendered the petitioner incompetent. Those sections are as follows:

"Sec. 1099. When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people.

"Sec. 1100. When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant."

To understand these two sections, the next succeeding section must be considered, which provides that "the order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense."

We find no provision in sections 1099 and 1100 changing the provisions of the Code of Civil Procedure above referred to as to the competency of witnesses, or prohibiting a party not included in the same indictment or information from being called as a witness by either party to it. By the operation of section 1101 the defendant, when discharged under sections 1099 and 1100, is acquitted of the offense stated in the indictment or information, and when he is called as a witness after such discharge he cannot be allowed to say that anything he may state in his testimony will tend to convict him as regards the offense of which he stands acquitted. He will, under such circumstances, be more at liberty in answering the questions put to him, and will not be hampered by any apprehension of saying anything which may be used against him. He will, as regards the offense about which he is called to testify, feel no restraint whatever from fear of convicting himself. For this object the sections under consideration were enacted. They are enabling in their character; but they do not prohibit the district attorney, representing the state, from calling a party proceeded against in one information to testify against a defendant charged in another and different information; the defendant, when so called as a witness, retaining his right to object to answering a question put to him by reason of its tendency to criminate him. It would seem that the district attorney would have the same right when two or more defendants are charged in the same indictment or information, and neither elects to be tried separately. But this need not be decided, as Stice is not such a defendant. As stated above, he is charged in an information other and distinct from that in which Prewett was on trial.

We construe the words, "when two or more persons are included in the same charge," in section 1099, as meaning the same as the words, "when two or more persons are included in the same indictment or information," in section 1100. That this is so is manifest from the words which follow the

above, quoted from section 1099. We cannot admit the correctness of the contention urged by the learned counsel for petitioner, that the words just above quoted from section 1099 mean parties proceeded against for the same offense, though in different informations or indictments. If such contention be allowed, no meaning would be attributed to the words of the section following those above given, viz., "the court may at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people." We are of opinion that the words "any defendant" refer to a defendant included in the information or indictment on which the trial is proceeding, and not to a defendant charged in another and distinct information or indictment.

We are of opinion that the witness was competent; that he had no right to refuse to be sworn; that the order of the court that he be sworn was a lawful one, for the disobedience of which he was guilty of contempt, to punish which the superior court had jurisdiction.

But it is said the court had no jurisdiction to make the order of the first of March, 1886, under which the commitment was had by reason of what follows: On the twenty-seventh of February, 1886, while the same trial (that of Prewett) was proceeding in which the order of March 1, 1886, above stated, was made, Stice was called as a witness, and was ordered by the court to be sworn as a witness, and he refused; whereupon he was, by the court, adjudged guilty of contempt of court. Thereupon the following order was made:

"[Title of court and cause.] On this twenty-seventh day of February, 1886, the above-named case was on trial before a jury, in the above-entitled court, and Richmond Stice was called in said cause as a witness, and he was ordered by the court to be sworn as a witness, and he refused to be so sworn; whereupon he was, by the court, adjudged guilty of contempt of court: Now, therefore, it is ordered, adjudged, and decreed that said Richmond Stice be, and he is hereby, committed to the county jail of San Benito county, to be there confined and detained until Monday, the first day of March, 1886, at 10 o'clock A. M. JAMES F. BREEN, Superior Judge."

Under this order Stice was taken into custody by the sheriff, and so held until 10 o'clock A. M., on Monday, the first day of March. On the first of March, 1886, after 2 o'clock P. M., the order on which the imprisonment is had from which the petitioner here seeks to be discharged was made. (See order quoted above.)

Now, it is contended that the refusal to be sworn in the same case is but one offense; that Stice had refused to be sworn on the twenty-ninth of February, 1886, for which he had been punished under the order of that date; that when he refused to be sworn on the first of March he was guilty of the same offense, and no other, for which he had been punished by the order of the twenty-seventh of February; that the penalty inflicted by the order last in date is an additional punishment for one and the same offense, which the court was without jurisdiction to impose. We do not think that the refusal to be sworn on the first of March was the same offense for which the petitioner had already been punished. On the contrary, we think it was a different one. The petitioner was again called as a witness on the first of March. This the district attorney had a right to do. When Stice refused then to be sworn the court had full power to order him to be sworn, and his refusal to obey such order was a contempt of court, for which the superior court of San Benito county had jurisdiction to punish him.

It is argued that if the law be such as is here held there will be no limit to the making of such orders; that a party may be called as a witness every day, or every hour in the day, during a protracted trial, and on each refusal to be sworn a penalty might be inflicted, to the great oppression of the subject of

it. Such a course would be a great and unjustifiable abuse of power. There is no such case before us. Nor do we anticipate that such an extreme course will be pursued by any court.

In this case the court ruled within its jurisdiction. The petitioner must be remanded to the custody of the sheriff. So ordered.

We concur: MCKINSTRY, J.; MYRICK, J.; MCKEE, J.; SHARPSTEIN, J.

(69 Cal. 572)

REAY v. BUTLER and another. (No. 8,937.)

(Supreme Court of California. May 24, 1886.)

1. EJECTMENT—LANDLORD AND TENANT.

In California, in actions of ejectment, (even though commenced prior to the adoption of section 379 of the Code of Civil Procedure,) where the defendant answers averring that he is the tenant of one who asks permission to defend the action, the latter, as landlord and owner, will be permitted to defend, as a matter of course, on notice and motion.

2. EXCEPTIONS—BILL OF EXCEPTIONS—PRESUMPTION IN FAVOR OF REGULARITY.

Unless it expressly appears from the record that the regular steps were not taken for the settlement of the bill of exceptions, the appellate court will presume that the bill was regularly settled.

3. SAME—BILL OF EXCEPTIONS—ASSIGNMENT OF ERRORS.

There is no requirement in the California statute that a bill of exceptions should contain an assignment of errors of law.

4. SAME—BILL OF EXCEPTIONS—TIME FOR SETTLEMENT.

That a bill of exceptions was not settled until after an appeal was taken, is, of itself, no objection to it, as its settlement may have been thus postponed for sufficient reasons, and, nothing appearing to the contrary, the court will presume that such was the case.

5. SAME—BILL OF EXCEPTIONS—CERTIFICATION—TIME FOR FILING.

That a bill of exceptions was not filed until more than six months after it was allowed by the judge, is no reason why it should be disregarded, if it comes properly certified as a part of the record of the court below, and it must be so treated in this court.

6. EJECTMENT—INTERVENTION—LANDLORD AND TENANT—EQUITY.

In an action of ejectment against a tenant his landlord may intervene, and set up any equitable defenses which he might have to the action.

7. SAME—EQUITABLE DEFENSES.

In an action of ejectment against a tenant in possession, when the defendant's landlord intervenes, no equitable issues are disclosed by the landlord's pleadings where nothing more is averred than an unexecuted design, by collusion between the tenants of the intervenor and the plaintiff, to allow a judgment by default against the defendant before the landlord was informed of it.

8. SAME—EQUITABLE DEFENSES—CLOUD UPON TITLE.

Where, in an action in ejectment, a person claiming the premises intervenes, and avers that plaintiff's claim is invalid and unfounded, and is a cloud upon the intervenor's title, this is not sufficient to entitle the intervenor to invoke the aid of a court of equity.

9. APPEAL—FROM ORDER REFUSING TO VACATE JUDGMENT.

Where an appeal has been taken from a judgment, any grievance which the plaintiff suffered could be redressed thereby, and under such circumstances the court will not take jurisdiction of an appeal in the same case from an order denying a motion to vacate the judgment.

In bank. Appeal from superior court, city and county of San Francisco. *Flournoy & Mhoon*, for appellant. *Fisher Ames* and *W. C. Burnett*, for respondent.

THORNTON, J. On the twentieth of February, 1866, the plaintiff commenced an action to recover of defendants possession of a lot of land situate
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in the city and county of San Francisco. The complaint is in the usual form in the action of "ejectment," so-called, in this state. To this complaint the defendants, by J. P. Treadwell, as their attorney, filed an answer. The answer denies each and every allegation of the complaint, and then proceeds, for a further and separate answer, to aver that J. P. Treadwell, at all times in the complaint mentioned, and long before, was, and ever since has been, and still is, the owner of, and in possession and occupation and entitled to the possession of, the land in the complaint described; and that the possession of said land by the defendant supposed in the complaint was under and by leave of said Treadwell, and in subordination to his right and title, and not otherwise; and that said Treadwell is ready and willing to and does defend this action as landlord and owner of the demanded premises. The answer thus concludes: "Wherefore defendants pray that an order of court may be made allowing said Treadwell to defend this action, and that they be hence dismissed, and for costs of suit."

This answer was filed on the second of March, 1866. That the order allowing Treadwell to defend the action would have followed as of course, on notice and motion, we regard as settled in this state. *Dutton v. Warschauer*, 21 Cal. 609; *Calderwood v. Brooks*, 28 Cal. 151; *Dimick v. Deringer*, 32 Cal. 488; *Valentine v. Mahoney*, 37 Cal. 389. That in the condition in which the cause stood, on the filing of the answer, Treadwell, by a notice and motion, which would have been granted as soon as made, would have been constituted so far *dominus litis* that no judgment could have been procured in the cause by a fraud or trick, without his knowledge and ability to protect himself, is well settled by the rulings in this state. *Dutton v. Warschauer* and *Valentine v. Mahoney*, *supra*. It should be remarked here that the pleadings in the cause were filed before the adoption of the provision in the Code of Civil Procedure (see section 379) allowing the landlord to be made a party.

The statement above made exhibits the condition of the cause when an intervention by J. P. Treadwell, the same person who signed the answer as attorney for defendants, was allowed to be filed. This pleading begins with the statement that the intervenor has an interest in the subject of the action, and against maintaining the same, against both plaintiffs and defendants; and then proceeds to state that at the time this action was commenced, and long before, the intervenor, Treadwell, was, ever since has been, and still is, the owner, and in the exclusive possession and occupation, of all that part of the demanded premises, known as and called "Speck Ranch" or "Treadwell Ranch;" that, while he was so owner and in possession, the plaintiff and defendants, with other persons unknown to the intervenor, confederated together to defraud him, and to trick him out of the possession of his said land, by means of a clandestine suit in ejectment therefor, to be brought by the plaintiff against defendants, and in which they should suffer the plaintiff to obtain judgment and possession by default before the intervenor should have notice thereof; that in pursuance of this conspiracy, while the intervenor was in possession, defendant Owens executed a certain pretended conveyance of said ranch to the plaintiff, who intends to rely on the same as color of title; that on February 16, 1866, said Owens made a contract with the intervenor to go on the ranch, and do the carpenter work in erecting a small dwelling-house on said ranch; that Owens then employed defendant Butler as a carpenter, to aid him in doing the work for the intervenor, on which Butler first went on the ranch in furtherance of the conspiracy; that plaintiff, in pursuance of said conspiracy, then employed a lawyer, (Peter Dempsey,) as his attorney, who accordingly did draw up the complaint in this action against defendants, and caused them to be therein summoned in February, 1866; that the plaintiff and his said attorney then requested and procured the defendants to conceal from this intervenor all knowledge of the fact that they had been summoned, or this suit had been commenced, and to delay said work un-

til judgment by default had been entered against them, and plaintiff put in possession by the sheriff, and also paid the defendants a sum of money, and promised to pay them more, so as to aid them in the conspiracy; and defendants, induced thereby, did delay the work for several days, and concealed from intervenor all knowledge of the suit or service of summons on them until the tenth day thereafter, when the said conspirators fell out among themselves as to the division of the spoil, and a knowledge of the same then first came to the knowledge of the intervenor; and the intervenor shows that at the time this action was commenced neither of the defendants was in possession or occupation of any part of the land described in the complaint, or claiming any right or interest therein, and that they do not defend this action themselves.

It is further stated that the defendants never resided on the said land mentioned herein; that the plaintiff was informed of and well knew that defendants never were in possession of, and claimed no interest in, the land described in the complaint, each and every allegation of which is untrue; that the plaintiff claims some right or interest in the land described in the petition, *which latter is* within the demanded premises, but in fact his claim is without right, invalid, and is a cloud—and especially said pretended deed from Owens is a cloud—on this intervenor's title; and the plaintiff has continued, and is intending to prosecute, another clandestine and fraudulent suit of ejectment thereon *against the intervenor's servants* in charge of said ranch without the intervenor's knowledge, and thereby trick him out of the possession thereof; that the plaintiff *ought to be compelled to set forth his claim, and the same ought to be declared invalid and barred as against the intervenor*, and the intervenor quieted in his title and possession of said ranch against all claims by the plaintiff thereto.

The prayer of the petition is as follows: "Wherefore this intervenor prays that this action by the plaintiff against the defendants, Butler and Owens, may be adjudged fraudulent against the intervenor, and that the plaintiff be restrained from commencing or prosecuting any other action to recover said ranch against defendants, or any servant of the intervenor; and that all claims by the plaintiff to said ranch may be barred and declared to be invalid as against intervenor, and the intervenor quieted in his title and possession against the same; and that the plaintiff may be decreed to pay the intervenor the expenses to which he has been hitherto put by this clandestine action against the defendants, and also his costs of this intervention, and also for such other, further, and different relief as he ought to have."

Every material allegation of this petition was denied by Reay.

A bill of exceptions, filed December 21, 1882, is in the record, which it is contended should be disregarded, on the ground that it was not settled in time. It appears from the certificate of the judge that it was settled on the tenth of June, 1882. The notice of appeal was served and filed on the thirtieth of December, 1880, and the contention seems to be that the bill could not be settled so long after the appeal was taken. But it nowhere appears that the bill was not presented in time, and the regular steps taken for its settlement. The settlement may have been postponed by the order of the judge. It must appear to this court from the record that the regular steps were not taken for the settlement of the bill. Unless this appears, we are bound to presume the will was regularly settled. A mere objection to such settlement, in the absence of the showing above stated, does not authorize this court to disregard the bill.

It is said that there is no assignment of errors in the bill as settled. We presume the errors here referred to are "errors of law." There is no requirement in the statute that the bill should contain any such assignment. That the bill was not settled until after the appeal was taken, is no objection to it. Its settlement may have been thus postponed for sufficient reasons, and, nothing appearing to the contrary, we must presume that such was the case.

It is said that the bill was not filed until more than six months after it was allowed by the judge. We do not consider this a reason why it should be disregarded. It comes here properly certified, as a part of the record of the court below, and it must be so treated in this court. The delay in filing it after the settlement does not authorize this court to disregard it.

As shown by the above bill of exceptions, on the eighth of February, 1868, the plaintiff moved to strike out the above intervention, on the ground that an intervention is not proper in an action of ejectment. This motion was denied, and plaintiff excepted to the ruling. As further appears from the same bill, the cause came on regularly for trial on the twenty-fifth of September, 1867, before the court and a jury. Thereupon the following occurred, as stated in the bill: "Plaintiff was sworn as a witness, and was testifying in his own behalf in the case, when the court called for the reading of the pleadings. And thereupon was read the plaintiff's complaint, and the answer thereto, and the intervenor's complaint in intervention, with proof of service thereon on the plaintiff and the defendants, Butler and Owens, and the entry of default of the two latter for not answering the intervention, and also the plaintiff's answer to the intervention, a copy of which is in the judgment roll. The court said if the conspiracy and frauds alleged in the complaint of intervention were true, as there stated, they concern the court as well as the intervenor, and that the court would protect itself against attempted impositions upon it; that it was a matter of equitable cognizance that could not well be tried before a jury, and that it might be proper to have a preliminary inquiry as to that. The intervenor then moved the court that the equitable issues in the pleadings be first tried and determined without a jury. The plaintiff objected to the same on the ground that the court had no jurisdiction to discharge said jury. The court overruled said objection, and discharged said jury, and granted said motion; and ordered said equitable issues to be first tried before the court without a jury; to all of which plaintiff then and there duly excepted."

It may be conceded that a landlord might have been allowed to intervene and defend an action of ejectment brought against his tenants in their name; in accordance with the law regulating procedure in the courts of this state, at the time Treadwell was allowed to file the intervention in this case. This, we think, was held by this court in *Dutton v. Warschauer*, 21 Cal. 609, and it was substantially so held in *Porter v. Garrissino*, 51 Cal. 560, 561; though a distinction seems to be there made between an intervention under the statute and the leave given to a landlord to defend in the name of his tenant, (St. May 15, 1854; St. 1854, p. 73, §§ 71, 72, 73, 74,) of which distinction we will say that it appears to us to be one without a difference. The foregoing intervention by the landlord in this case to defend in the name of his tenants, however, extends only to the defenses which may be made at law. And, for the purposes of this case, it may also be conceded that the landlord might have been permitted to intervene, and set up any equitable defenses which he might have to the action.

But if the landlord is allowed to intervene, and set up a defense in equity, it must certainly be a defense of that character. In this case it appears that the court treated the intervention as setting up an equitable defense, and after the trial of the action at law had commenced, the court, against the objection and exception of plaintiff, discharged the jury in order to try and determine the equitable issues. This it proceeded to do against the objection and exception of plaintiff, and rendered a judgment perpetually enjoining plaintiff from further prosecuting his action, and from all further proceedings in the cause; and further enjoining him from bringing and prosecuting any other action of ejectment for the Speck ranch—the land in the complaint and the complaint of intervention described—against the tenants and servants of the intervenor, by collusion with them not to inform the in-

tervenor thereof. The court did, in effect, dismiss the plaintiff's action without any trial of the issues joined by the complaint and answer. Truly, this was a novel proceeding.

What the equitable issues were, disclosed by the intervention or the pleadings, we are unable to discover. We find nothing more averred than an unexecuted design, by collusion between the tenants of the intervenor and plaintiff, to allow a judgment by default against the defendants before the landlord was informed of it. This design was abandoned, and made known to the landlord (intervenor) in time to file an answer, which effectually put it out of the power of the colluders to effect it; for after answer filed there could be no default or judgment without the knowledge of the landlord. There was then no fraud which any court could be called on to redress. An unexecuted and abandoned intention to commit a fraud is not, in contemplation of the law, a fraud. *Fraud without damage* calls for no redress from any court. However in morals such conduct may be censurable, it is not regarded by the law as of sufficient consequence to put in operation the machinery of courts. It may be added here that the petition of intervention shows that the defendants in the action had abandoned all defense to the action, for it is expressly stated that "they [the defendants are here referred to] do not defend in this action themselves."

The further averment that plaintiff's claim is *invalid and unfounded, and is a cloud upon the intervenor's title*, is not sufficient to entitle the intervenor to invoke the aid of a court of equity. Let it be remarked that a party may be allowed to invoke the powers of a court of equity to remove a cloud from his title, where the defendant, setting up such a claim, fails or refuses to bring an action by which the claims of the respective parties may be determined, but, clearly, this cannot be the case where the person setting up such unfounded claim brings an action in which the respective claims of the opposing parties may be passed on and determined by due course of law, and challenges a trial of such claims. The only matter averred to be a cloud upon Treadwell's title is a deed averred to have been executed by defendant Owens to the plaintiff, or some other of the confederates, who has since executed a deed to plaintiff. If such was the character of the deed, its effect could be determined in the action at law, which action was, in course of trial, urged by plaintiff, with the result above stated. When the legal remedy was at hand, it was strange that the intervenor should have urged the court to turn aside from it, for relief in a forum only allowable where a court of law could not afford redress.

After the allegations just above referred to as to the character of plaintiff's title, there follow these allegations: "And the plaintiff has continued and is intending to prosecute another clandestine and fraudulent suit of ejectment thereon against the intervenor's servants in charge of said ranch, without the intervenor's knowledge, and thereby trick this intervenor out of possession thereof; that the plaintiff ought to be compelled to set forth his said claim, and the same ought to be declared to be invalid and barred as against this intervenor, and the intervenor quieted in his title and possession of said ranch against all claim by the plaintiff thereto."

There does not seem to be any relation or connection of any sort between plaintiff and intervenor demanding equitable cognizance. So far as it appears from the pleadings, it is only that of one person setting up a claim to land in possession of another. Such being the case, there is no reason why the powers of a court of equity should be invoked by a complainant to prevent another from bringing a suit against him, alleged to be clandestine and fraudulent, with a view to trick him out of possession of land. How the suit contemplated is fraudulent is not stated. Such an allegation is not of a character to demand the consideration of a court of justice. The facts should be averred from which it would appear to the court that the suit is

fraudulent. As to its being clandestine, actions must be brought by filing a complaint in a public office, with a public officer, and procuring a summons from that officer, sealed with the seal of the court. Allegations of the character above mentioned would hardly call into operation the powers of a court of equity. Further, to determine whether the suit is fraudulent or not, it would have to be tried, and it would not be expected that a court of equity would spend its time in trying an action to determine whether it is conceived in fraud to prevent its being heard and determined in another forum, equally competent to determine it. Again, the trick apprehended would be easy of redress in the court where the action was brought. The possession so obtained by collusion with the servants of the intervenor would be of brief duration, the intervenor would be promptly restored to a possession out of which he had been tricked, and the judgment vacated in the same court in which it had been procured. That this can be and should be done we have no doubt.

Dimick v. Deringer, 32 Cal. 488, was not a case apprehended by the intervenor. In that action, which was ejectment, the landlord, O'Hara, was made a party defendant along with the tenants, Deringer and McDonald. Deringer and McDonald suffered default, and the action was dismissed as to O'Hara. A judgment was then entered against Deringer and McDonald on their default, and, on a writ of execution issued on this judgment, Dimick was put in possession. The court below, on motion and affidavit of O'Hara, ordered a perpetual stay of execution; that the sheriff restore Dimick and O'Hara to possession of the land; that the order dismissing the action as to O'Hara be set aside, and the cause be restored to the calendar for trial. A similar order was made as to another tenant, who was turned out under the writ. This court dismissed the appeal from the order vacating the order dismissing the action, and restoring it for trial as to O'Hara, on the ground that such order was not appealable, reversed the other orders, and remanded the cause; remarking at the same time, as to the order the appeal from which was dismissed, that permitting it to stand would be of no service to O'Hara, as she did not propose to file a counter-claim. The court had, antecedently to this remark, stated in the opinion that, inasmuch as O'Hara was not in possession when the action was commenced, she was neither a necessary nor proper party to the action, and that the court below on the trial would, on motion, order a nonsuit as to her.

In this cause, it will be observed, the landlord was a party, and permitted the action to be dismissed as to her though she was informed of the pendency of the action against her tenants and herself by the summons served on her. In this it differs from an action brought against the tenants alone, of which the landlord knew nothing. This latter is the character of the action apprehended by the intervenor. Under such circumstances the landlord, (Treadwell,) knowing nothing of the action, would certainly be relieved by the court in which the action was brought from a judgment by default, taken by collusion between a plaintiff and his tenants, and a possession obtained by a writ issued upon it. As we are of opinion that the court in which the action was pending on motion would relieve in the case stated by intervenor, we see no reason why a resort should be allowed to a court of equity for relief.

If the prayer of the complaint gives character to the action, it would seem that the intervenor in this cause was attempting to change an action of ejectment into an action to quiet title. In *Doyle v. Franklin*, 40 Cal. 106, it was held that an action of the latter character is not an equitable defense to the action of ejectment. We can perceive no reason why such a defense should be allowed at all, either at law or in equity, in the action of ejectment, for the judgment in favor of defendant in the ejectment, being a bar to any other action in which the same matters are in issue, would be as effectual a protec-

tion to the defendant as a decree quieting his title against plaintiff. See *Doyle v. Franklin, supra*.

Further, conceding the averments of the complaint in intervention to be true, Treadwell could not be turned out of possession under a judgment against the defendants. It is stated in the complaint that before the action was commenced, and ever since, he has and had been in the possession and occupation of the land in controversy, and that the defendants never had any possession whatever of such land. How one in possession of land can be turned out of his possession on a writ issued on a judgment rendered in an action to which he was not a party, in which he was never heard, and where the defendants were never in possession, we cannot comprehend. To hold otherwise would be contrary to rules settled by numerous decisions of this court, and violative of every principle of right.

We cannot find in the intervention or pleadings any equitable issues to be tried. So far as the intervention shows any matters of defense, they can be made under the answer. The action, then, was purely one at law, in which the plaintiff was entitled under the constitution, to a trial of the issues by a jury, and the court erred in discharging the jury against plaintiff's objections.

In our judgment the petition of intervention did not state facts sufficient to constitute a ground of intervention, and the court erred in considering it at all.

The court below seems to have derived the impression from the allegations of conspiracy and frauds in the complaint in intervention that it was called on to protect itself from imposition. Conceding it to be so, would it not have been better to test the matter by trying the issues in the cause, and ascertain whether the action was so far without foundation as to call for action on the part of the court on the ground that an imposition was practiced, or attempted to be practiced, on it? If such should have turned out to be the case, it could have been nothing more than an abuse of the process of the court which would have constituted a contempt (Code Civil Proc. 1209) for which the plaintiff might have been proceeded against and punished. But, certainly, a suit which the plaintiff cannot maintain would rarely afford grounds for such proceeding, any more than would an unmaintainable defense. Such action may be instituted in entire good faith, and, if so, there would be no abuse of process. The law affords redress against parties bringing such actions by the costs which they incur, and which are taxed against them and in favor of the successful party. And if the action is instituted and prosecuted maliciously, and with reasonable or probable cause, the party aggrieved may have his action for damages, and recover the expense incurred by him beyond the taxable costs. *Eastin v. Bank of Stockton*, 4 Pac. Rep. 1106. But, certainly, the court would be acting in the line of its duty, and maintaining its dignity in trying the issues joined in the cause. And we find nothing in the record in this case which excused the court from proceeding regularly to try the issues joined by the complaint and answer. We think, for the reasons above given, that the intervenor would have found ample protection had this course been pursued.

The appeal from the order refusing to vacate the judgment should be dismissed. Any grievances which the plaintiff suffered could be redressed by an appeal from the judgment, and, under such circumstances, this court will not take jurisdiction of an appeal from an order denying a motion to vacate it. *Henly v. Hastings*, 3 Cal. 342; *Holmes v. McCleary*, 63 Cal. 497; *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 295; S. C. 4 Pac. Rep. 13.

The judgment should be reversed, and the cause remanded, with directions to strike out the intervention so that the trial may be had by a jury, if not waived, of the issues raised on the complaint and answer; the represent-

ative of the intervenor, who has died since the action was commenced, to be allowed to defend in the name of the defendants, all proceedings on the new trial to be in accordance with what is said herein, and the appeal from the order refusing to vacate the judgment be dismissed. Ordered accordingly.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKEE, J.; MCKINSTRY, J.

70 Cal. 17

PEOPLE v. HORN. (No. 20,150.)

(Supreme Court of California. May 31, 1886.)

CRIMINAL LAW—ONCE IN JEOPARDY—INSTRUCTION—VERDICT.

Where a defendant was properly placed on his trial, for an assault with a deadly weapon, and, after hearing witnesses, the court, on motion of the defendant, instructed the jury to acquit the defendant, whereupon the jury retired, and, after deliberating, returned into court, and rendered a verdict of "not guilty," such defendant has been once in jeopardy, and cannot be retried, though the court had no power to so instruct the jury to acquit, but was only authorized to advise them.

In bank. Appeal from superior court, county of Sierra.

The Attorney General, for appellant. Van Chief & Wehe, for respondent.

MCKINSTRY, J. The information, charging the defendant with an assault with a deadly weapon, is valid and regular in form. To the information the defendant pleaded not guilty. The issue came on regularly to be tried by a jury, and certain witnesses were called and sworn on behalf of the prosecution, and gave testimony. The court, on motion of the defendant, instructed the jury to acquit the defendant. Whereupon the jury retired, and returned into court, and rendered verdict of "not guilty." The district attorney excepted to the order of the court directing the jury to acquit the defendant. The people have appealed from the order directing the jury to find for the defendant. Penal Code, § 1238. Prior to April 9, 1880, section 1238 did not contain the subdivision which purports to authorize such an appeal. The Criminal Practice Act in force prior to the codes provided for an appeal to the supreme court by the party aggrieved, "whether that party be the people or the defendant." Section 481, Hitt. Gen. Laws, par. 2068. The defendant here has been once in jeopardy, and he has been once acquitted. He cannot be twice put in jeopardy. Const. art. 1, § 13. If a party is once placed upon his trial before a competent court and jury, upon a valid indictment, the "jeopardy" attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent; or, in case a verdict is rendered, if it be set aside at his instance. *People v. Webb*, 38 Cal. 467.

The court was only authorized to "advise" the jury to acquit, and the jury were not bound by the advice. Pen. Code, 1118. Here the bill of exceptions reads that the court "instructed" the jury, but the jury retired and deliberated before rendering the verdict "not guilty." They were permitted to retire for deliberation, and found a verdict; *non constat* that they did not act on the evidence. The request of the defendant that the court "instruct" should have been denied, but the court was authorized to "advise" an acquittal. It is no reason for setting aside the direction that the defendant consented to a verdict in his favor. We cannot here inquire whether the verdict was sustained by the evidence. "If, through misdirection of the judge in matter of law, * * * a verdict is improperly rendered, it can never afterwards, on application of the prosecution in any form of proceeding, be set aside." Bish. Crim. Law, cited by SAWYER, J., in *People v. Webb*, *supra*.

"A legislative provision for the rehearing of a criminal cause cannot be interpreted to violate the constitutional rule." 1 Bish. Crim. Law, 665.

Order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; ROSS, J.; MYRICK, J.; THORNTON, J.; MCKEE, J.

70 Cal. 69

In re Estate of RICARD, Deceased. (No. 9,393.)

(*Supreme Court of California. June 26, 1886.*)

EXECUTORS AND ADMINISTRATORS—RIGHT TO COMMISSIONS.

Executors of the estate of a deceased person are entitled to commissions for the value of the estate taken into their possession and accounted for by them; but they are not entitled to commissions upon a piece of land of which the deceased died seized and possessed, and which was inventoried as part of the estate, and which was taken into the possession of the executors, where suit for the possession thereof had been pending during the life-time of the deceased, of which suit the executors assumed the defense, and in which suit judgment was finally rendered against them, since in such case the land itself did not belong to the estate; it was therefore no part of its assets, and its value did not form any part of the value of the estate in the possession of the executors for which they were chargeable.

Department 2. Appeal from the superior court, city and county of San Francisco.

Jarboe & Harrison, for appellant. *A. P. Needles, H. A. Powell, S. S. Wright*, and *F. J. French*, for respondent.

MCKEE, J. On the first of April, 1877, Jean P. Ricard died in the city and county of San Francisco, seized and possessed of certain real property, which was inventoried by the executors of his last will and testament as assets of his estate, and appraised at \$7,500. But at the time of his death there was pending against him an action to recover possession of the property, and after his death the executors took possession of the property, assumed defense of the action, and continued to defend it until October, 1882, when judgment was finally rendered against them; after which they surrendered the possession to the plaintiff in the judgment. Before the surrender, the executors had collected from the property rents amounting to the sum of \$2,608.50, for which they accounted in their annual accounts. On the filing of the final account of their administration, they presented a claim of \$900.99 for commissions upon the sum of \$19,524, being the appraisement contained in the inventory; but the court, upon a hearing of an exception taken to the allowance of the claim, deducted the sum of \$7,500, the appraised value of the real property which the executors had surrendered to the true owner, and awarded the executors commissions upon the sum of the balance of the appraisement in the inventory, and of the rents collected for which the executors had accounted. It is insisted that the executors were entitled to commissions on the entire appraisement contained in the inventory; and that is the question.

The whole of the estate of a deceased person which may come into the possession of the executor or administrator, (with the interest, profit, and income thereof,) except such parts of it as may have decreased or been destroyed without his fault, must be accounted for, upon the basis of the inventory, in the final settlement of the administration. In such accounting the court, in the exercise of its jurisdiction of the estate and its administration, is authorized to allow the executor or administrator for all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting necessary proceedings or suits in courts, and, for his services, commissions allowed by law, "upon the amount of the estate accounted for by him." Sections 1613, 1614, 1616, 1618, Code Civil Proc. The value of the estate taken into his possession and accounted for

by him is therefore made the basis for the allowance of commissions. *In re Simmons*, 43 Cal. 543; *In re Isaacs*, 30 Cal. 113.

Admittedly, the executors took possession of the land, which was inventoried as part of the estate, and appraised at \$7,500. But the estate had no other interest in it than possession. That interest the executors took and maintained until it was taken from them by process of law. They have accounted for it, and were allowed commissions upon the rents which it yielded. But the land itself did not belong to the estate. It was therefore no part of its assets, and its value did not form any part of the value of the estate in the possession of the executors for which they were chargeable; therefore, as it was not legally included in the value of the estate taken into their possession, and for which they had to account, they were not entitled to commissions upon it. Order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

70 Cal. 59

PEOPLE v. COLE. (No. 9,619.)

(Supreme Court of California. June 25, 1886.)

I. LICENSES—LICENSE TAX—TIME FOR FIXING, IN CALIFORNIA.

Subdivision 3 of section 4045 of the Political Code of California is substantially complied with if the matter of fixing rates for county licenses comes on before the board of supervisors on the first Monday in October, and is continued from day to day, and an ordinance therefor is finally passed. It is not a proper construction of the language of the statute to hold that all power over the subject is to cease with the end of the first Monday; but the statute is more properly construed so as to allow a substantial compliance by holding that it is sufficient if the board take up the subject for consideration, and conclude it as soon as may be.

2. COUNTIES—BOARD OF SUPERVISORS—ORDINANCES—LICENSES.

Under the California county government act it is not required that county ordinances, to be effective, shall be first recorded, publication and posting being all that is made necessary.

In bank. Appeal from superior court, Fresno county.

E. D. Edwards and Sayle & Harris, for appellants. *Bennett & Wigginton*, for respondent.

MYRICK, J. Action to recover a license tax of \$106. The court below granted a nonsuit, and on this appeal two points are presented by the respondent as to the correctness of the ruling: (1) The ordinance was not passed on the first Monday of October, as required by subdivision 3, § 4045, Pol. Code. (2) The ordinance was not recorded by the clerk in the ordinance book until after the defendant made the sales complained of. "Act to establish a uniform system of county governments," approved March 14, 1883, sections 2 and 21.

It appears from the transcript that on Monday, October 1st, the matter of fixing rates for county licenses came on for consideration by the board of supervisors, and the board, by entry in its minutes, continued the matter until the 3d; on the 3d the matter was continued until the 4th; and on the 4th was again continued until the 5th; on the 5th the ordinance was passed by unanimous vote. We think this was a substantial compliance with the statute. We do not think a proper construction of the language of the statute is that all power over the subject is to cease with the end of the first Monday. We think, rather, a proper construction is that the board should on that day take up the subject for consideration, and conclude it as soon as may be. As said above, the ordinance was passed October 5th, and was duly signed and published as required by law; but was not recorded until about the first of February following. The sales complained of took place between the publication and the recording. It is claimed by the defendant, and the court below seems to have been of that opinion, that the document was not an ordinance until recorded. We do not read in the statute a requirement that the ordinance shall be recorded before it shall take effect. By the statute, publication or posting is made necessary before it takes effect, (section 26, act above referred to,) but not recording.

The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: ROSS, J.; SHARPSTEIN, J.; THORNTON, J.; MCKINSTRY, J.

69 Cal. 601

PEOPLE v. RODRIGO. (No. 20,169.)

(Supreme Court of California. May 25, 1886.)

1. CRIMINAL LAW—PRELIMINARY EXAMINATION—COMMITMENT.

An information will not be quashed, on the ground of illegality of the commitment, merely for slight informality or irregularity before the committing magistrate; but it must at least appear that the defendant was deprived of some substan-

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tial right. The mere omission by the district attorney or magistrate to ask of a witness his profession or business could not affect any substantial right of a defendant.

2. SAME—TRIAL—EVIDENCE—CHARACTER OF DEFENDANT.

Until it is shown that a witness has lived in the same county with or knows the defendant's general reputation in the county, it is not proper to question him in regard thereto.

3. ASSAULT AND BATTERY—INSTRUCTION—"DEADLY WEAPON" DEFINED.

There is no error in instructing a jury, on a trial for assault with a deadly weapon, that "a deadly weapon is any weapon or instrument by which death may be produced, or would be likely to be produced, when being used in the manner in which it may appear it was used in the affray. The jury are the judges as to whether the weapon was or was not a deadly weapon."

4. SAME—ASSAULT WITH DEADLY WEAPON—JUSTIFICATION—REASONABLE DOUBT.

In a prosecution for assault with a deadly weapon, it is not proper to instruct the jury that they must find defendant not guilty if they entertain a reasonable doubt that he acted under a reasonable apprehension of great bodily injury. If such a state of facts existed, still the defendant would not be justified, unless the use of a deadly weapon was necessary to prevent the injury.

5. SAME—ASSAULT WITH DEADLY WEAPON—BURDEN OF PROOF.

In a prosecution for assault with a deadly weapon, when the defendant sets up in defense no distinct and independent facts, but contends upon the facts and circumstances, as proved by the evidence, constituting the transaction charged as criminal, that he is not guilty, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the assault as charged was unjustifiable, and the burden of proof does not shift throughout the case.

6. WITNESS—IMPEACHMENT—CONVICTION OF FELONY.

A party seeking to impeach a witness may ask him with respect to a judgment in a prosecution for felony against him, and this includes the right to ask him whether he was convicted of felony, and, if so, what sentence was imposed on him.

In bank.

Information for assault with a deadly weapon. The facts are all stated in the opinion, except with relation to the following instruction, which was given at the request of the prosecution, viz.: "A 'deadly weapon' is any weapon or instrument by which death may be produced, or would be likely to be produced, when being used in the manner in which it may appear it was used in the affray. The jury are the judges as to whether the weapon was or was not a deadly weapon." The appellant's attorney objected to the instruction, on the ground that it was too extensive, inasmuch as under it there is no exception to anything material being a deadly weapon; and also on the ground that the latter sentence of the instruction stated that a deadly weapon had been used, whereas this was a matter for the jury.

W. I. Foley, for appellant. *The Attorney General*, for respondent.

McKINSTRY, J. The defendant was found guilty of an assault with a deadly weapon. The defendant moved to set aside the information on the ground that, before the filing thereof, he had not been legally committed by a magistrate. It is urged that the testimony taken before the committing magistrate was not taken as prescribed by section 869 of the Penal Code. But our attention has not been called to any particular defect or irregularity in the mode of taking the depositions, or in certifying the same, or in the order of commitment. The commitment is in accordance with the statute. Pen. Code, 872. Each deposition is signed by the witness. Each is signed and declared "approved," in writing, by the magistrate, which is a certification. Pen. Code, 869, subs. 4, 5. Subdivision 3 of the same section was complied with. Each of the deposing witnesses stated his name and place of residence. Subd. 1. All the witnesses (except T. B. Hudson) stated their respective occupations or professions. The statute was complied with in every substantial respect.

Section 995, which authorizes and directs an information to be set aside on motion of a defendant, when the defendant has not been "legally committed,"

does not require the information to be set aside for every informality or irregularity before the magistrate. To justify the quashing of the information it must, at least, appear that the defendant was deprived of some substantial right. In the case at bar the witness Hudson was cross-examined by the defendant when his deposition was taken before the magistrate. The mere omission of the district attorney or justice of the peace to ask of the witness his profession or business could not have injured the defendant.

We cannot say the court erred in sustaining the objection to the question asked of the witness W. B. Baker: "What is his (defendant's) general reputation for peace and quiet in this county, so far as you know?" The witness had not stated that he lived in the county, or knew the defendant's general reputation in the county.

The instruction given by the court defining "deadly weapon" is not subject to the objection urged by counsel for appellant.

The court below was justified in refusing to give the instruction asked by the defendant, by which the jury were told it was their duty to find the defendant not guilty if they entertained a reasonable doubt that he acted under a reasonable apprehension of great bodily injury. Even if it were conceded that the instruction asked was correct in other respects, the defendant would not be justified, although acting under a reasonable apprehension of great bodily injury, unless the use of a deadly weapon was necessary to prevent the injury. The instruction assumes that the bare fear, if reasonable, would justify the defendant's act. But if all the circumstances supposed by the instruction were shown to exist, it would still remain for the jury to determine whether his acts were necessary, and therefore justifiable.

Counsel for the defendant requested the court to charge the jury as follows: "In any criminal charge, if the defendant relies upon no separate, distinct, or independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof never shifts, but remains upon the government throughout the whole case to prove the act a criminal one beyond a reasonable doubt." The court refused to so instruct the jury. This was error. The instruction was refused as "not called for by the evidence." We think it appropriate, and clearly applicable to the case. An assault is an *unlawful* attempt, etc. Pen. Code, 240. Where the attempt or actual battery, with or without a weapon, is justifiable, there is no offense. That the instruction requested correctly declares the law is made apparent by the reasoning in *Com. v. McKie*, 1 Gray, 61.

It is claimed that the rule in cases of assaults with a deadly weapon should be the same as in cases of homicide, and that in cases of homicide the burden of proof is changed. Even in cases of homicide, however, the burden of proving beyond a reasonable doubt that a killing is criminal is upon the prosecution. This does not mean that the prosecution must anticipate a defense, and affirmatively establish (by evidence other than that of the killing) that the homicide was *not* justifiable. When the people have proved the killing, and no evidence has been given tending to prove justification, they have performed the task imposed upon them, and proved *prima facie* the guilt of the defendant beyond a reasonable doubt. By reason of statutory rule of evidence the *prima facie* case of the prosecution can be overcome only by proof of justification established by a preponderance of evidence. In case the prosecution has given evidence tending to prove self-defense, the defendant is entitled to the benefit of it. If not sufficient of itself to establish self-defense, the defendant is entitled to connect it with evidence which *he* may introduce; and if all the evidence bearing on the subject taken together, preponderates in his favor as to the issue of justification, he should be acquitted. Section 38 of the act of 1850, "concerning crimes and punishments," and section 1105 of the Penal Code, do not change the rule which casts on the prosecution the burden of

proving (beyond a reasonable doubt) the act of a defendant to be a crime. They fix the *quantum* of evidence which is necessary to overcome the proof on the part of the prosecution which, until overcome, establishes beyond a reasonable doubt the guilt of the defendant. Nothing was decided in the *Cases of Milgate, Stonecifer, Arnold, or Hong Ah Duck* (5 Cal. 127; 6 Cal. 405; 15 Cal. 476; 61 Cal. 387) which conflicts with these views. That a rule at least as broad as that laid down in the instruction asked and refused is correct, in cases other than homicides, seems decided in *People v. Cheong Foon Ark*, 61 Cal. 528.

At the trial below, one Francisco Ballesteros was called and examined as a witness on the part of the prosecution. On his cross-examination counsel for the defendant asked the witness: "Did you plead guilty on March 17, 1882, in the superior court of this county, to the crime of robbery?" To which the witness answered: "Yes, sir." Counsel for defendant then asked: "Were you sentenced on that occasion to punishment for eighteen months in the penitentiary?" The last question was objected to as irrelevant and immaterial. The objection was sustained, and counsel for defendant duly excepted. We do not find it necessary to express any opinion as to whether the word "penitentiary," in the question objected to, can be interpreted "state prison," but we entertain no doubt that a party may ask a witness with respect to the fact of a judgment and sentence against him for a felony. A felony is a crime which is punishable with death, or by imprisonment in the state prison. Pen. Code, § 17. Robbery is a felony. Pen. Code, § 213. The defendant had the right to prove by the witness that he had been convicted of a felony. "Conviction" is usually defined the legal proceeding of record which ascertains the guilt of the party, and upon which the sentence or judgment is founded. Bouv. Law Dict. The term is sometimes applied to the finding of a person guilty by verdict of a jury, (1 Bish. Crim. Law, 223;) but it is sometimes used to denote final judgment,—Bouv. Law Dict.; Dwar. St. (2d Ed.) 683. Conviction of certain crimes, when accompanied by judgment, disqualified the person convicted as a witness. Bouv. Law Dict.; *Keithler v. State*, 18 Miss. 192; *Utley v. Merrick*, 11 Metc. 302. A witness may be shown to have been guilty of a felony by "his examination," or "by the record of the judgment." Pen. Code, § 205. The proof of the conviction by the oral examination of the witness is a substitute for proof of the judgment by the record; and, in view of the pre-existing law, which required the conviction to be proved by the judgment, and of the section which permits proof by the witness or by the record of the judgment, (proof by the witness instead of by the record,) we hold that the party seeking to impeach the witness may ask him with respect to the judgment.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; ROSS, J.; MCKEE, J.; THORNTON, J.

69 Cal. 611

MARTIN v. SPLIVALO and others. (No. 8,787.)

(Supreme Court of California. May 26, 1886.)

1. EJECTMENT—DEED—PROOF OF CONSIDERATION—EVIDENCE.

In ejectment, plaintiff (who claims under a deed from defendant, payment of the consideration of which deed is denied by defendant) may, if his deed is regularly executed, read it in evidence, without being first required to allege or prove the consideration or payment thereof.

2. MORTGAGE—ASSUMPTION BY VENDEE—DEED—VESTING OF TITLE—CONSIDERATION.

Where, by terms of deed, grantee, as part of consideration, is to pay mortgage, or assume grantor's indebtedness thereunder, this does not operate as a condition

upon the breach of which the title would revest in the grantor, but vests the title absolutely in the grantee, and creates between him and the creditor of the grantor the relation of debtor and creditor.

3. EJECTMENT—DEFENSES—BREACH OF COVENANT.

Where, in ejectment, the title to property is shown to be vested absolutely in the plaintiff, his right to recover its possession from the defendant, his grantor, cannot be defeated by showing that he had failed to pay the stipulated consideration for it. In such case the grantor's remedy is by action for damages for breach of covenant.

4. SAME—ABATEMENT—PLEA OF ACTION PENDING.

Pendency of an action for unlawful detainer, after expiration of an alleged lease, cannot be properly pleaded in abatement to an action between the same parties for the recovery of the possession of the same land.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

A. D. Splivalo and *M. Mullany*, for appellants. *Houghton & Reynolds*, for respondent.

BELCHER, C. C. This is an action of ejectment for the possession of certain real property in Santa Clara county. The plaintiff claims title to the demanded premises under a deed executed to him by the defendants on the fourteenth day of July, 1877. The deed purports to have been made in consideration of five dollars, the receipt of which is acknowledged, "and the assumption by the party of the second part of the indebtedness hereinafter recited." The recital referred to is as follows: "Said premises are subject to a deed of trust executed by the parties of the first part to James de Fremery, Robert B. Swain, and Alexander Campbell, Sr., dated the fifteenth day of February, 1872, A. D., and recorded in the office of the county recorder of said county of Santa Clara, in Liber 23 of Deeds, at pages 409 and following, given to secure the payment of the promissory note of said Stephen Splivalo to the San Francisco Savings Union, a corporation, for the sum of \$10,000, and interest, having even date with said deed of trust, and referred to therein; and all indebtedness secured by said deed of trust is to be assumed and paid by the party of the second part, as part of the consideration for this conveyance." By their answer the defendants deny that the plaintiff paid the five dollars named as consideration for the deed, or any part thereof; and they allege "that plaintiff has not taken said promissory note up, and has not assumed or paid the same, or any part thereof, to said 'San Francisco Savings Union,' or to any other person or party whatever, and defendants have never received any consideration or value from plaintiff for said deed of conveyance, and the same is null and void as against these defendants, and each of them;" and they also allege the pendency of another action in the same court between the same parties, and for the same cause.

At the trial the plaintiff offered his deed in evidence, and its admission was objected to by the defendants upon the ground that the plaintiff had neither alleged in his complaint, nor proved, "that the obligations therein contained and provided to be performed on the part of the plaintiff, as the consideration therefor, viz., the assumption and payment of the indebtedness therein mentioned to the San Francisco Savings Union, were accomplished or performed prior to the commencement of this action, or at any time, or at all." The objection was overruled and an exception reserved.

After the plaintiff rested his case, the defendants offered to prove that the plaintiff had not paid the five dollars mentioned in the deed, or any part thereof, or any indebtedness on account of the defendants, or either of them, to the San Francisco Savings Union. The evidence was objected to by the plaintiff as irrelevant, incompetent, and immaterial, and the objection was sustained; the defendants reserving an exception.

Upon the question of the pendency of another action when this action was commenced, the court found "that on the twenty-fifth day of January, 1879,

the said plaintiff herein instituted an action against said defendants herein in the county court in and for the said county of Santa Clara, for the unlawful detention by them of the premises described in the complaint herein, which said action was based upon the alleged wrongful detention and withholding said premises by defendants from said plaintiff, after the termination of an alleged lease thereof, made to defendants by plaintiff," and that that action was still pending. The court further found "that the same issues, matters, and things involved in said action in said county court are not in issue or involved in this action, and the cause of action is not the same."

Judgment was rendered in favor of the plaintiff, and the appeal is from that judgment and an order denying a new trial.

1. There was no error in permitting the plaintiff's deed to be read in evidence. It was regular in form and properly executed, and the plaintiff was not required to allege or prove the consideration for its execution. Sections 1614, 1615, Civil Code.

2. When the defendants delivered their deed to plaintiff, the title to the property described therein vested absolutely in him, and his agreement to pay the debt to the San Francisco Savings Union did not constitute a condition, upon a breach of which the title would revert in them. *Hartman v. Reed*, 50 Cal. 485. By the terms of the deed the plaintiff assumed and was to pay the mortgage debt; and, when he accepted the deed, he became bound to pay it, and to indemnify and hold the defendants harmless against its payment. As between themselves he became the principal debtor, and they his sureties. *Boardman v. Larrabee*, 51 Conn. 39; *Comstock v. Drohan*, 71 N. Y. 9; *Slau-son v. Watkins*, 86 N. Y. 601; *Bowen v. Beck*, 94 N. Y. 89; *Sparkman v. Gove*, 44 N. J. Law, 252. For the purpose of this case it was immaterial, therefore, whether the plaintiff had paid the five dollars to the defendants, or the debt to the savings union, or not. The title to the property being vested in the plaintiff, his right to recover its possession could not be defeated by showing that he had failed to pay the stipulated consideration for it. If the defendants considered themselves damnified by the plaintiff's failure to pay their debt at the time and in the manner he had bound himself to pay it, their remedy was by an action such as was upheld in *Sparkman v. Gove*, *supra*, and the cases therein cited. It follows that the court did not err in excluding the offered evidence.

3. In an action to recover the possession of land, a plea in abatement that another action is pending between the same parties will not be sustained, unless it appear that the same title, the same injury, and the same subject-matter are in controversy in both actions. "It is not sufficient that the second action is brought to recover the same land. It must be for the same injury, and the same matters must be in issue that were in issue and might have been tried in the first action; otherwise the causes of action are not identical. If a judgment in the first suit would not be conclusive in the second, the pendency of the former action cannot defeat the second." *Vance v. Olinger*, 27 Cal. 360; *Larco v. Clements*, 36 Cal. 132. As the former action, the pendency of which was pleaded in abatement in this action, was for an unlawful detainer, after the expiration of an alleged lease, it is clear that the same matters were not in issue in both actions, and a judgment in the first action would not be conclusive in the second. *Kirsch v. Smith*, 64 Cal. 14.

4. The testimony showed the rental value of one of the pieces of land in controversy to be \$300 per annum. The court found its rental value to be \$25 per month. One of these seems to us to be the equivalent of the other, and the defendants were in no way prejudiced by the finding.

5. As the defendants made their deed to the plaintiff less than five years before the commencement of this action, they cannot avail themselves of the statute of limitations.

The judgment and order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

69 Cal. 634

HITCHCOCK v. McELRATH. (No. 9,333.)

(*Supreme Court of California*. May 27, 1886.)

1. APPEAL—MOTIONS—RENEWAL OF—JUDICIAL DISCRETION—SETTING ASIDE DEFAULT.

It being discretionary with the court in which a motion was made and denied to allow a renewal of the same motion, such discretion will be presumed to have been properly exercised, unless the contrary is made to appear. So held where leave was granted a third time, on new grounds, to renew a motion to set aside a default.

2. JUDGMENT—DEFAULT—MOTION TO SET ASIDE—AFFIDAVITS.

The fact that affidavits used on the hearing of a motion to set aside a default for failure to answer an amended cross-complaint contained matters of doubtful propriety upon such a motion, will not warrant the reversal of the action of the court below in setting aside the default, if the affidavits did contain a sufficient showing of a meritorious defense to the cross-complaint, and such objectionable matter might be treated as surplusage.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Clement, Osment & Clement, for appellant. *Wm. H. Fifield*, for respondent.

SEARLS, C. 1. This appeal is taken by the defendant from an order setting aside a default entered against plaintiff for want of an answer to an amended cross-complaint. Various reasons were set forth as grounds upon which the motion was made. Two motions had been previously made with the same object in view, the first of which was denied without prejudice on account of the informality in the moving papers. The second was also denied, but for what reason does not clearly appear. Subsequently the order of denial was so modified as to permit plaintiff to renew his motion, which was accordingly done, and additional grounds specified as reasons why the motion should be granted, and upon the hearing of said last motion the default was set aside.

A motion once made and denied, except for informality in the papers or proceedings, cannot be renewed before any other court or officer except a higher tribunal, save where liberty is given by the court or officer refusing the motion to renew the same. Code Civil Proc. § 182. In all ordinary motions, where the jurisdiction is not limited by statute, it is in the discretionary power of the court or judge hearing and denying a motion to grant leave for its renewal, and this discretion will not be interfered with, except in cases of palpable abuse. (*Bowers v. Cherokee Bob*, 46 Cal. 280;) and the leave to renew a motion may be given after the original motion is denied, (*Kenney v. Kelleher*, 63 Cal. 442.)

It stands to reason that, where such leave lies within the discretion of the court, it will be presumed to have been properly exercised, unless the contrary is made to appear. In the present instance we see no cause for doubting the propriety of the action of the court below in granting leave, under the circumstances, to move even a third time to set aside the default.

2. The affidavits used on the hearing, to portions of which defendant's counsel objected, contained matters of doubtful propriety upon such a motion; but as those affidavits, aside from the matter objected to, contained a sufficient showing of a meritorious defense to the cross-complaint, and as the objectionable matter was only collateral to such defense, they may be treated as surplusage, and will not warrant the reversal of the action of the court below.

3. Upon the merits we are of the opinion the action of the court in granting the motion and setting aside the default should be upheld. It is always desirable that every cause should be heard upon its merits, and finally decided in consonance therewith. Hence a large discretion is vested in courts of original jurisdiction, in removing such obstacles and impediments as tend to prevent a full and fair hearing of pending causes, and a default inadvertently permitted in a cause, by a party having a substantial defense, presents a case in which great latitude should be extended to the discretion of the court by which such default is set aside.

Upon a review of the record, we are of opinion that the discretion of the court below was properly exercised in this cause, and that to have refused the motion *might* have worked injustice, and therefore that the order appealed from should be affirmed.

I concur: BELCHER, C. C.

FOOTE, C., did not participate in this case.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

70 Cal. 1

Ex parte MITCHELL. (No. 20,181.)

(*Supreme Court of California.* May 29, 1886.)

1. CONSTITUTIONAL LAW—EXCESSIVE, CRUEL, OR UNUSUAL PUNISHMENTS.

Punishment of an assault with a deadly weapon, by imprisonment in the state prison or county jail not exceeding two years, or by a fine not exceeding \$5,000, or both, as authorized by section 245 of the California Penal Code, is not an excessive, cruel, or unusual punishment, within the meaning of section 6, art. 1, of the California constitution, which prohibits such punishments.

2. ASSAULT AND BATTERY—WITH DEADLY WEAPON—VERDICT—INDICTMENT.

Under section 245 of the Penal Code of California, in a prosecution for an assault with a deadly weapon it is unnecessary to charge in the indictment, or for the jury to find, that the assault was made with intent to produce great bodily injury. It is sufficient to follow the language of the statute in charging the offense, and for the jury to find in the language of the charge.

3. CRIMINAL LAW—ILLEGALITY OF PART OF SENTENCE.

Where part of a sentence imposed as a punishment for crime is illegal, if the part that is valid can be separated from the rest it will be enforced.

Department 1. Application for discharge on writ of *habeas corpus*.

The indictment charged, and the jury found, in the language of the statute, that the petitioner was guilty of the crime of assault with a deadly weapon. He was sentenced by the court to imprisonment for two years, (the maximum allowed by statute,) and to a fine, and in addition, in case of failure to pay the fine, that he should be imprisoned for the number of days, at a certain rate per day, that will be equivalent to the fine, or the amount thereof remaining unpaid.

Carroll Cook, for petitioner.

BY THE COURT. 1. The punishment authorized by section 245, Pen. Code, is not excessive, cruel, or unusual within the meaning of section 6, art. 1, of the constitution.

2. *People v. Turner*, 4 Pac. Rep. 553, to which we adhere, disposes of the second point made for petitioner.

3. The entire judgment is not void. That portion of it providing for imprisonment as a means of enforcing the payment of the fine is separable from the rest. The sentence to imprisonment, as a punishment, is in force, and the petitioner cannot now be discharged, whatever may hereafter be his rights regarding the order of imprisonment as to the fine. Whether he will be en-

titled to a discharge on the expiration of the two years, we indicate no opinion.

The petitioner is remanded, and the writ discharged.

GOOBY v. HANSON. (No. 11,643.)

(*Supreme Court of California.* June 15, 1886.)

APPEAL—UNDERTAKING—JUSTIFICATION OF SURETIES.

The failure of the sureties on an undertaking on appeal to justify, after an exception to their pecuniary sufficiency has been taken, does not render the appeal ineffectual, and is not ground for dismissal, but merely operates to avoid the stay of execution of the judgment, order, or decree appealed from.

Department 1. Appeal from superior court, county of Alameda.

Motion to dismiss appeal on the ground that the sureties on the undertaking have failed to justify after exception to their sufficiency.

Tyler & Tyler, for appellants. *Wm. Gibbons*, for respondent.

BY THE COURT. Upon the authority of *Hill v. Finnigan*, 54 Cal. 311, the motion to dismiss the appeal is denied.

70 Cal. 42

GATES v. McLEAN. (No. 9,296.)

(*Supreme Court of California.* June 23, 1886.)

1. NEW TRIAL—FINDINGS—ERROR WITHOUT INJURY.

A new trial, asked for on the ground of failure to find upon a particular material issue, may be denied if a finding in favor of the party asking the new trial, and upon such issue, could not have changed the result.

2. VENDOR AND VENDEE—COVENANT FOR TITLE—RESCISSION OF CONTRACT.

Under a contract for the sale of land, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to do so, and to restore the possession, specifying his objections, in which case he may recover the purchase money advanced, and interest, and the value of his improvements, less the reasonable value of the use of the premises. But the purchaser cannot retain possession, and at the same time refuse to pay the purchase price; and, if he chooses not to rescind, he must pay the price agreed on.

In bank. Appeal from superior court, county of Stanislaus.

L. J. Maddux, *W. L. Dudley*, and *W. O. Minor*, for appellant. *W. E. Turner*, for respondent.

McKINSTRY, J. The contract between the parties, as alleged in the complaint, was: "On the eighth day of October, 1881, this plaintiff agreed to and with said defendant to sell and convey said lots and parcels of land [hereinafter described] to said defendant for the agreed price of \$2,800; that on said date the said defendant paid to plaintiff the sum of \$300, and then and there promised and agreed to and with the plaintiff to pay the balance of said purchase money, to-wit, the sum of \$2,500, and interest thereon at 1 per cent. per month from said eighth day of October, 1881, on the execution and delivery by plaintiff to said defendant of a good and sufficient deed of conveyance of and to said lots and parcels of land."

As alleged in the answer the contract was: "On the eighth of October, 1881, plaintiff and defendant entered into an agreement for the sale and conveyance to defendant by plaintiff of the lots described in the complaint, [the same hereinafter described,] in consideration of \$2,800 to be paid to the plaintiff by defendant upon plaintiff making and executing and delivering to defendant a good and sufficient title to the lots described in the complaint, free from all incumbrance save and except the present tax liens."

The superior court found: "On the eighth day of October, 1881, a contract

of sale between the parties was finally culminated, made, and entered into, and the following terms were then and there agreed to by and between said parties, to-wit: That the said defendant should pay to the plaintiff, as the purchase price for said lots, the sum of \$2,800, in the manner following: \$300 in cash within a reasonable time after said eighth day of October, 1881; but out of said \$2,500 defendant was to assume and pay the mortgage lien then on said premises, in favor of one McLellan, and which at that time amounted to about \$1,200. It was also agreed by and between said parties to said contract that in case the deed then on file from said Fulkerth to said James Brusie, purporting to convey from said Fulkerth to said Brusie the title to said lots, should be held to be a good and sufficient deed, sufficient to convey a good and sufficient title to said lots to the said Brusie, paramount to plaintiff's title, then and in that event defendant was to quit and surrender possession of said lots to plaintiff, without damage and without further or other consideration save and except the return by plaintiff of the whole amount of the purchase money and interest paid to plaintiff by defendant; and, upon the return to defendant of said sum aforesaid, said contract was to become from thenceforth void and of no effect."

The contract between these parties was reduced to writing, and is as follows:

"Received of S. M. McLean the sum of three hundred dollars, part payment of the purchase price of lots Nos. twelve, (12,) thirteen, (13,) fourteen, (14,) fifteen, (15,) sixteen, (16,) in block No. sixty-eight, (68,) in the town of Modesto, county of Stanislaus; and I hereby agree to make to the said McLean a good and sufficient title to the above lots, free from all incumbrances, save and except the present tax liens, upon the payment of the further sum of twenty-five hundred dollars, with one per cent. per month interest from date until paid.

"*Dated Modesto, October 8, 1881.*

[Signed]

"SAMUEL GATES."

The foregoing was given in evidence by the defendant without objection. It is admitted that defendant paid to the plaintiff \$300 (part of the \$2,800) when the receipt or writing was executed. The contract, as alleged in the pleadings of the respective parties, does not differ in its legal effect except as to interest, and that, as alleged in the answer, it contained the clause, "free from all incumbrance save and except the present tax lien." The effect of the promise (averred in the complaint to be in the contract) that plaintiff should execute and deliver "a good and sufficient conveyance," was the same as a promise that he should convey the title. *Haynes v. White*, 55 Cal. 40. The contract as proved was substantially the contract alleged in the answer. It varied from that alleged in the answer, in that it provided for interest upon \$2,500; but, as we have seen, it was introduced by defendant without objection on the part of the plaintiff. The defendant was entitled to a finding that the contract was as set forth in the receipt above recited.

There is an appeal from the judgment. It is not necessary to say whether, if the case were here upon the pleadings, findings, and judgment alone, we should be compelled to reverse the judgment because the finding is without the issue. But there is an appeal from the order denying a new trial. The two appeals being in the same transcript, we ought not to reverse the judgment if convinced the new trial was properly denied. The defendants did not ask for a new trial on the ground of insufficiency of the findings.

There is a specification in the statement for new trial that finding No. 11, with respect to the terms of the contract, is not justified by the evidence. The specification proceeds: "The contract between the parties is set out in defendant's Exhibit B, [being the receipt hereinbefore mentioned,] and fails to state anything about a mortgage or a deed to Brusie, but requires plaintiff to

make defendant a good and sufficient title free from all incumbrances except existing tax liens."

If the finding of the court be disregarded, still the defendant should not have a new trial, if, conceding that the contract was as alleged by the defendant, or as by him proved, the result must be a judgment against him. It has been repeatedly held that, even when the court has omitted to find upon a material issue, a new trial may be denied, if, on the evidence, the finding must have been adverse to the party asking the new trial. By parity of reason a new trial may be denied if a finding in favor of the party asking the new trial (upon a particular issue) could not have changed the result.

Conceding that the contract ought to have been found as alleged and proved by the defendant, and assuming that what ought to have been found is to be treated as found, what were the rights of these parties? On October 2, 1878, in the justice's court of Empire township, one James Brusie commenced an action to recover of one Minor Walden \$166 and costs, and on said day caused a writ of attachment to be duly issued in the action, which attachment was placed in the hands of W. G. Ross, constable, who on the same day attempted to levy the same on the premises herein demanded. On the twelfth of October, 1878, judgment by default was entered in the action, in favor of the plaintiff for the amount claimed therein. The plaintiff herein became the legal owner of the lands in controversy on the twentieth November, 1879, by virtue of a conveyance from Minor Walden, (defendant in the justice's suit,) which conveyance was duly recorded January 6, 1880. An abstract of the judgment in the action *Brusie v. Walden* was filed with the county recorder, October 1, 1880. On the same day a writ of execution was issued on the judgment, under which and the judgment all the right, title, and interest of Walden in the lands and premises herein demanded were sold and conveyed by the sheriff to said Brusie.

We agree with counsel for defendant herein that the attachment issued in *Brusie v. Walden* was never served or levied as required by law, or in such manner as to constitute a lien on Walden's title to the lands. The sheriff's deed, therefore, only conveyed to Brusie such title as Walden had when the abstract of the judgment in *Brusie v. Walden* was filed with the county recorder. As we have seen, Walden had previously conveyed all his title to the present plaintiff. The attachment did not constitute a "cloud" on the title which the plaintiff herein offered to convey to the defendant. Moreover, if it could be treated as in any sense a cloud, it was not an "incumbrance," within the meaning of the agreement of October 8, 1881. It follows, that, if it be admitted that the court below erred in receiving in evidence the record of the action brought by Brusie, in which the nonsuit was granted, the defendant was not injured, because he himself proved the Brusie title to be invalid, and that it constituted no incumbrance. The deed tendered by the plaintiff would have conveyed "a good and sufficient title."

As to the McLellan mortgage. On the third day of January, 1880, the plaintiff mortgaged the premises herein demanded to one E. J. McLellan, to secure the payment of \$1,195, which said mortgage was recorded, and remained in full force and effect until April 11, 1883, when it was fully paid off, satisfied, and discharged by the plaintiff. This action was commenced October 30, 1883. January 9, 1883, plaintiff tendered to defendant, at the town of Modesto, "a grant, bargain, and sale deed conveyance of said lots, which said deed was duly executed and acknowledged by said plaintiff, so as to entitle it to be recorded, and which conveyed the title to said property from said plaintiff to said defendant, his heirs, executors, and assigns, forever, and which contained all the usual recitals of a grant, bargain, and sale deed, and then and there demanded of and from defendant that he (defendant) should accept said deed, and pay to plaintiff the balance of the purchase price due on said lots, as agreed upon at the time of making said contract" of purchase

and sale; but to pay the same, or any part thereof, said defendant then and there refused and neglected, and ever since has refused and neglected, and then and there refused to accept said deed. January 12, 1883, plaintiff again tendered the said deed, together with a certain bond of indemnity, the contents whereof need not be specified. On the thirteenth January, 1883, plaintiff served on defendant a written notice rescinding the contract of sale and purchase of said lots, and all of them, entered into as aforesaid, and the whole and every part of said contract, and at the same time did tender to the defendant the sum of \$300, (the sum paid by defendant to plaintiff when the contract was entered into,) and interest thereon at 1 per cent. per month from October 8, 1881, to the said thirteenth January, 1883, in all \$342, etc.; and the said plaintiff then and there demanded possession of said lots, and the said defendant refused to deliver possession, etc., but retained and kept possession, and ever since and still holds possession, etc.

When the deed and money were tendered, notice given, and demand made, the mortgage to McLellan was a valid lien on the demanded premises. The mortgage was satisfied before this action was commenced. The existence of the McLellan mortgage when the deed was tendered, is not pleaded in the answer as a defect in the plaintiff's title or as an incumbrance thereon. In his answer, the defendant relies entirely on the Brusie title, so called. When the written contract of October 8, 1881, was signed and delivered, the existence of the McLellan mortgage was known to the defendant, and the court finds that the defendant was to discharge it out of the deferred payment. But conceding, as claimed by defendant, that all previous conversations were merged in the writing of October 8, 1881, the fact that the McLellan mortgage was unsatisfied was not mentioned by defendant as an objection to the title when plaintiff tendered his conveyance. In response to the tender of the deed the defendant in writing specified as his objection to plaintiff's title the Brusie suit, attachment, judgment, execution, and deed. If the purchaser is not content to take the title offered, "he should specify his objection, and give up possession of the land." *Viele v. Troy & B. R. Co.*, 20 N. Y. 187. The written contract on which the defendant relies, does not provide for vendee taking possession, or recognize his right to the possession, as in *Willis v. Wozencraft*, 22 Cal. 608.

In *Spencer v. Tobey*, 22 Barb. 269, it is said: "The plaintiff having given the defendant the possession, if he was not entitled to it under the contract, does not affect the plaintiff's right to recover. Nor can that act, subsequent to the contract, aid in the construction of the contract." And in that case it was held that, where the contract does not provide for the purchaser entering into possession, no license to enter is to be implied. In *Gaven v. Hagen*, 15 Cal. 211, the supreme court of this state said that *Spencer v. Tobey* correctly lays down the general proposition as to implied license, (to enter,) arising from a mere contract of purchase. In *Bohall v. Diller*, 41 Cal. 533, the vendor sought to recover all the money due under the contract and the possession of the land. Moreover, that case holds that vendor may rescind on return of the purchase money received, and recover possession; the vendee having failed to perform. In *Central Pac. R. Co. v. Mudd*, 59 Cal. 585, there was a distinct stipulation that, on failure of the vendee to pay, the vendor should have a right to re-enter. *Hicks v. Lovell*, 64 Cal. 14, and *Whittier v. Stege*, 61 Cal. 238, hold that the vendor can recover in ejectment against the vendee who refuses to perform his contract.

Here the defendant in possession claims the right to retain his possession by virtue of the contract, and yet refuses to pay the purchase price. The plaintiff has tendered a return of the sum paid, and given notice of rescission. Even where the contract provides for vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to,

and to restore the possession, in which case he may recover the purchase money advanced, and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money, and interest, according to the contract. In the latter case it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants. *Taft v. Kessel*, 16 Wis. 274, and cases cited; *McIndoe v. Morman*, 26 Wis. 588.

In one of the Wisconsin cases it is said that, where the purchaser seeks to rescind, the court may provide by the judgment that the possession be retained until the amount received by the vendor, and the value of improvements, less, etc., shall have been paid. If the defendant was entitled to be so protected, his rights were secured by the judgment in the present case. As a set-off to the mesne profits proved, the court below allowed the \$300 paid to the plaintiff October 8, 1831, with interest thereon to the rescission by plaintiff, and the value of the improvements on the lands made by defendant while in possession.

Here the defendant, if he proposed to affirm the contract, was required at least to tender the money due on it, less sufficient to discharge the McLellan mortgage. *Pierce v. Tuttle*, 53 Barb. 169. Both parties to the contract were to be actors. The defendant could not remain passive and in possession until the plaintiff had performed his contract to the letter. *Id.*

Judgment and order affirmed.

We concur: THORNTON, J.; MYRICK, J.; MCKEE, J.; SHARPSTEIN, J.

70 Cal. 61

PEOPLE v. PHILLIPS. (No. 20,124.)

(Supreme Court of California. June 25, 1886.)

1. FORGERY—CONFUSING OR MISLEADING INSTRUCTIONS.

On trial under an information charging forgery of a promissory note, instructions are not misleading and calculated to confuse the jury with respect to the offense charged, which read as follows: "The defendant is not charged in the information with the forgery of the mortgage. That has been introduced in evidence here for the propose or showing the intent; showing the intent that the party had in forging (if you find that he did forge) and in passing this promissory note, showing the intent of the passing, or the attempt to pass, to Elgin, for the purpose of prejudicing, damaging, or defrauding him. He is not charged here, I say, with the forgery of that mortgage; and, if you find that he did so, still you do not pass upon it in this case, as to the question of his guilt or innocence under the information." And: "You [the jury] being satisfied that the defendant did voluntarily forge this note; that he, knowing it to be such, passed it to Mr. Elgin with the intent to injure or defraud Er. Elgin." And, again: "As I stated before, gentlemen, your first point is, was this note forged by the defendant? Did he know it was forged? Did he pass it, or attempt to pass it, to W. A. Elgin, to the injury of Elgin?"

2. SAME—INDICTMENT—VARIANCE.

Where, in an indictment, a word found in the instrument proved is omitted from the instrument as recited, or when a word is inserted in the instrument described which is not in the instrument proved, and the change in no manner or for any purpose alters the signification, the variance is unimportant. Thus, in an information for forging a promissory note, the insertion of the word "to" in the note recited, which word is omitted in the note proved, where this does not affect the meaning, is not a material variance.

3. SAME—EVIDENCE.

-In a prosecution for forgery of a note, evidence tending to show that the note was used to secure a valuable benefit from the person to whom it was delivered, is admissible, though it be of facts taking place after the delivery of the note.

4. CRIMINAL LAW—TRIAL—INSTRUCTIONS—CHARGING AS TO FACTS—ERROR WITHOUT INJURY.

Though such a mode of charging a jury should be avoided, still an instruction assuming a fact does not demand a reversal if the fact is admitted, or there is no shadow of conflict of evidence with respect to it.

In bank. Appeal from superior court, county of Napa.

Coghlan & Coombs, for appellant. *The Attorney General*, for respondent.

MCKINSTRY, J. The court below charged the jury as follows: The defendant is not charged in the information with the forgery of the mortgage. That has been introduced in evidence here for the purpose of showing the intent; showing the intent that the party had in forging (if you find that he did forge) and in passing this promissory note; showing the intent of the passing, or the attempt to pass, to Elgin, for the purpose of prejudicing, damaging, or defrauding him. He is not charged here, I say, with the forgery of that mortgage, and, if you find that he did so, still you do not pass upon it in this case as to the question of his guilt or innocence under the information." And elsewhere in the charge the court said: "You [the jury] being satisfied that the defendant did voluntarily forge this note; that he, knowing it to be such, passed it to Mr. Elgin with the intent to injure or defraud Mr. Elgin," etc. And in still another place the court said: "As I stated before, gentlemen, your first point is, was this note forged by the defendant? Did he know it was forged? Did he pass it, or attempt to pass it, to W. A. Elgin, to the injury of Elgin?"

It is insisted by appellant that the foregoing was misleading, and calculated to confuse the jury with respect to the offense charged, and comes within the rule laid down in *People v. Monahan*, 59 Cal. 389. There is no doubt that the instructions given in *People v. Monahan* were confused and misleading. But by section 470 of the Penal Code the uttering or passing of a forged promissory note as true and genuine, knowing the same to be forged, is declared to be a forgery. In the two last of the citations from the charge above set forth the "forgery" spoken of is clearly shown by the context to mean the passing of a note knowing it to be forged. The information charges "forgery, committed as follows," and then proceeds to aver that the defendant did "feloniously," etc., "utter, publish, pass," etc., "a certain false and forged promissory note," etc. The crime was forgery as alleged, and the question properly put to the jury was, did the defendant commit that crime as averred in the information? Upon like reasoning the instruction first above recited was not fatally erroneous.

The appellant urges that his objection to the promissory note given in evidence should have been sustained. The promissory note alleged to be forged is set out in the information "in the words and figures following:"

"NAPA COUNTY, CAL., June 1, 1885.

"On or before June 1, 1886, I promise to pay to H. C. Phillips, or order, the sum of \$2,000 for value received, drawing interest at the rate of 10 per cent. per annum. This note is secured by mortgage, and is a part thereof bearing even date.

"Witness: M. SILBAUGH, *Notary Public*. C. H. FITCH.

[Indorsed.] "H. C. PHILLIPS."

At the trial the instrument introduced in evidence was in all respects like that set forth in the information, except that the note given in evidence did not contain the word "to" immediately before the words "H. C. Phillips, or order." Counsel for defendant objected to the promissory note offered, as irrelevant, incompetent, and immaterial, and because of the variance. The court overruled the objection, and defendant duly excepted to the ruling. Counsel justly claim that the rule which requires that an instrument pleaded

in hæc verba must be proved as laid is not one of construction, but a rule of identity and description.

It is said by Wharton that, when an indictment undertakes to set forth a document *in hæc verba*, or according to its "tenor," or "as follows," or "in words and figures following," then *any* variance as to the words of the document, unless such variance be a mere fault of spelling, is material. He adds: "But it is otherwise as to the variance of a letter, amounting only to misspelling." Crim. Ev. § 114.

It is not, however, only when rule *idem sonans* can be applied that the variance is immaterial. A misspelling has been held not to be a fatal variance when the word as spelled in the instrument means nothing, and has a different sound from the word intended, as "undertood" for "understood." The variance of a letter, or the omission of a letter, to be material, must change the word attempted to be written into another word having a different meaning. Whart. Crim. Pl. & Pr. § 173.

Wharton, citing Heard, Crim. Pl. and Tayl. Ev., adds: "The great rigor of the old English law in this respect was one of the consequences of the barbarous punishments imposed. A more humane system of punishment was followed by a more rational system of pleading." Id.

Bishop, in his work on Criminal Procedure, thus lays down the rule: "If the indictment professes to set out a written instrument by its tenor, whether the law has made so exact an averment necessary, in the particular case or not, the proof must conform thereto with *almost* the minutest precision." Section 487.

Section 1021 of our Penal Code provides: "If a defendant was formerly acquitted on the ground of variance between the indictment or information and proof, * * * it is not an acquittal of the same offense." See, also, section 1165.

In *Butler v. State*, 22 Ala. 48, it would seem that the note was set forth in full in the indictment. The court said that to render the note admissible "it is not necessary that there should be a liberal correspondence between it and the papers set out in the counts under which it is offered. If the correspondence be such as to prevent the prisoner from being a second time in jeopardy for the same cause, should he be acquitted, * * * it will be sufficient."

The case of *Quigley v. People*, 2 Scam. 301, is very like that now before us. It was there held that a note payable to "B. Aymer or bearer" was properly admitted in evidence when the description *in hæc verba* was "B. Aymer, bearer."

In *State v. Street*, Tayl. 158, an omission of a figure, which "changed the sense," was held fatal.

In *U. S. v. Mason*, 12 Blatchf. 497, the court recognized the rule that, where an indictment purports to set forth an exact copy of a bank-bill, the description must conform to the instrument given in evidence, but added: "A mere literal variance will not be fatal." There the indictment omitted the word "to" from the phrase "pay to the bearer." It was held the variance was not material, because the defect was not such as "changed the sense" in any way.

In an indictment an order was said to be signed by "Jno. Hulse." The order offered in evidence appeared to be signed "Jna. Hulse." In the indictment the place was called Fayelville; in the order it was Fayetteville. Held not fatally variant. *U. S. v. Hinman*, Bald. 293.

We think the true rule is that, if the variance does not change the sense in any way, it is not material. We are not to be understood as saying that, when a contract alleged to have been forged is set forth in the indictment or information in words and figures, any other contract is admissible the *legal effect* of which is the same as that alleged and set forth in terms in the in-

dictment; but that, when in the indictment a word found in the instrument proved is omitted from the instrument as recited, or when a word is inserted in the instrument described which is not in the instrument proved, and the change in no manner or for any purpose alters the signification, the variance is unimportant. Applying the rule to the case at bar the court did not err in overruling the objection to the note offered in evidence.

Appellant insists that all the testimony of the witness Elgin as to what took place after the delivery of the note alleged to be forged (and the mortgage purporting to secure it) was inadmissible; that the passing of the note was complete when it was delivered to the witness; and that it was then delivered to Elgin as security for a past indebtedness due from defendant to Liddell. And in this connection it is urged—*First*, that Elgin was not injured or defrauded; and, *second*, that an intent to defraud was not proved by proving that the note was deposited as security for a past indebtedness.

The jury were authorized to infer from the evidence that, while the note was originally deposited with Elgin as agent of Liddell as security for the debt due the latter, (to be retained until the defendant should borrow money on the note and mortgage and pay the Liddell debt,) Elgin was subsequently induced by the defendant to furnish a team, drive him or have him driven to Napa, in order to have the mortgage recorded, where, as defendant asserted, he believed he could borrow money on the second note. The witness Elgin testified that he did furnish a carriage, and drive the defendant to Napa, in compliance with defendant's request. It was fairly inferable from the transaction that it was understood between the parties that the note alleged to be forged should be retained by Elgin as security for the expense to which he should be put in furnishing the team, and for his services in driving it. And there was evidence to sustain a finding that from the time of the agreement to furnish a team, etc., Elgin received and held the note as security, not only for the debt due Liddell, but for the expenses to which he should be put by reason of that agreement. In other words, there was evidence tending to prove that the note was used to secure a valuable benefit from Elgin.

Appellant urges that the court erred in admitting evidence of the assignment of the mortgage, inasmuch as the assignment was made the day after the passing of the note and the recording of the mortgage, and after Elgin had incurred the expense of a team, and his service had been performed, and after he had paid the recorder's fee for registering the mortgage; that the assignment was no part of the *res gestæ*, and was in no way connected with the offense charged,—the uttering or passing of the forged note. But we think, with the court below, that the assignment of the mortgage was admissible as tending to show the intent of the defendant in passing the note to Elgin. The jury were clearly instructed that the defendant was not charged in the information with forging or uttering the mortgage; and, even if the mortgage was forged or feloniously passed, that fact would not justify a verdict against the defendant, but the fact could only be considered as tending to prove his intent in passing the note.

It is insisted that the expense to which the witness Elgin was put was not incurred "upon the strength of the note, but of the mortgage." The mortgage purported to secure the note; Elgin (there was evidence to prove) was to retain the note and the evidence tended to show that Elgin was induced to retain the note as security for his expenses, by defendant's promise to record the mortgage.

Appellant claims the court violated the constitution by charging as to matter of fact. Article 6, § 19. The court said: "It appears by the testimony that defendant gave one Liddell a check," etc.; proceeding to state matters as to which there was no conflict in the testimony. Of course, this mode of charging a jury should be carefully avoided. But it has been held here that an instruction assuming a fact does not demand a reversal if the fact is ad-

mitted, or there is no shadow of conflict of evidence with respect to it. In stating the testimony the trial judge should be careful to give the very words, or the substance of the words, of a witness.

The witness Silbaugh testified that he did not subscribe the note or mortgage as a witness, and, in effect, that he did not, as a witness thereto, swear before the notary to the execution of the mortgage. Elgin testified that Silbaugh did swear to the execution of the mortgage as appears in the notarial certificate. The testimony of Elgin contradicted, and, if credible, disproved, the testimony of Silbaugh. The declaration of Silbaugh to Elgin, if made, that Fitch signed the note and mortgage in his presence, tended to impeach his testimony on the stand that neither were signed by Fitch in his presence. But Silbaugh's declarations to Elgin were not evidence that Fitch in fact signed the note or mortgage. If Silbaugh was impeached, the jury could disregard his testimony. The court was justified in so informing the jury, and in informing them that the discarding of his testimony did not control in determining whether the note was forged, but left that question to be decided on the other evidence.

Other instructions were asked by the defendant and refused; but the jury were charged substantially as requested.

Judgment and order affirmed.

We concur: ROSS, J.; MYRICK, J.; SHARPSTEIN, J.; MCKEE, J.

70 Cal. 72

SCHAMMEL v. SCHAMMEL. (No. 11,470.)

(Supreme Court of California. June 28, 1886.)

APPEAL—RECORD—DIVORCE—IDENTIFICATION OF PAPERS.

On an appeal from an order made on a motion *pendente lite* for counsel fees and alimony, in an action of divorce, the certificate of the judge who heard the motion is sufficient, under rule 13 of the supreme court, for the purpose of identifying the papers used on such motion, and which are omitted from the transcript.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

Fisher Ames and Dunne & Davidson, for appellant. *D. Louderback and Cary, Sullivan & Cary*, for respondent.

FOOTE, C. This is an appeal from an order made *pendente lite* for counsel fees and alimony in an action of divorce. The only matter concerning it now to be considered is the motion to dismiss that appeal. That motion alleges as grounds why it should be sustained, "*First*, because said transcript of the record on appeal from said order fails to authenticate, identify, or show what papers were used on the hearing of said motion on the sixteenth of October, 1885, for alimony and counsel fees, and upon which said order was made and entered; *second*, because there is no bill of exceptions or anything else in the record to show what papers were used on the hearing of said motion for alimony and counsel fees in the court below, and upon which the order appealed from was founded."

In the case of *Pieper v. Centinela Land Co.*, 56 Cal. 173, this court declared that the certificate of a judge of the trial court, similar to the one now under consideration, except that the former appeared in the transcript of the record of the cause, and the latter does not, was a sufficient identification of the papers used on the hearing of the motion. And in that case the following language was used: "The statute [*i. e.* section 951, Code Civil Proc.] prescribes no mode by which it shall be made to appear to this court on appeal what papers were used on the hearing of such a motion as the one before us. Under such circumstances this court has the power to prescribe by a rule how

such papers can be brought before it on appeal. This it can do in order to make effectual the appeal given by law. As it has such right to make a rule in advance, it has a like power to ratify and adopt the mode followed in this case. We shall consider the papers named in the judge's certificate as properly before us."

Under rule 13 of this court, "exceptions or objections to the transcript, * * * or any technical exception or objection to the record in civil cases affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken, and notified to the appellant in writing at least five days before the hearing, or they will not be regarded; *and when so noted it shall be the duty of the appellant to present and file, at the hearing of the cause, such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail.*"

The present proceeding to dismiss the appeal is well taken, unless the certificate of the judge who heard the motion in this case is sufficient under that rule, or ought to be so held independent of that rule. We are of opinion that such certificate is sufficient, both under that rule, and for the reason that, as it serves the sole purpose of the identification of papers, (for which no rule of law is laid down in the statutes,) there is no more reason why the judge's certificate in this case is not as good for the purpose intended as those sometimes filed, made by clerks of the trial court, about some omission in the record, as to which they are competent to certify, although they are not thus competent in such a matter as the present.

The judge's certificate as to such papers as here involved, if properly made, is as sufficient, and should be as fully considered, as an identification of such papers out of the transcript, as in it, if presented at the proper time.

The motion to dismiss should be denied.

We concur: BELCHER, C. C.; SEARLES, C.

BY THE COURT. For the reasons given in the foregoing opinion the motion is denied.

70 Cal. 75

DU BRUTZ, Adm'x, and others v. JESSUP. (No. 9,069.)

(Supreme Court of California. June 28, 1886.)

ASSUMPSIT—PLEADING—COMPLAINT—STATEMENT OF CAUSE OF ACTION.

A complaint which merely states a promise without alleging its breach, or which alleges the breach of something which is not alleged in the complaint to have been promised, does not state a cause of action.

Commissioners' decision.

Department 2. Appeal from the superior court, city and county of San Francisco.

Crittenden Thornton and F. H. Merzbach, for appellant. B. S. Brooks, for respondents.

FOOTE, C. This was an action brought by James L. Hussey and F. C. M. Du Brutz against Isaac Jessup, to recover the sum of \$25,000 for a breach of contract. The original plaintiffs have died since the institution of this suit, and the administratrix of the one and the assignee of the other have become substituted parties to the record. The trial court, sitting without a jury, rendered judgment for the sum of \$2,000 and costs, and from that, and an order refusing a new trial, the defendant appeals.

The defendant contends that upon the face of the record, the judgment is erroneous, because, as he alleges, said judgment was rendered on findings

upon the first count of the complaint alone, which count does not state facts sufficient to constitute a cause of action.

The first count in the complaint is upon a special contract to procure a purchaser of a certain tract of land belonging to the defendant, at a certain fixed sum, for which the plaintiffs were to receive a certain compensation. The second count is an ordinary count in debt for \$25,000 for work, labor, and services done and rendered.

The first count reads substantially as follows: That the defendant was the owner of a certain tract of land in the village of San Rafael, Marin county, and, being desirous of selling the same, entered into a contract with the plaintiffs that they should procure the formation of a corporation which should purchase said land for the sum of \$25,000, to be paid in certain installments, at certain stated times, etc. And for the work and labor, skill, care, and diligence, journeys and attendances, of the said plaintiffs, to be done, performed, and bestowed by them in and about the disposing of and settling of the said premises, in the manner and upon the terms aforesaid, and at his special instance and request, *the said defendant then and there undertook and promised the plaintiffs to pay unto them whatever amount the purchaser should pay over and above the sum of twenty-five thousand dollars, with the interest thereon as aforesaid;* and that the plaintiffs undertook the performance of the work on those terms, and procured the due incorporation of a corporation named the San Rafael Property Union, and obtained from the latter an agreement or offer to purchase the lands on the terms agreed to by the defendant. A written instrument setting out the terms of the agreement of sale intended to be executed on the part of the defendant and the said corporation was executed under the seal of the said corporation, and tendered to the defendant for his signature thereto, (a copy of which is annexed to the complaint, marked "Exhibit A;") that the said writing was in strict accordance with the terms upon which the defendant had authorized the plaintiffs to negotiate a sale of the tract of land; *but that the said defendant then and there refused to execute the said agreement; and, though often requested, he has hitherto refused, and still does refuse, to execute the same. By means whereof the said plaintiffs have suffered damages in the sum of \$25,000,* which, according to the terms of their agreement, was to be paid to them in United States gold coin.

According to the complaint there was no agreement between the defendant and the plaintiffs that any writing should be executed by the defendant to them, or to any other person or corporation other than "a good and sufficient deed of bargain, and sale" to the purchaser of his land at the proper time, which time had not, under said agreement, arrived. Therefore the breach alleged in the complaint, that the defendant would not execute the written agreement presented to him, is not a breach of any promise set out in the complaint as having been made by him; and, if he never made any such promise, the assignment of the breach thereof shows no cause of action against him. The promise which he by the complaint is alleged to have made, is that he would pay the plaintiffs whatever amount the purchaser *should pay over and above the sum of \$25,000, with interest thereon as aforesaid.* There is no breach of that promise alleged by the complaint to have taken place on the part of the defendant, but it is alleged that he has refused to execute a certain agreement, (which the complaint nowhere alleges he was under obligation or promise to execute,) and that thereby damage has accrued in favor of the plaintiffs in the sum of \$25,000. Thus we perceive that in the first count of the complaint there is no breach assigned of the promise alleged to have been made.

How can a cause of action exist upon the mere statement of a promise, without alleging its breach? And if a breach is assigned of something which is not alleged in the complaint to have been promised, where is there any

cause of action alleged? There was no sufficient cause of action stated in the first count, and there was no finding of facts by the court upon the second count of the complaint. The judgment was rendered on findings under the first count alone, which states no sufficient cause of action. It would seem, therefore, under section 434, Code Civil Proc., and the reasoning of this court in *Barron v. Frink*, 30 Cal. 486, that the judgment and order in this case should be reversed, and cause remanded, with leave to plaintiffs to amend their complaint.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded, with leave to plaintiffs to amend their complaint.

70 Cal. 14

BROWN v. GRIFFITH. (No. 9,974.)

(Supreme Court of California. May 31, 1886.)

EVIDENCE—PUBLIC RECORDS.

The books of a recorder's office are not admissible in evidence for the purpose of proving the execution and contents of instruments which have been duly recorded, unless the absence of the original is first explained or accounted for. Section 1951, Code Civil Proc. Cal.

In bank. Appeal from superior court, county of Fresno.

Wharton & Shaw and J. R. Webb, for appellant. D. W. Tupper and Sayle & Harris, for respondent.

MCKINSTRY, J. At the trial the plaintiffs produced books of the recorder of Fresno county, and offered in evidence matter recorded on certain pages thereof, for the purpose of proving the execution and contents of conveyances, and of a power of attorney to convey real estate. The defendants objected to the record as not the best evidence, and as not being admissible to prove the execution and contents of the instruments until the absence of the original was explained or accounted for. The objection was overruled. This was error.

By section 1894 of the Code of Civil Procedure public records of private writings are included in "public writings." Section 1893 of the same Code, as originally passed, provided: "Every public officer having the custody of a public writing which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is primary as evidence of the original writing."

July 1, 1874, section 1893 was amended so as to read as follows: "Every public officer having the custody of a public writing which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence, in like cases and with like effect as the original writing."

Section 1951 was added to the Code of Civil Procedure on the day last mentioned. That section is: "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence, in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument, thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy."

The section relates to the precise subject, fixes the rule, and determines under what circumstances, and upon what proof, the certified copy of the record of a private conveyance or instrument affecting real property is ad-

missible. *Canfield v. Thompson*, 49 Cal. 210, was decided on facts occurring before section 1951 was adopted. Since its adoption it is plain that section 1893 (in so far as it makes certified copies admissible "with like effect as the original writing primary evidence") relates to certified copies of public writings other than those mentioned in the fourth subdivision of section 1894. The fourth subdivision of section 1855, which provides that a certified copy of a record is admissible "when a certified copy of the record is made evidence by this Code," etc., does not affect the question here considered, because the certified copy is made evidence by the Code only after the preliminary proof.

The sections of the Code of Civil Procedure above referred to do not, by their terms, relate to the record of conveyances. It is by virtue of section 1919 of the same Code ("a public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record") that a record of a private writing is evidence. By that section the record is placed upon the same footing as a certified copy of it. But the record only proves itself as a record. The record is not made primary evidence of the original writing. If the record is evidence of the execution and contents of the original writing, it is evidence only in the same cases in which a certified copy would be evidence; that is, after proof that the original writing is not under the control of the party offering the record or certified copy.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; THORNTON, J.; MYRICK, J.; ROSS, J.; MCKEE, J.

2 Cal. Unrep. 662

MANCELLO v. BELLRUDE. (No. 11,672.)
(Supreme Court of California. June 15, 1886.)

PROHIBITION—WRIT OF PROHIBITION DENIED. Justices of the Court.

Department 2. Application for writ of prohibition.

An action was commenced in Justice BELLRUDE's court, of Marin county, by the North Pacific Coast Railroad Company against petitioner, Mancello, for forcible detainer. Defendant in that action, by a verified answer, denied any unlawful or forcible detainer, but made other allegations which he claims necessarily involved the question of title and possession to the real property. Defendant, before and during the trial, moved to suspend further proceedings, and to certify the pleadings to the superior court. The justice refused to entertain the motion, proceeded with the trial, and gave judgment in favor of the plaintiff. Thereupon defendant made application to the superior court for a writ prohibiting the justice from proceeding further in the cause, or issuing execution or final process therein. The writ was denied. Thereupon defendant filed this petition, alleging want of jurisdiction on the part of the justice, and that he had already exceeded his powers in the cause, and that unless he be restrained he will issue and cause execution and final process ejecting defendant from the premises.

W. W. Fitz Maurice, for petitioner.

BY THE COURT. We think the remedy of the petitioner is by appeal, and that the application for a writ of prohibition should be denied. So ordered.

PEOPLE v. JONES. (No. 20,157.)

(Supreme Court of California. June 28, 1886.)

CRIMINAL LAW—MURDER—VIEW OF LOCUS IN QUO.

Section 1119 of the Penal Code, providing for the jury to be taken from the courtroom, pending a trial for murder, to view a place or places elsewhere, does not

authorize such action to be taken unless the defendant be present during the whole time of such view; and, if such view is in fact had in his absence, it is in violation of the rights secured to him by article 1, § 13, of the constitution, to appear and defend in person, and with counsel, and to be confronted with the witnesses against him on his trial. On authority of *People v. Bush*, 10 Pac. Rep. 169.

In bank. Appeal from superior court, county of Alameda.

Information for murder. During the trial of this case an order was made by the court directing that the jury be conducted, by the sheriff, in a body, to view the premises where the alleged murder was committed. The order made by the court did not require or permit the defendant or his counsel to be present with the jury at such views, nor were they or either of them present.

V. H. Metcalf and *John Yule*, for appellant. *The Attorney General*, for respondent.

BY THE COURT. On the authority of *People v. Bush*, 10 Pac. Rep. 169, the judgment and order are reversed, and cause remanded for a new trial.

(70 Cal. 87)

SAVILLE, Adm'r, etc., v. FRISBIE and others. (No. 9,449.)

(Supreme Court of California. June 29, 1886.)

PLEADING—DISMISSAL OF SUIT—WANT OF PROSECUTION—REFEREE.

An action is properly dismissed for failure to prosecute it for a period of five years during the life of plaintiff, and for fifteen years more by plaintiff's administrator, though the latter had knowledge of the condition of the action; and there is no reason why the reference of the cause for trial and judgment, and its pendency before the referee, should deprive the court of its full power to order such dismissal for want of diligence in its prosecution before the referee.

Department 2. Appeal from superior court, city and county of San Francisco.

Philip A. Galpin, for appellant. *W. W. Stow*, *H. P. Irving*, and *B. S. Brooks*, for respondent.

THORNTON, J. The order of the twenty-fourth of February, 1881, dismissing this case, from which an appeal was prosecuted to this court, was here reversed in May, 1883, on the ground that the opportunity had not been afforded the plaintiff to show cause why the order should not be made. 11 Pac. Coast Law J. 354. The *remittitur* from this court was filed in the court below on the nineteenth day of June, 1883, and the motion to dismiss the action was renewed, by a notice served on plaintiff, on the fourteenth of July following. The motion was heard in October, 1883, and the order dismissing the action was made on the fifth day of the next month. The motion was made on the ground that plaintiff had failed to prosecute the action with reasonable diligence or any diligence.

There was certainly great delay in prosecuting the action. It was commenced on the thirty-first of March, 1860, and referred to S. H. Dwinelle, Esq., on the fifteenth of May, 1861, to report a judgment. The plaintiff had not finished putting in his evidence when the notice of the motion was given. Evidence was introduced before the referee in the years 1862 and 1863. It does not appear that any further steps in the matter of the introduction of evidence were taken until June, 1883. David Saville, in whose name the action was originally brought, lived more than five years after the evidence introduced in 1863 was taken before the referee. During the period above mentioned nothing further was done in the cause. In August, 1868, David Saville died. The present plaintiff was appointed administrator of the estate of David Saville on the eighth of February, 1869, but was not substituted as a party plaintiff until twenty-fourth of February, 1881,—more than 12 years after his appointment. There was evidence before the court

below that the present plaintiff knew of the action and its condition for at least 10 years before he was made a party.

We see no reason why the reference of a cause for trial and judgment, and its pendency before the referee, should deprive the court of its full power to order its dismissal for want of diligence in its prosecution before the referee. We find no irregularity in the court's making the order, and we think it justified by the circumstances before it. There is no error in the record. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCKEE, J.

70 Cal. 98

PEOPLE v. MARSEILER. (No. 20,110.)

(Supreme Court of California. June 29, 1886.)

1. CRIMINAL LAW—INFORMATION—CHARGING OFFENSE.
Information charging felony in the language of the statute is sufficient.
2. SAME—APPEAL—RECORD—INSTRUCTIONS.
Where the record on appeal does not bring up the charge of the court below, alleged imperfections in such charge cannot be considered in the appellate court.
3. SAME—EVIDENCE—ERROR WITHOUT INJURY.
A defendant cannot complain that the court allowed a witness to testify, against his objection, to certain matters, if, subsequently on the trial, he himself admitted the facts brought out by such testimony.
4. ASSAULT AND BATTERY—ASSAULT WITH DEADLY WEAPON—PROOF OF INTENT.
The offense of assault with a deadly weapon does not involve the necessity of proof of any specific intent to commit it, and therefore evidence as to whether defendant was drunk or sober at the time of the offense is immaterial, and a court commits no error in excluding offered evidence of that character.
5. SAME—WITNESS—EVIDENCE OF DEFENDENT'S CHARACTER.
Where a court, after questioning a witness, sustains an objection to a question propounded to the witness by defendant's counsel as to whether he knows the defendant's reputation for peace and quietude in the community in which he lives, and the questions asked by the court do not appear in the record, nor does it appear therein that the witness knew what community the defendant lived in, it must be presumed that the court was satisfied the witness did not know the defendant's reputation, as asked for, in the community in which he lived.
6. CRIMINAL LAW—APPEAL—WITNESS—EXAMINATION—ERROR WITHOUT INJURY.
Where it does not appear by the record on appeal that any answer was given to a question objected to by the defendant, but allowed by the court, no injury was done defendant, notwithstanding the allowance of the question by the court might be erroneous.
7. EVIDENCE—EXPERTS—EYE-SIGHT.
Evidence of physicians, as experts, concerning the eye-sight of men under particular circumstances, and of the relative strength of the eye-sight of the defendant and the person assaulted, is not admissible, unless it is first proved that such physicians have made an examination of the eyes of the persons concerning whom the testimony is to be given.
8. WITNESSES—ENFORCING ATTENDANCE OF—JUDICIAL DISCRETION.
There is no abuse of discretion by a court in refusing to grant an attachment for witnesses, if it is not shown by any sworn statement what was intended to be proved by such witnesses; especially where they are out of the county in which the trial was had, and no attachment was asked to enforce their appearance until after one side of the case had been closed, and numerous witnesses had been examined on the other side.

Commissioners' decision.

In bank. Appeal from superior court, county of Santa Cruz.

James A. Hall, for appellant. The Attorney General, for respondent.

FOOTE, C. The defendant was by a jury found guilty of an assault with a deadly weapon. He has appealed from the judgment of conviction and an order denying him a new trial.

Cal. Rep. 9-11 P.—50

The demurrer to the information was properly overruled. The latter was in substantial conformity to the requirements of sections 950-952, Pen. Code, and charged but one offense, an assault with intent to kill and murder.

The alleged imperfections in the charge of the court to the jury cannot be considered here, as in the record before us that charge does not appear.

The defendant complains that the court allowed a witness to testify, against the former's objection, that one Morris, the person alleged to have been assaulted, told the witness about two hours after the alleged shooting that he (Morris) was shot. The defendant himself, when sworn as a witness, admitted to having fired the shot complained of, for the purpose of scaring Morris, and the statement first referred to did not indicate *who* fired the shot; hence by its admission in evidence the defendant was not prejudiced.

The objection that it was hearsay evidence was made to the statement of E. Dakin, that Morris had claimed, in his presence, but not in that of the defendant, that a certain gun belonged to the latter. For the reason that the defendant identified that very gun as his own when testifying, the error, if any, was cured.

The court is said to have erred in not permitting Peter Morris to answer a question as to the condition of the defendant as to sobriety, or the contrary, at the time of the alleged shooting. As the offense of which the defendant was convicted did not involve the necessity of proof of any specific intent to commit it, evidence as to whether the defendant was drunk or sober at the time of the alleged shooting was immaterial, and the court committed no error in excluding it.

The defendant's counsel propounded to a witness this question: "Do you know the reputation of this defendant for peace and quietude in the community in which he lives?" The district attorney objected to it, upon the ground that it had not been shown whether, as a matter of fact, the witness knew the particular community in which the defendant lived. By the bill of exceptions it appears that the court thereupon asked the witness several questions, and then sustained the objection. What those questions were does not appear in the record, nor does it appear therein that the witness knew what community the defendant lived in; from which it must be presumed that the court was satisfied the witness did not know the defendant's reputation, as asked for, in the community in which he lived, and properly sustained the objection of the district attorney.

A question put by the district attorney to one Pratchner, a witness, as follows: "Did you ever get drunk there with him?" was objected to as irrelevant, immaterial, and not proper cross-examination, but was allowed by the court to be asked. Since no answer to the question is shown by the record to have been given, it does not appear that the defendant was deprived of any legal right.

The defendant further complains that the court below erred in not permitting a question to be answered, asked by his counsel of certain physicians as experts, as follows: "Suppose that on a medium dark night one man was standing a distance of twenty-five paces from another; that one of the men had lost one eye: would he be as apt to see the movements and what was done by the other man as if he had both eyes in good condition?" The defendant then offered to prove by those physicians that, under the circumstances mentioned in that question, the prosecuting witness, a one-eyed man, could not have seen as well as the defendant, who possessed two eyes. It seems to us that, to render such a question or such evidence proper, it ought first to have been shown that those physicians had made an examination of the eyes of Morris and the defendant; for, without a knowledge of the structure, condition, and powers of the particular eyes about which they were called upon to give evidence, it is impossible to perceive how they could better

have known anything about the relative powers of the two men's eyes under the conditions named than any unprofessional person could have done by simply looking at the two men casually, or, as the question was put, without even looking at any two *particular* men, or at any men at all.

The action of the court in not issuing attachments for certain witnesses for the defendant is also assailed as erroneous. It appears that the two witnesses in question had been duly subpoenaed to appear, but it does not appear but that the defendant knew they were not present when he went to trial. After the case for the people was closed, and the defendant had testified, and numerous other witnesses had been sworn and testified in his behalf, the two above referred to were called at the court-room door by the sheriff, and failed to answer. Then a bench-warrant was asked for by the defendant to enforce their appearance. It did not appear by affidavit, or any sworn statement, what was sought to be proved by those witnesses, or either of them, or that the evidence expected from them was, in any particular, material to the defense. The trial of this cause was had in Santa Cruz county; the witnesses were served with the subpoena in Santa Clara county, California; from all which we do not perceive that the court, in refusing to grant the attachment for the witnesses, abused the discretion vested in it in reference to such matters. There appeared to be no need for their evidence upon the part of the defendant; they are not shown to have been within easy or immediate reach; and, for all that the court knew, the trial might have been uselessly prolonged for several days without the witnesses being then forthcoming, or their testimony of any value when had.

The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 79

McALESTER *v.* LANDERS, Defendant, and another, Intervenor.
(No. 9,159.)

(*Supreme Court of California.* June 29, 1886.)

1. COVENANT—COVENANT FOR TITLE—QUIET ENJOYMENT.

An express covenant, in a lease, for quiet enjoyment, implies a covenant that the lessor had title to the property leased, and power and right to demise it; and therefore, if, at the time of a lease with such covenants, there be, as to part of the property leased, another valid and outstanding lease, the lessor, had, at the time of the second lease, no power to so demise the part of the property already demised by the first lease, and his covenant would be immediately broken.

2. SAME—COVENANT FOR QUIET ENJOYMENT—BREACH OF—EVICTION.

There can be no breach of a covenant for quiet enjoyment without an eviction, actual or constructive. Recovery in an action of trespass against the covenantee is such a disturbance of his possession as will constitute a constructive eviction, and therefore a breach of the covenant.

3. SAME—BREACH OF—MEASURE OF DAMAGES.

The measure of damages in an action against a lessor for breach of his covenant of quiet enjoyment, where the covenantee has been evicted, cannot be less than the amount of the judgment for damages and costs recovered against the covenantee. That amount may properly be classed as "expenses properly incurred by the covenantee in defending his possession."

4. LANDLORD AND TENANT—ACTION FOR RENT—COVENANT—BREACH OF—DAMAGES—SET-OFF AND RECoupMENT.

When damages have been sustained by a lessee by a breach of the lessor's covenant, if an action for rent is brought, the lessee may recoup his damages from the rent, or, at his election, he may bring a separate action for the recovery of the damages, and the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Robert L. Behre, for appellant. *Robinson, Olney & Byrne*, and *William Reade*, for respondent.

BELCHER, C. C. The facts out of which this case arose are as follows: In August, 1870, the plaintiff leased to P. M. Darcy and Edward Naughton a tract of 515 acres of land, situate in Marin county, for a dairy and stock ranch. The lease was for a term of five years, with a privilege of two months' extension, and it remained in full force during the whole term named. In October, 1874, the plaintiff leased to one Mosheimer a tract of 45 acres, which embraced 20 acres then leased to and in the possession of Darcy and Naughton, for the purpose of making bricks. The lease to Mosheimer was for a term of seven years, commencing October 10, 1874, and it contained a covenant that the lessee should and might peaceably and quietly have, hold, and enjoy the demised premises, for the term aforesaid, without molestation by, through, or under the act or acts of the lessor, his heirs or assigns. The rent reserved was \$900 for each six months of the term, payable in advance, on the tenth of October and April of each year. Upon the 20 acres covered by both leases there were certain springs of water which were essential to the first lessees for the purpose of watering their stock, and absolutely essential to the second lessee for the purpose of making bricks. Shortly after its execution, Mosheimer, with the written consent and approval of the plaintiff, assigned his lease to the California Brick Company, and the defendant, Landers, in consideration of the assignment, and that the company should have and enjoy quiet and peaceable possession of the premises demised, executed a written guaranty to the plaintiff that the brick company would pay the rent reserved in the lease, and in default thereof he would pay the same. In March, 1875, the California Brick Company, being ignorant of the lease to Darcy and Naughton, and the 20 acres covered by both leases being apparently unoccupied by any one, entered upon the said 20 acres, and proceeded to construct buildings and build reservoirs, and to dig out and excavate the springs of water thereon, and to use the soil for the manufacture of bricks; and it continued thereafter in the possession and occupation thereof during the remainder of the term named in its lease. In July, 1877, an action was commenced by Darcy against the plaintiff here, McAlester, and the California Brick Company, to recover damages for the entry by the company upon the premises leased as aforesaid to Darcy and Naughton, and taking possession of the springs of water thereon, and permitting its horses to enter thereon, and upon other lands demised to them, between the thirty-first day of March, 1875, and the fifteenth day of October, 1875, the day of the expiration of their lease. The plaintiff employed counsel, and defended the action in his own behalf and in behalf of the company, but such proceedings were had in it that in November, 1881, judgment was rendered in favor of Darcy, and against the company, for \$2,000 damages, and \$318.80 costs; the principal element of damages proven at the trial being the exclusion of Darcy and Naughton and their cattle from the springs of water. The company paid the rent due under its lease up to July 10, 1880, and thereafter refused to pay it, leaving unpaid, at the expiration thereof, the sum of \$2,250, to recover which from the defendant on his guaranty this action was brought.

Upon these facts the court below was of the opinion that there had been such a breach of the covenants, express and implied, in the lease under which the company held, as exonerated the defendant from liability on his guaranty. Judgment was then entered in favor of the defendant and the intervenor, and the plaintiff appealed; the case coming here on the judgment-roll.

1. The lease to Mosheimer, in addition to the express covenant for quiet enjoyment, contained an implied covenant that the lessor had title to the

property leased, and power and right to demise it. Rawle, Cov. 472. As the 20 acres on which the springs were situated had already been leased to Darcy and Naughton, and their lease was still outstanding and valid, the lessor had at that time no power to demise that part of the property, and his covenant was immediately broken.

2. As to the covenant for quiet enjoyment, the rule is that there can be no breach without an eviction, actual or constructive. But what acts will constitute such an eviction it is often difficult to determine. It is settled, however, that there need not be an actual dispossession.

It was so held in *McGary v. Hastings*, 39 Cal. 367. In that case the plaintiff purchased, with a covenant for quiet enjoyment, and went into possession of a parcel of land which was a portion of a supposed Mexican grant. The grant was afterwards rejected, and the plaintiff then, under an act of congress, which he assisted in getting passed, bought the government title. This was held to be an eviction.

In *Loomis v. Bedel*, 11 N. H. 74, a prior conveyance had been made by the covenantor. Upon the death of the prior grantee, the land was sold by his administrator at public auction, and purchased by the plaintiff, and it was held that these facts constituted an eviction.

In *Dyett v. Pendleton*, 8 Cow. 727, a majority of the court allowed the tenant to regard as an act of ouster from the tenement which he hired, consisting of part of a dwelling-house, the suffering of prostitutes openly to occupy the other part of the house.

In *Lewis v. Payn*, 4 Wend. 428, the court, referring to *Dyett v. Pendleton*, say: "It seems to be held that any obstruction by the landlord to the beneficial enjoyment of the demised premises, or a diminution of the consideration of the contract by the acts of the landlord amounts to a constructive eviction."

In *Williams v. Shaw*, T. R. (N. C.) 630, the supreme court of North Carolina held that there was a breach of the covenant for quiet enjoyment when one, claiming a superior title, obtained a judgment for damages in an action of trespass *quare clausum fregit* against the covenantor. TAYLOR, C. J., said: "It is wholly immaterial whether the eviction is effected by legal process, or by private disturbance or molestation; but, if a legal recovery were necessary, I should not hesitate in considering the judgment in an action of trespass *quare clausum fregit*, as effectual for that purpose." DANIEL, J., said: "The land being woodland, and no one in actual possession, the possession then followed the title; and that, the court and jury said, was in McKetham. This is equivalent to an eviction under legal process." RUFFIN, J., said: "I am of opinion that the recovery in the action of trespass against the plaintiff, as set forth in the declaration, is such a disturbance of his possession as will form a breach of the defendant's covenant for quiet possession. In that respect it is tantamount to an actual eviction."

The ruling in that case we think in point, and it should be followed here. It is true, the action of trespass involved in this case was not commenced till after the expiration of the Darcy and Naughton lease, and judgment in it was not recovered till the expiration of the Mosheimer lease; still the judgment must be held to have related back to the commencement of the action, and to have operated to disturb the company's possession during the whole time the action was pending.

3. The detriment caused by the breach of the plaintiff's covenants cannot be less than the amount of the judgment for damages and costs recovered against the covenantor. That amount may properly be classed as "expenses properly incurred by the covenantor in defending his possession." Section 3304, Civil Code.

4. When damages have been sustained by a lessee by a breach of the lessor's covenant, if an action for rent is brought, the lessee may recoup his

damages from the rent, or, at his election, he may bring a separate action for the recovery of the damages. *Kelsey v. Ward*, 38 N. Y. 83. And the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term. *Cook v. Soule*, 56 N. Y. 420.

5. Under the Code, "a guarantor is exonerated, except so far as he may be indemnified by the principal, if, by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Section 2819, Civil Code. As the brick company had a right to recoup its damages to the full amount of rent claimed by plaintiff, and, as it appeared, and by its complaint in intervention set up that right, it is clear, we think, that the plaintiff's rights against the company were impaired, and the case is brought within the provisions of the above-quoted section.

In our opinion the court below did not err in holding that the defendant was exonerated from liability on his guaranty, and the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 85

COHEN v. GREY. (No. 6,664.)

(Supreme Court of California. June 29, 1886.)

MUNICIPAL CORPORATIONS—OPENING STREETS—CONDEMNATION PROCEEDINGS—INJUNCTION.

Where condemnatory proceedings were commenced under the California statute entitled "An act to provide for opening streets in the town of Alameda," approved March 23, 1876, an injunction order restraining such proceedings, made four months after the passage of another act repealing the first act mentioned, would be erroneous, as the threatened wrong against the plaintiff would have been averted by the intervention of the legislature, and the condemnatory proceedings would fall of their own weight.

Department 2. Appeal from superior court, county of Alameda.

John Ellsworth, for appellant. *Lake & McCoon*, for respondent.

MCKEE, J. This is an appeal from an order granting a preliminary injunction, in an action brought to obtain a decree to perpetually enjoin the defendants, who were members of the board of trustees of the town of Alameda, from passing or voting upon any proceedings pending before the board for the opening of a public street through a tract of land belonging to the plaintiff. The action was brought upon the ground that the proceedings were taken, and would be continued, for the pecuniary aggrandizement of one of the trustees, with whom, as alleged, the other trustees had conspired to carry out his purposes, regardless of the rights of the plaintiff, and that the proceedings already taken, and as contemplated by them, for that purpose, were and would be fraudulent and corrupt.

The complaint in the action was filed on the thirtieth of July, 1877, and on that day the judge of the court made an *ex parte* order on the defendants to show cause, on the tenth of August, 1877, why an injunction should not be issued, and in the mean time restrained the defendants from further acting upon the proceedings pending before the board of trustees. The restraining order was granted without any undertaking; but on the seventeenth of August, 1877, on motion of defendants, the plaintiff was ordered to file an injunction bond, which he did on the same day. Thereupon defendants filed

their respective answers to the complaint, in which they specifically denied its allegations of fraud, conspiracy, and corruption; but the restraining order was continued until the second of August, 1878, when the judge of the court, having heard and considered the order to show cause upon the pleadings and affidavits filed, granted and allowed an injunction *pendente lite*. Upon the entry of that order the restraining order spent its force. Section 530, Code Civil Proc.; *Hicks v. Michael*, 15 Cal. 107.

But the order of the second of August for a preliminary injunction was erroneous, because the condemnatory proceedings sought to be enjoined were commenced under a statute entitled "An act to provide for opening streets in the town of Alameda," approved March 23, 1876, which was repealed on the first of April, 1878, (St. 1877-78, p. 964,) four months before the date of the order. The threatened wrong against the plaintiff was therefore averted by the intervention of the legislature, and the proceedings before the board fell of their own weight; so that on the second of August, 1878, there were no proceedings to enjoin. An injunction was therefore useless and unnecessary, and the order for an injunction was irregular and erroneous. *Linden v. Case*, 46 Cal. 171; *Bucknall v. Story*, 36 Cal. 70; *Houghton v. Austin*, 47 Cal. 647; *Northern Pac. R. Co. v. Carland*, 3 Pac. Rep. 134; *Gates v. Lane*, 49 Cal. 266.

Order reversed, and cause remanded.

We concur: THORNTON, J.; SHARPSTEIN, J.

(70 Cal. 120)

PEOPLE v. WEBB. (No. 20,164.)

(Supreme Court of California. June 30, 1886.)

WITNESSES—EXAMINATION—IMPEACHMENT.

Where, in a criminal case, one of the witnesses of the defendant is, after examination or cross-examination, recalled by the prosecution for further cross-examination in order to lay a foundation for impeaching him, the prosecution is bound by the answers of the witness in regard to matters collateral and not relative to the issues being tried, and, as to such matters, he cannot be contradicted; and it would be error to allow, against the objections of the defendant, any evidence for such a purpose.

In bank. Appeal from superior court, city and county of San Francisco. *John D. Whaley*, for appellant. *The Attorney General*, for respondent.

BY THE COURT. On the trial of this case, after the prosecution had announced that the case was closed, the court permitted the district attorney to recall a witness for the defendant, who had been examined and cross-examined, for further cross-examination in order to lay a foundation for impeaching him. On the cross-examination for that purpose the witness was asked questions which were answered without objections. But the subject-matter of the cross-examination was collateral, and not relative to the issues being tried, and the prosecution was bound by the answers of the witness. As to them he could not be contradicted. It was therefore error to allow, against the objections and exceptions of the defendant, the testimony offered and given to contradict the witness. *People v. Devine*, 44 Cal. 452; *People v. Furtado*, 57 Cal. 345.

Judgment and order reversed, and cause remanded for a new trial.

70 Cal. 103

SWIFT and others v. GOODRICH and others. (No. 11,522.)

(Supreme Court of California. June 30, 1886.)

1. WATERS AND WATER-COURSES—RIPARIAN PROPRIETORS—USE OF WATER BY—IRRIGATION.

A riparian proprietor may take water from a stream for necessary household purposes, and may make reasonable use of it for purposes of irrigation.

2. ESTOPPEL—LANDLORD AND TENANT—RIPARIAN LESSEE.

A riparian proprietor who is the lessee of another riparian proprietor's right to use water is not a tenant, in the meaning of the California statute relating to landlord and tenant, and therefore does not come within the statutory prohibition which precludes tenants holding over from denying the title under which they entered into possession until after they have returned the possession to him from whom they received it.

3. EJECTMENT—WATER-COURSES.

Ejectment will not lie to recover possession of a water-course.

4. SAME—LANDLORD AND TENANT—USE OF WATER.

In an action to restrain an upper riparian proprietor from using water of a stream which he had theretofore been using in pursuance of a lease which has expired, if the complaint does not aver that such upper proprietor has been or is using an unreasonable quantity of water for irrigation purposes, nor state facts showing that the quantity used for such purpose has been or is unreasonable, the complaint does not state a cause of action.

Department 1. Appeal from superior court, county of Santa Barbara.

R. B. Canfield, for appellant. *W. C. Stratton*, for respondent.

MCKINSTREY, J. The complaint was demurred to on the ground that it did not state a cause of action. The complaint avers that the plaintiffs and defendants are riparian proprietors, the lands of defendants lying above those of the plaintiffs on Bush creek; and further avers that on the fourth day of March, 1874, Jarvis Swift (predecessor in interest of plaintiffs) and B. T. Dinsmore (grantor of defendants) executed a certain instrument, in words and figures as follows:

"This indenture of lease, made and entered into this fourth day of March, A. D. 1874, between Jarvis Swift, the party of the first part, and B. T. Dinsmore, the party of the second part, both residents of Montecito, in the county of Santa Barbara, state of California, witnesseth that the said party of the first part hereby grants to the party of the second part the right and privilege to the free use of the water of a certain stream running near the house of said Dinsmore, known as 'Bush Creek,' for all the necessary purposes of his house use, and the same to be taken from said stream where it is now taken, and then to be turned back into the stream at a point immediately below where the party of the second part now obtains water for family and house use; and the party of the first part further agrees that the party of the second part shall have the use of the water for irrigation to the same amount now required, as often as it shall be necessary, and without waste or injury to the party of the first part, and, after the water has been so used, to be turned back again into the stream at the same point heretofore mentioned; and the said party of the second part agrees and binds himself to not use the water so taken from said stream for any other purposes than those agreed upon by this lease, and in such a manner as to avoid the least waste, and, after using the water for irrigation, to turn it back into the stream at the point above mentioned, and that he will use all reasonable efforts to keep the water confined in the place where said water is to be returned into the stream; and, for the privileges hereby granted by this lease,

the party of the second part agrees to pay to the party of the first part one dollar per year for the period of ten years. This lease shall be for the term of ten years from this date.

JARVIS SWIFT.

"B. T. DINSMORE."

—That immediately upon the execution of said "lease" Dinsmore used the water of said creek as therein provided, and he and his successors so used said water during the term in the lease specified; that the lease expired March 4, 1884, and that defendants have continued ever since to use, and will, unless enjoined, continue to use, the water "for all necessary house use, at the house mentioned in said lease, (on defendant's land,) and to use said water upon said land owned by them for the purposes of irrigation," etc.

Unless the defendants are estopped by the written agreement from using the waters for necessary household purposes, or from using the water for irrigation, the complaint states no cause of action. A riparian proprietor may take water from the stream for necessary household purposes, and may make reasonable use of it for purposes of irrigation. *Lux v. Haggin*, 10 Pac. Rep. 674, (April 26, 1886.) There is no averment in the complaint that the upper riparian proprietors have been or are using an unreasonable quantity of water for irrigation purposes, or of facts showing that the quantity used for such purposes has been or is unreasonable. The position of respondents is that when the grantor of defendants executed the "lease" he admitted that his only right to the use of the water was that which he acquired under and by virtue of the lease; that the plaintiff's cause of action is founded on the fact that the lease has expired, and that defendants are estopped from claiming any right to the use of the water, and should be compelled to discontinue it. The question in this case is not what were the respective rights of the parties to the agreement of 1874, or of their successors, while the written agreement was in force, but what were their rights when this action was commenced.

Respondents rely upon the fourth subdivision of section 1962 of the Code of Civil Procedure: "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." The statute relates to existing tenancies. But, upon principles of justice and policy, the courts hold that a tenant cannot remain in possession of the land demised after the expiration of his term, and, while so in possession, dispute the landlord's title. He is estopped to do so because he entered into and obtained the possession from the landlord. Bigelow, Estop. 372, 381-384. After the expiration of the lease, however, he may surrender the possession, and then assert a title hostile to that of the landlord. A statement of the doctrine shows that it is not applicable to a case like the present. For aught that appears, defendants and their grantors have been in possession of the *land* through which the creek flows since a date antecedent to the execution of the written instrument. They are not called on to surrender the land, or the water on the land, to the plaintiffs, before asserting a right to the reasonable use of the flowing water. How could defendants surrender to the plaintiffs the use of the water except by ceasing to use it? If this were necessary, a cessation of the use, for however limited a period, would authorize them to assert their right to a renewed use. But to say that a cessation of the use for a day or an hour (by which the plaintiffs would secure no substantial benefit) must precede the assertion by defendants of a right to the use of the water would lead to an absurdity. On the other hand, if the defendants here are forever estopped from claiming any use of the water, they occupy a very different and much less desirable position than any tenant of real property with reference to his former landlord.

But the relation of landlord and tenant, to which the rule as to estoppel is referable, never existed between the parties to the written agreement, or between their successors. Though contracts with respect to incorporeal hereditaments may be good as contracts, they do not create the relation of land-

lord and tenant. 1 Washb. Real Prop. *310. There may be an enjoyment of the easement, but no possession such as can be made the basis of an action of ejectment. Tayl. Landl. & Ten. § 699. The definition of an easement excludes the idea of its being held as a tenancy. Bing. Real Prop. 17. No action (of ejectment) will lie to recover possession of a water-course. Ang. Water-courses, § 8. If it be conceded that the parties to the written agreement might be estopped from denying admissions contained in it while it was operative, the defendants were not "tenants," within the meaning of subdivision 4 of section 1962 of the Code of Civil Procedure; nor are they tenants holding over, to whom is applicable the prohibition which precludes such from denying the title under which they entered into possession of corporeal hereditaments until after they have returned the possession to him from whom they received it.

The demurrer to the complaint should have been sustained.
Judgment reversed, and cause remanded.

I concur: MORRISON, C. J.

MYRICK, J. It is stated by respondents (plaintiffs) in their brief that their cause of action is founded upon the fact that the lease has expired, and the defendants should discontinue the use of the water; that there is no issue as to the rights of riparian proprietors, and it is entirely immaterial whether they (plaintiffs) are or are not deprived of the use of the water. Plaintiffs assert that the taking of the lease should estop defendants from making any claim to the use of the water after the expiration of the term of the lease. I am of opinion that this assertion is not maintainable, and for that reason only, I concur in the judgment.

70 Cal. 147

Estate of SBARBORO, Deceased. (No. 9,035.)

(Supreme Court of California. July 13, 1886.)

1. APPEAL—PROBATE OF WILL—ORDERS APPEALABLE.

Orders made dismissing a petition for the revocation of the probate of a will, or denying motions of contestants of a will to set aside and vacate all the orders and decrees made in the matter of the probate of a will, are not appealable orders.

2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—NOTICE.

Where the decree making distribution of an estate shows that proof was made to the satisfaction of the court that notice was given as required by statute, and there is no evidence in the record on appeal that such notice was not properly given in due form, and for the proper time, this will be taken as sufficient and conclusive evidence of the fact that the necessary notice was given.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

A. D. Splivalo and John Reynolds, for appellant. J. M. Burnett and D. Sawyer, for respondent.

FOOTE, C. In this case the trial court dismissed a petition for the revocation of the probate of a will, as it was directed to do by this court in *Estate of Sbarboro*, 63 Cal. 9, and we perceive no error in such action. And from the order made therein no appeal lies under section 963, subd. 3, Code Civil Proc., since such an order is not there mentioned as being appealable. And the order made denying the motion of contestants of the will to set aside and vacate all the orders and decrees made by the late probate court is not made appealable under the section, *supra*. The court, having dismissed the petition heretofore mentioned, proceeded to distribute the estate of the decedent in accordance with his wishes expressed in the will. The decree made for that purpose the appellants seek to reverse on the ground, as they allege, that

the notice required by section 1633, Code Civil Proc., was improperly given. That notice, which is in due form, was signed by the clerk of the proper court, through his deputy. It was posted according to law, as the affidavit of Frank Grimes, annexed thereto, shows, he being a person qualified by law so to do. There is no evidence in the record that he did not act for said clerk, or that said notice did not remain where posted for the time required by law; and the final decree of distribution contains this recital: "And it appears by proper evidence that the notice, as prescribed by law, had been given of the hearing of said petition, and of the settlement of said final account." All of which is sufficient and conclusive evidence of the fact that the necessary notice was given. *McClellan v. Downey*, 63 Cal. 520-523.

The appeals from the orders should be dismissed and the decree appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the appeals from the orders are dismissed, and the decree is affirmed.

(70 Cal. 135)

THOMPSON v. WHITE. (No. 9,036.)

(Supreme Court of California. July 13, 1886.)

SLANDER OF TITLE—NONSUIT—TITLE IN DISPUTE.

In an action for slander of title, where the evidence shows that the existence of the title alleged to have been slandered is in dispute, and that an action is pending between the same parties for the purpose of determining that very issue, a nonsuit is properly granted.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

D. L. Smoot, for appellant. M. A. Wheaton, for respondent.

FOOTE, C. This suit was instituted by Thompson for the purpose of obtaining a judgment for \$20,000 damages against White, for slander of the former's title to an ore-roasting furnace, and for an injunction prohibiting him from continuing such slander. After the evidence in the cause had been submitted to the court, it appeared to be undisputed that Thompson's title to the undivided interest which he claimed in the ore-roasting furnace, as against White, rested solely upon a decree of the Nineteenth district court of the city and county of San Francisco, and a commissioner's deed thereunder. Upon an inspection of the bill of exceptions in the record, it is evident that the action in which the decree ordering the deed to be made was rendered, has never been finally disposed of, but is still pending. The existence of the title itself, alleged to have been slandered, is yet in dispute between the parties to the original suit, brought for the purpose of determining that very issue. Therefore, considering the law as laid down in sections 44 to 48 of the Civil Code, inclusive, and the facts of this case as disclosed by the record, we can perceive no good reason why the defendant should have been precluded from asserting, orally or by publication, that which he had a right to do, and was in good faith continuing to do, in the original and pending suit, which had for its object the determination of the question of title to the ore-roasting furnace. To declare that the nonsuit in this case was im-providently granted, would be, in effect, to say that, where two parties are engaged in litigating the ownership to property which both claim, each could maintain an action for slander of title against the other, for asserting, orally or by publication, his ownership of that which is thus in dispute.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

BECKMAN v. BRONNER. (No. 11,245.)

(*Supreme Court of California.* July 22, 1886.)

JUDGMENT AFFIRMED.

Department 1. Appeal from superior court, county of Sacramento.
A. L. Hart, for appellant. A. P. Catlin, for respondent.

By THE COURT. There is no question of law involved in this appeal, and, as we would not be justified in holding the evidence insufficient to sustain the findings, the judgment and order must be affirmed. So ordered.

70 Cal. 194

WING HO v. BALDWIN. (No. 11,232.)

(*Supreme Court of California.* July 22, 1886.)

ASSIGNMENT—PARTNERSHIP—FILING OF CERTIFICATE—RIGHTS OF ASSIGNEES TO SUE.

The provision of the Civil Code to the effect that persons doing business as partners, contrary to the provisions of the article requiring the filing and publishing of a certificate showing the names and residences of all the members of the partnership, "shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this state, until they have first filed the certificate and made the publication herein required," does not preclude the assignees of such persons from maintaining an action therein.

In bank. Appeal from superior court, county of Los Angeles.
Thos. B. Brown, for appellant. Wells, Van Dyke & Lee, for respondent.

ROSS, J. The sole question in this case is whether or not the provision of the Civil Code to the effect that persons doing business as partners, contrary to the provisions of the article requiring the filing and publishing of a certificate showing the names and residences of all the members of the partnership, "shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this state, until they have first filed the certificate and made the publication herein required," also precludes the assignee of such persons from maintaining an action thereon. It is claimed that it does, because of the general rule that the assignee of a chose in action acquires no greater rights than his assignor had. But the disability created by the statute is of a personal character, and, as applied to the *partnership*, operates only to abate the action. *Byers v. Bourret*, 64 Cal. 73; *Sweeny v. Stanford*, 6 Pac. Rep. 688. The partners may at any time remove the disability by complying with the provisions of the statute. But an assignee of such partners cannot do so, nor is there any mode by which he can compel them to remove it. The statute does not in terms apply to the assignee of such persons, and to extend it by construction to the assignee would be to place the latter in a worse position than his assignor; for, as already said, it would lay in the power of the partners to remove the disability, while their assignee could not do so. As the language of the statute does not include the latter, we do not think it should, by construction, be extended to them. *Cheney v. Newberry*, 7 Pac. Rep. 445.

Judgment reversed, and cause remanded.

We concur: MCKINSTRY, J.; SHARPSTEIN, J.; MCKEE, J.

I dissent: MYRICK, J.

69 Cal. 643

HARTMAN v. ROGERS. (No. 11,320.)

(Supreme Court of California. May 28, 1886.)

1. APPEAL—RECORD—FINDINGS—INSUFFICIENCY OF EVIDENCE.

Where the statement on appeal contains no specification of insufficiency of the evidence to sustain the findings, the question of the sufficiency of the evidence will not be considered in the appellate court.

2. MASTER AND SERVANT—CONTRACT FOR PERSONAL SERVICES—ACTION ON QUANTUM MERUIT.

Where, in the case of a contract for personal services, the master denies the servant's rights under the contract, and attempts to rescind it, the latter is at liberty to abandon the contract, and sue for reasonable compensation for work actually done.

3. EVIDENCE—COMPETENCY—TESTIMONY CONCERNING INTENTION OF ANOTHER.

There is no error in striking out the portion of a defendant's testimony which purports to declare the intention of the plaintiff concerning the matter in dispute between them.

4. SET-OFF AND COUNTER-CLAIM—MASTER AND SERVANT—QUANTUM MERUIT.

In an action on a *quantum meruit* for personal services, the defendant cannot set off damages arising from his being compelled to surrender to his landlord his lease of the premises on which the plaintiff had been engaged to work, because the latter had violated his contract, such damage not being a direct consequence of the plaintiff's violation of his contract.

5. WITNESS—ADMISSIBILITY OF EVIDENCE OF HOSTILITY.

A party is not injured by cross-examination of a witness to show that ill feeling at one time existed between them, if the witness, on the direct examination, has testified favorably to the party.

6. MASTER AND SERVANT—DISCHARGE OF SERVANT FOR CAUSE—COMPENSATION.

An employe dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

Department 1. Appeal from superior court, county of San Bernardino. *J. D. Bethune*, for appellant. *W. J. Curtis* and *H. M. Willis*, for respondent.

MCKINSTRY, J. Appellant contends that there is absolutely no testimony in the statement for new trial tending to show the value of plaintiff's services. The statement contains no specification of a deficiency of the evidence to sustain the finding as to the value of the services. Code Civil Proc. § 659, subd. 3. There is a substantial conflict of the evidence bearing on other issues. The defendant claimed that the plaintiff, although employed to work for him under a specific contract for a term, violated his contract during the term, and ousted defendant both from the real and personal property confided to plaintiff's charge. The plaintiff claimed that having entered into the possession under the contract, by the terms whereof he was to deliver to Samuel Rogers one-third of the product at the close of the cropping season, and was to receive reasonable compensation for his services, the defendant (after the plaintiff has performed labor thereunder in raising a crop, but before the expiration of the cropping season) denied the contract, expressly refused to recognize the plaintiff's rights under it, and asserted that plaintiff was working, and had agreed to work, for \$100 a year; that thereon the plaintiff demanded reasonable wages for his work, which the defendant refused to pay or promise to pay; that plaintiff then declared

his intention to retain possession of the property, saying: "I won't give it up to no man without my money, and I don't work for Chinaman's wages." The case shows that the plaintiff retained possession of the land and certain personal property, and that the land and personal property were subsequently recovered by the defendant in actions of ejectment and replevin. The present action is for wages up to the alleged denial of the specific contract by defendant.

If the contract was as stated by the plaintiff, and \$100 a year was grossly inadequate compensation, and the defendant denied plaintiff's rights under the contract, and attempted to rescind it, the plaintiff was at liberty to abandon it and sue for reasonable compensation for the work actually done previously. His right so to do attached when the contract was rescinded by the action of both the parties, and the fact that the plaintiff did not subsequently perform the conditions of a contract which both had agreed to ignore, cannot affect his right to recover in this action. However illegal and ill-advised his attempt to "jump" the land, he had done work under an alleged express contract which he was relieved from executing, according to its terms, by the conduct of the defendant. He sues, not for the *profits* which he might have made if the parties had stood by the terms of the original contract, but simply for the actual value of his labor. The plaintiff and defendant contradicted each other as witnesses. Whatever might be our opinion if the matter were submitted to us as an original question, there is here a "substantial conflict," and the established rule would require us to sustain the verdict. The subsequent judgments in replevin and ejectment were in no way determinative of the plaintiff's right to wages. The present action assumes that the property involved in those actions belonged to the defendant herein.

The answer of the defendant in the ejectment (plaintiff here) cannot be treated as an admission that the defendant therein had violated the contract under which he held possession of the land immediately after the contract was entered into. But if the answer could be so treated, it only proved an *admission* by the present plaintiff, to be considered by the jury with the testimony of the plaintiff in the present action.

Defendant insists that plaintiff cannot recover in this action because he violated the specific agreement *before* the defendant violated or refused to be bound by it. This, too, was a question of fact submitted to the jury upon evidence *pro* and *con*. The objection to the question asked plaintiff when testifying on cross-examination, "Did you not pasture two jacks for one Baker?" was properly sustained on the ground that "it was not responsive to the examination in chief." There was no error in striking out that portion of defendant's testimony which purported to declare the "intention" of the plaintiff. It was not error to hold that damages sustained by the defendant in consequence of being compelled to surrender his lease to his landlord was not a direct consequence of the plaintiff's violation of his contract with the defendant, if plaintiff did violate it. Besides, defendant fully testified on that subject. Defendant was not injured by the cross-examination of his brother as a witness, showing that ill feeling at one time existed between him and the witness, who testified *in his favor*. The respondent was authorized to prove that a witness, called against him, was hostile to him. The court, although requested by the defendant, refused to instruct the jury as follows: "An employe, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract." Therefore, if you believe that the evidence shows that plaintiff agreed to perform services for defendant for the cropping year of 1884, or for the entire year of 1884, to be paid for at the end of his services, and was dismissed by his employer *for good cause* before the end of the services, your verdict will be for the defendant." This was error. There was some evidence that the contract between the plaintiff

and defendant was such as it was assumed to be in the instruction offered. Civil Code, §§ 2000, 2002.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; MYRICK, J.

70 Cal. 89

MCBROWN v. DALTON. (No. 9,286.)

(*Supreme Court of California.* 1886.)

1. PARTITION—CO-TENANCY—TRUSTS—EQUITY.

The owner of an undivided interest in land sold and conveyed all his right, title, and interest therein, except a specified portion, described by metes and bounds, which was then in his exclusive possession. The grantees stipulated by instrument in writing that in consideration of said deed they would consent and agree that he, the said grantor, should have set off to him in any decree of partition of said land that portion of the land so reserved, and that they would use all their influence to secure the same to him as the part reserved out of the interest which he held in the land before his deed to them. *Held*, that under such an agreement the said grantor only reserved to himself the equivalent of his undivided interest in the part reserved, and not the equivalent of the whole of the land reserved as described, and that such agreement did not constitute the grantees trustees, so that when the reserved portion was allotted to them under a partition, they would be bound to convey it all to him, but that a decree of partition allotting to him so much of the land in the reserved portion as was equivalent to his undivided interest therein gave him all that he was entitled to.

2. SAME—EFFECT OF DECREE ON TITLE.

A decree of partition from which no appeal has ever been taken is binding and conclusive upon the parties to it, as far as concerns the division of their several interests; but it confers no new or additional title, nor does it strengthen or confirm the title under which the parties claim.

In bank. Appeal from superior court, city and county of San Francisco. *G. F. & W. H. Sharp and Calhoun Benham*, for appellant. *E. J. Pringle*, for respondent.

MCKEE, J. This case arises out of an original action in equity brought by the plaintiff against the defendants to compel a conveyance of the legal title to certain land and premises, which it is claimed they have received and hold in trust for him. It appears by the complaint in the case that in the year 1865 the plaintiff was the owner of an undivided three-ninths interest in a ranch, known as the "Bojorquez Ranch," containing about 25,000 acres; that in that year he sold and conveyed to the defendants "all his right, title, and interest" therein, except a specific portion, described by metes and bounds, which was then in his exclusive possession; that at the time of the sale the defendants stipulated, by an instrument in writing, that this portion should be allotted and set apart to him by the final decree of the court in which there was then pending an action for the partition of the ranch, and that by the final decree rendered in that action the land thus reserved was, in fact, allotted and set apart for the defendants in this action, but they refuse to execute their trust by conveying it to him. The defendants by their answer specifically deny the allegations of the complaint. But it was proved on the trial of the cause, and the court below finds: That on the nineteenth of May, 1860, Horace Gates was the owner of an undivided one-ninth interest in the Bojorquez ranch, and commenced an action against several hundred persons named in the complaint in the action as defendants and tenants in common of the ranch, for partition of the same among them according to their respective interests; that one of these defendants was the present plaintiff, McBrown; that on the thirty-first of May, 1860, McBrown filed his answer to the complaint, in which he set forth that he was the owner in fee-simple absolute of an undivided three-ninths of the ranch, derived by direct

and mesne conveyances from the original owner, and that other persons, who were parties defendant in the action, and were in possession of portions of the ranch claiming interests therein by deeds from the same source of title, had no right or title adverse to him; and that the deeds under which they asserted their rights were ineffectual and void as to him.

After this answer was filed, McBrown and certain of the tenants in common and defendants in the partition suit, about 40 persons, including the defendants in this action, on the first of September, 1865, entered into an agreement for the formation of a land league to buy in for the use and benefit of the members of the league the undivided interests in the ranch claimed by "Horace Gates and other persons." Under that agreement a league was organized known as the "Bojorquez League," and the defendants in this action were appointed and acted as the executive committee of the league to make purchases. In that capacity the defendants purchased and acquired undivided interests in the ranch from Horace Gates and the plaintiff McBrown. The purchase from McBrown was made on the fourteenth of March, 1865. On that day McBrown by deed conveyed to the defendants a portion of his interest in the ranch by the following description: "All his right, title, and interest, in law or equity, in possession or expectancy, in the ranch, * * * reserving, saving, and excepting all that portion of said *ranch* lying and being in the south-west corner of said *ranch*, now in the possession of the said John McBrown, and more particularly described as follows, to-wit: Commencing at the south-west corner of said *ranch*, and running thence easterly along and on the south-westerly boundary line of said *ranch* to the south-east corner of the said *ranch*; thence northerly along the easterly line of said *ranch* eight chains to the line of the Clark and Casanueva tract, (so-called;) thence westerly along said line to the south-west corner of said Clark and Casanueva tract; thence northerly along the westerly line of said tract to the north-east corner of John McBrown's fence, or a point on said line easterly therefrom; thence westerly along and with the line of said fence to the fence inclosing the Potrero tract, (so-called;) thence southerly along and round the Potrero fence to the intersection of John McBrown's fence with the Potrero fence; thence westerly along and in the same direction of said fence to the westerly line of said *ranch*; thence southerly along the westerly line of said *ranch* to the place of beginning."

Contemporaneously with the execution of the deed, the defendants executed and delivered to McBrown an instrument in writing which recited that "in consideration of said deed we consent and agree that he, the said McBrown, shall have set off to him in any decree of partition of said ranch * * * that portion of the ranch reserved by said deed, * * * and we will use our influence to secure the same to him as the part reserved by him out of the interest which he held in the ranch before his deed to us."

After the defendants had in that manner acquired title from McBrown, they had themselves substituted in the partition suit as representatives of the interest thus acquired; and they filed an answer in which they alleged that, at the date of the deed, McBrown owned an undivided three-ninths of the ranch, derived by deeds from three of the heirs at law of the original owner of the ranch, less certain interests which had been conveyed to other parties by his grantors *before* he had acquired their rights, and less certain interests conveyed by McBrown himself *after* he had acquired his rights; and that all the interest which he had in the ranch at the date of the deed vested in them, except the interest reserved in the tract described in the deed; and they asked that they be adjudged owners in fee of the said undivided three-ninths, less the interest therein conveyed *before and after* McBrown acquired his rights, and less the quantity of the interest remaining in him in the tract reserved in the deed under which they claimed from him, and that the same be set apart to them, quantity and quality relatively

considered. As a defendant in the partition suit, McBrown himself continued to represent the interest in the ranch which remained in him after his deed to the defendants.

Upon the trial of the issues in the partition suit, the court found: That Bartolome Bojorquez was the original owner of the Bojorquez ranch; that in 1851 he conveyed an undivided one-ninth interest in the ranch to each of his eight children, reserving an undivided ninth to himself; that Gates, the plaintiff in the action, derived title to an undivided one-ninth thereof; that McBrown, the plaintiff in this action, derived title to an undivided three-ninths thereof, of which he transferred by deed to W. P. Bullard an undivided one one hundred and sixty-third interest, to L. A. Marshall an undivided one one hundred and fifty-fifth interest, and to Dalton, Denman, Railsback, Martin, and Meacham, defendants in this action, by the deed of the fourteenth of October, 1865, an undivided seven thousand eight hundred and eighty-seven seventy-five thousand two hundred and sixty-fifths interest in the ranch, reserving to himself whatever interest remained in him as described in the deed. And by the interlocutory decree it was adjudged that the said parties were respectively the owners in fee of the interests thus ascertained and settled, and were entitled to have the same set apart to them, quality and quantity relatively considered; the interest of McBrown to be set apart to him within the boundaries of the portion of the ranch described in the deed of the fourteenth October, 1865, as reserved. That portion of the ranch contained 3,138 acres. Eight hundred and twenty-six acres of it were allotted and set apart to McBrown as his ascertained and adjudged interest; the remainder, 2,311 acres, was allotted and set apart to Horace Gates for his ascertained interest; while the interest acquired by the defendants, Denman, Dalton, Railsback, Martin, and Meacham, from McBrown by the deed of the fourteenth October, 1865, was allotted and set apart to them in a portion of the ranch wholly outside of the tract reserved by McBrown in that deed.

The final judgment confirmed and made effectual forever these allotments. The several parties to the judgment were adjudged to be the owners in fee of their respective allotments. From the judgment no appeal has ever been taken. It is, therefore, binding and conclusive upon all the parties to it. But the judgment conferred no new or additional title upon the parties. It ascertained, awarded, and allotted to each his interest. Thereby the common possession which each had in the ranch before the rendition of the judgment became several and distinct; the unity of possession was severed, and each became entitled by the judgment to the exclusive possession of that part of the ranch which was allotted to him. McBrown, therefore, was the owner in fee of the tract of 826 acres allotted to him, and he is in the exclusive possession of it. No one questions his title to it. The defendants neither have nor claim any right or title to it, in trust or otherwise, adversely to him. Gates is the owner in fee of the remainder of the reserved tract described in the deed of the fourteenth of October, 1865; and he cannot be divested of his title or disturbed in the enjoyment of the land allotted to him by a proceeding to which he is not a party.

It is true that the defendants here acquired Gates' interest in the ranch in December, 1865, by a deed executed and delivered to them, in consummation of a contract of sale of that interest entered into by him and them on the twenty-sixth of October, 1865, 12 days after the execution and delivery of the deed of McBrown to the defendants. But the defendants acquired the interests conveyed to them by Gates' and McBrown's deeds by different and distinct transactions between them and their grantors who were with them, at the time of the transactions, tenants in common in the ranch and parties to an action for its partition. The conveyances, in which the transactions resulted, changed the extent of the interests which each of the grantors and grantees named in the deeds had in the ranch at the commencement of the action, but

they wrought no change in the legal relations of the parties to the action. The parties still remained tenants in common and actors in the action of partition, representing in their own rights the interests which they claimed to be still vested in them. On the trial of the action those interests were ascertained and determined, set apart and allotted to them respectively; and the judgment rendered is conclusive and binding upon each as to the extent and allotment of his interest. No one of the parties to the judgment is entitled to a right to the land allotted to another, or to control the legal title to it, except as he may derive such a right from some conveyance of the title or agreement for the transfer of the title by way of sale or in trust, executed by him or those to whom the allotment has been made.

As to the land allotted to Gates, McBrown does not *personally* claim any right derived from any deed or agreement in writing executed by Gates, nor by any personal transaction between Gates and himself. His only claim is founded upon the instrument in writing which was executed and delivered to him by the defendants on the fourteenth of October, 1865, simultaneously with the execution and delivery of his deed to them. But Gates' interest in the ranch did not form any part of the subject-matter of that instrument. The instrument had reference only to a portion of the ranch described as reserved for the allotment of McBrown's undivided interest in the ranch. Gates was no party to the instrument. The only parties to it were McBrown and the defendants. Besides, the instrument does not contain words of trust or of contract for the sale or transfer of the title to the tract of land described in the instrument as reserved. The words in it express a mere gratuitous promise by the defendants to use their influence to have McBrown's interest in the ranch allotted to him in that portion of it which he himself in his deed to them reserved for that purpose; and they express the consent of the defendants that that shall be done. But the defendants had no power or authority to ascertain and determine the interest of any tenant in common of the ranch, or to set it apart and allot it for him in any particular portion of the ranch. That could only be done under the law, by the officers of the law, in the action of partition; and it is not to be supposed that the parties to the instrument intended to attempt to influence the officers as to the extent of McBrown's interest or its allotment. Performance of an agreement for such a purpose could not be compelled by a court of equity. But be that as it may be, the words used in the instrument are not words declaratory of a trust or expressive of a contract. No obligation, therefore, springs from the instrument binding the defendants to sell or convey the land to which it refers, or to procure the legal title to it in trust for McBrown; therefore, the latter derives from the instrument no equitable right enforceable against the defendants in a court of equity.

The defendants, however, do hold the legal title to the land allotted to Gates; but as holders of that title they cannot be compelled to transfer it to McBrown, except upon the ground that they hold it in trust for him personally, or upon some agreement by them founded upon an adequate consideration for the transmission to him of the title. It is not claimed that they acquired or that they hold the legal title to the land in trust for him individually. They did, as the executive committee of the land league, purchase from Gates and also from McBrown, and acquired their titles; but they do not hold the titles thus acquired in trust for either McBrown or Gates. Both acquisitions were paid for with funds raised for that purpose, by assessments levied upon the original interests in the ranch of the members of the league; and, according to the provisions of the league agreement, the members who paid their assessments were entitled to share in the purchases in proportion to the amount of assessments levied and paid by them respectively. The defendants, therefore, hold the titles which they acquired from Gates and McBrown in trust for the members of the Bojorquez League. The league

agreement declares the purposes of the trust, and the powers and duties of the defendants as trustees in relation to the trust; and by it the rights of beneficiaries in the trust must be ascertained and determined. If, as a member of the league, McBrown has complied with the terms of the agreement under which the defendants purchased, there can be no question that he would be entitled with the other beneficiaries to share in the trust property, and to enforce the trust; but that must be done in a proper case, to which all the beneficiaries are parties, so that the rights of all may be settled and adjudged. *Gates v. Lane*, 44 Cal. 392; *Bates v. Townsend*, 61 Cal. 333. McBrown's single interest as a member of the league cannot be tried and determined in a collateral way in an action, founded upon a separate and distinct instrument in writing, to which the other beneficiaries were not parties.

We find no reversible error in the proceedings. Judgment and order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.; SHARFSTEIN, J.

I dissent: THORNTON, J.

70 Cal. 140

In re Estate of LEARNED, Deceased. (No. 9,164.)

(*Supreme Court of California*. July 13, 1886.)

1. WILL--PROBATE--JURISDICTION.

A petition for the probate of a will need not state whether it is an olographic or other species of will, nor will any defect of form, or in the statement of the jurisdictional facts actually existing, make void the probate of a will; but the court is to admit the will to probate or not, under all the facts shown in evidence.

2. SAME--PROBATE--CONTEST.

On the contest of a will, where the tribunal found against the contestants on all the issues raised by them, the fact that it also found upon an issue not embraced in the pleadings of the contest, or that in such case there was no finding declaring the will valid as olographic, will not affect the validity of the probate of the will.

3. DEPOSITIONS--ADMISSIBILITY--PROOF OF NON-RESIDENCE OF WITNESSES.

Parties cannot complain on appeal of error in the court below, in the admission of depositions without the preliminary proof that the persons whose depositions were offered resided out of the county where the cause was tried, if, at the time of offering the depositions, the party presenting them also offered to prove the fact of such non-residence, and such fact was then admitted without proof by the opposing party.

4. WILLS--EXECUTION OF--VALIDITY.

A will, made and executed by a testator in accordance with section 1277 of the California Civil Code, is not invalid because made and executed by him anterior to the time when such section became operative, if the testator did not die until the statute referred to had gone into effect.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

J. M. Lesser and *A. D. Dancona*, for appellant. *Bicknell & White* and *Wallace & Hastings*, for respondent.

FOOTE, C. This is an appeal from an order admitting to probate the will of G. F. T. Learned, and revoking letters of administration previously granted (upon the supposition that no will then existed) to E. A. Learned; and from that refusing the contestants of the will a new trial, upon the issues propounded by them. The first point of objection raised by the appellants, who contested the probate of said will, is that the petition therefor did not propound it as *olographic*, and the contestants did not direct their attack on it as such; and not being advised by the pleadings that the instrument was claimed to be that kind of a will, the court had no right in its findings so to

declare it. In this the appellants are mistaken. In such a proceeding the contestant is plaintiff; the jury are to find upon all the issues of fact raised by the contest, and none others; and if facts are disclosed in evidence as to the question of the propriety under the law of admitting the will to probate upon grounds which are not put in issue before the jury, the court is then to pass upon such evidence by findings.

In the case now under consideration there was no jury, and the court, in view of all the evidence before it, had a right to determine whether or not the will should be admitted to probate, either as an olographic or other kind of will. *Estate of Collins*, Myr. Prob. 73, 74; Code Civil Proc. § 1312; *Estate of Cartery*, 56 Cal. 470. And there is nothing in section 1300, Code Civil Proc., which declares that a petition for the probate of a will shall state whether it is an olographic or other species of will, nor will any "defect of form or in the statement of the jurisdictional facts actually existing make void the probate of a will," and the evidence in this case sustained the findings. The court is to admit the will to probate or not, under all the facts shown in evidence, in accordance with the statutes of this state. But in this case, admitting that tribunal found upon an issue not embraced in the pleadings of the contest, yet it also found against the contestants on all the issues raised by them, and in such a case no finding declaring the will valid as olographic under section 1273, Civil Code, was necessary in order to sustain the judgment. *McCourtney v. Fortune*, 57 Cal. 617. And the contestants cannot complain of that finding in this instance, because, when the court offered to grant them time to meet the issue as to whether or not the will was valid as an olographic instrument, they declined to take it.

It is also urged that error was committed in admitting the depositions of Mrs. Hereford and Mrs. Dalton in evidence, because, as alleged, it was not shown as a preliminary fact that those persons resided out of the county where the cause was being tried. But the appellants cannot now be heard to take advantage of such omission, if any there was, because, when counsel for the respondent offered himself to be sworn as a witness to prove the fact that those ladies were not residents of the county of the place of trial, and made an oral statement of such fact upon his own knowledge, the former's attorney replied: "I will take your word for it; you need not be sworn."

Of the letters offered in evidence by contestants, one of which was admitted and the others excluded, the latter were not pertinent to any issue raised by the pleadings, and the action of the court in the premises was proper. But even had they been admitted, they could have had no possible influence upon the determination of the issues in the contest, or upon the action of the court in admitting the will to probate.

It is also claimed that the will was invalid because made and executed by the testator anterior to the time when section 1277, Civil Code, became operative. But that person did not die until the statute referred to had gone into effect, hence the point made is without merit. 1 Redf. Wills, 409, notes 30, 31; *Bishop v. Bishop*, 4 Hill, 139; *De Peyster v. Clendinning*, 8 Paige, 295; *Estate of Barker*, Myr. Prob. 78, 79.

The orders appealed from should be affirmed.

WE CONCUR: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion, the orders are affirmed.

70 Cal. 136

DYER v. BROGAN. (No. 9,348.)

(Supreme Court of California. July 13, 1886.)

1. EVIDENCE—RECORDS—PAROL EVIDENCE AFFECTING—ADMISSIBILITY.

Parol evidence, offered for the purpose of showing that what a party claims to be a record is not a record, is properly admissible, and is not parol evidence for the purpose of contradicting a record.

2. COUNTIES—RECORDS OF BOARD OF SUPERVISORS—CORRECTION BY CLERK.

A clerk of a board of supervisors is not clothed with power, of his own account, to correct a record of the proceedings of the board, even if it is shown that he made the correction in accordance with the true state of facts.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

J. M. Wood, for appellant. *E. R. Taylor*, for respondent.

FOOTE, C. The plaintiff sued to recover judgment on a street assessment. The only finding of the court below was: "That the board of supervisors of the city and county of San Francisco did not, on the fourteenth day of November, 1876, or at any other time, adopt or pass any resolution ordering the street work mentioned in the complaint to be done, and that said street work, viz., the grading of Vallejo street, from Larkin to Polk street, was never ordered by said board to be performed by resolution or otherwise. And as a conclusion of law, I find that defendant, M. Brogan, is entitled to judgment for his costs, and the clerk is hereby ordered to enter judgment accordingly." Judgment for the defendant followed in accordance with that finding. From the former and the order denying him a new trial the plaintiff appealed.

The main points urged here by the plaintiff are that the evidence did not justify the finding, and that parol evidence was improperly admitted to vary the records of the board of supervisors of the city and county of San Francisco. The principal defense set up by the defendant in his answer was that said board had never ordered the street work to be done, for the cost of which the action against him was being prosecuted.

It appears from the evidence that the record kept by the clerk of that board from 1867 and continuously up to the time of the alleged ordering of the work in controversy was, for convenience, done by pasting into a book the printed slips from the Daily Examiner (a newspaper doing the printing by contract under the street law) of the resolutions of intention, ordering street work, and notices for bids; that the record in reference to the work in hand was made up in that way; that the resolution under which this work was alleged to have been ordered to be done had several pieces of other work (as printed in it) erased by drawing blue pencil marks through, "and as to work for grading Vallejo street from Larkin to Polk street" the blue pencil was drawn through, also; that the erasures *were there prior to the board's passing the resolution*, and that the deputy of Mr. Russell, the clerk of the board of supervisors, Mr. Forman, placed the word "*stet*" opposite the words struck out as a guide to the printer that he should disregard the striking out of said words, but at what time he did so is not distinctly ascertained. It appears also that after this time that deputy placed in the record book, without any authority from the board of supervisors, a printed order which contained the clause stricken out, and was, with that exception, exactly in the language of the one first placed upon the record. The plaintiff's contention is that the proof shows the first order to have been duly made, including the work on Vallejo street from Polk to Larkin, and that the deputy clerk was only doing his duty when he placed on record a printed slip of the order which contained the words which, *according to Mr. Russell's testimony, had been stricken out before the board made that order.*

Under such a state of facts, we are of opinion that the trial court was justified in believing that said board of supervisors had never ordered the street work to be contracted for or performed as claimed in the action, and therefore its finding was proper. When such a finding was made conclusive as it was against the plaintiff's right of action, findings upon other issues were not necessary. We perceive no error upon the part of that tribunal in its admission of testimony. That offered by parol on the part of the defendant was not for the purpose of contradicting *the* record of the board of supervisors; it was for the purpose of showing that what the plaintiff claimed to be that record was not such record, and that *the true* record did not authorize the street work done by the plaintiff. Such testimony was for the purpose of showing which of two that record was, and to uphold it. It is not admitted that there was but one record; and where two are claimed to exist, one true and the other false, how else upon occasion would it be possible to determine which is the true one, unless the custodian thereof, or other person knowing the facts, may be heard upon his oath to declare which it is?

"A record is conclusive evidence; but what is or is not a record is matter of evidence, and may be proved by other facts; otherwise there would be no remedy." *Erier v. Woodbury*, 1 Pick. 363. The deputy clerk of the board of supervisors was not clothed with any power to correct a record, even if it had been shown, as it was not, that he made the correction in accordance with the true state of the facts. And to say that such an officer may of his own motion make such an alteration of a record, and then claim that he cannot be shown to have done so, even although he did it without evil intent, is to place him in the position of being able, through a mistaken opinion of the law and facts, in a given matter, to override and nullify the solemn act of a board of supervisors in making an order within its jurisdiction alone.

There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 144

SCHALLARD v. EEL RIVER STEAM NAV. CO. (No. 9,313.)

(Supreme Court of California. July 13, 1886.)

1. CORPORATIONS—EXECUTION OF INSTRUMENTS BY.

Where instruments, purporting to be executed by a corporation, have affixed to them the corporate seal, and are proved to be signed by the proper officers, such officers must be presumed not to have exceeded their authority, and the burden to prove the contrary is on the party disputing the due execution of the instruments.

2. SAME—EXECUTION OF INSTRUMENTS—AUTHORITY OF OFFICERS.

Where facts and circumstances surrounding the execution of instruments by the officers of corporations show the existence of proper resolutions of authorization, and support the presumption of their authoritative execution as shown by the corporate seal being thereto affixed, as well as the proved signatures of the proper officers, the fact that such resolutions do not happen to appear in the proper book of the corporation will not be held absolutely to disprove their existence, and make null and void such instruments.

3. MORTGAGES—FORECLOSURE—ATTORNEYS' FEES—CORPORATIONS.

Where the resolutions of a corporation, authorizing loans and mortgages, did not give authority to have attorneys' fees secured in the latter, a court in actions for the foreclosure of the mortgages properly declines to allow any.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

E. W. McGraw, for appellant. Cobb & Moore, for respondent.

FOOTE, C. The defendant is a corporation formed under the laws of this state, and this action was instituted for the purpose of foreclosing two mortgages, aggregating the sum of \$11,941.81, upon the steamer Ferndale, which was constructed by and is the property of the defendant. Those mortgages and the notes, the payment of which the former were intended to secure, were executed in the name of that corporation, by its president and secretary, with the corporate seal affixed. One of the loans of money was made about one year preceding the commencement of the present action, and the other about 14 months prior thereto. The money thus obtained was used in the construction of said steamer. The defense chiefly relied upon is that the execution of those mortgages was not authorized by the corporation, and that they are invalid as such. There seems to have been no question but what the money was loaned in the most perfect good faith; that it went towards the building and finishing the steamer of the corporation; that the board of directors of the corporation had lawful power, if exercised at lawful meetings by proper resolutions, to borrow the money and execute the mortgages; and that the corporation received adequate benefit from the transaction. The contention is that the meetings of the directors were special in their character, and without proper and legal notice being given to some of the directors who were absent therefrom. The findings state the fact to be, among other things, that the meetings at which these loans and mortgages were authorized were "adjourned meetings" from regular meetings of said board of directors, and that a majority of said board was present, and that no other notice of said meeting was required by the by-laws of the corporation, except said by-laws stated that regular meetings should be held every three months.

It does not appear that any one of the directors, whether present or absent, objected to the negotiation of the loans, or the execution of the mortgages, either at the time it was done or afterwards, which, while it does not affect the question of the legality of their execution, does go far to make it evident that the transaction was a fair one, destitute even of the smallest degree of turpitude. In fact, it seems to be conceded on all sides that the corporation is legally liable for the money in a proper action, but the defendant contends that the mortgages are invalid. They have affixed to them the corporate seal, and are proved to be signed by the proper officers. Therefore, the latter must be presumed not to have exceeded their authority, and the contrary must be shown by the opposite party. *Southern California Colony Ass'n v. Bustamente*, 52 Cal. 192-196; Ang. & A. Corp. § 224. And although there is some evidence tending to show that the resolutions of the board of directors, as recited in the mortgage, were not, in fact, adopted in the exact language as set forth therein, yet there is also evidence which shows the existence of those resolutions of authorization; and the trial court, on the whole evidence introduced, found that the loans and mortgages were, by legal and proper resolutions of said board, expressly authorized and executed. And where the facts and circumstances surrounding a transaction of this kind show the existence of proper resolutions of authorization, and support the presumption of the authoritative execution of the mortgages, as shown by the corporate seal being thereto affixed, as well as the proved signatures of the proper officers, we do not entertain the opinion that the fact that such resolutions do not happen to appear in the proper book of the corporation, should be held absolutely to disprove their existence, and make null and void such instruments as those in controversy here, so signed, sealed, and acknowledged. And this we believe to be the law as declared by this court in the case cited *supra*, and in Ang. Corp. § 288.

We perceive no error on the part of the trial court in the admission of evidence over defendant's objections. Such evidence was either pertinent to the issues in the cause, or it did not and could not have worked any prejudice to the defendant. There is a cross-appeal here by the plaintiff from that

part of the judgment which denies counsel fees to his attorneys; and by stipulation the transcript on the defendant's appeal is to be used on said cross-appeal. The resolutions authorizing the loans and mortgages did not give authority to have attorney's fees secured in the latter, and for that reason we think the court below properly declined to allow any.

We are of the opinion, therefore, that the judgment as made and entered, and the order denying a new trial, should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 158

GRAND LODGE OF THE INDEPENDENT ORDER OF GOOD TEMPLARS OF THE STATE OF CALIFORNIA *v.* FARNHAM, Ex'x, etc. (No. 11,157.)

(*Supreme Court of California.* July 14, 1886.)

SUBSCRIPTION—EFFECT OF—ACCEPTANCE.

A promise to pay a subscription to some charitable object is a mere offer, which may be revoked at any time before it is accepted by the promisee; and an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise. If the promisor dies before his offer is accepted, it is thereby revoked, and cannot afterwards, by any acts showing acceptance, be made good as against his estate; but the rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay.

Commissioners' decision.

Department I. Appeal from superior court, county of Solano.

Geo. A. Lamont and *Joel A. Hawly*, for appellant. *S. G. Hilborn* and *F. W. Hall*, for respondent.

BELCHER, C. C. The court below sustained a demurrer to the complaint, and whether it erred in so doing or not is the only question presented for decision.

The facts, as stated in the complaint, are substantially as follows: The plaintiff was the owner of certain real property in Solano county, on which was erected the Good Templars' Home for Orphans. At the time of filing the complaint, and for a long time prior thereto, the home was conducted and managed by the plaintiff. In 1883 it was deemed important to erect an addition to the home, so that a greater number of orphans could be taken care of thereat; and to raise money for that purpose subscription papers were circulated and subscriptions solicited by an agent employed by the plaintiff. In September, 1883, S. C. Farnham, the defendant's testator, subscribed one of these papers, and placed opposite his name, as the amount of his subscription, \$1,000. On the first day of December, 1883, Farnham died, leaving a will. The will was admitted to probate, and notice to creditors published, and then plaintiff presented to the executrix its claim for the \$1,000 subscription, and the claim was rejected. In October, 1883, the agent employed to get subscriptions reported to the plaintiff the amount of money collected and then on hand, and the amount subscribed and unpaid, of which the larger part was the \$1,000 subscribed by Farnham. The plaintiff afterwards, but it does not appear when, commenced to erect an addition to the home, and was still prosecuting the work when this action was commenced. The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The general rule is that a promise to pay a subscription like that declared on here is a mere offer, which may be revoked at any time before it is ac-

cepted by the promisee; and an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise. If the promisor dies before his offer is accepted, it is thereby revoked, and cannot afterwards, by any acts showing acceptance, be made good as against his estate. *Pratt v. Trustees, etc.*, 93 Ill. 475; *Beach v. Church*, 96 Ill. 179; *Phipps v. Jones*, 20 Pa. St. 260; *Helpenstein's Estate*, 77 Pa. St. 331; *Cottage-street Church v. Kendall*, 121 Mass. 528. The rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay. *George v. Harris*, 4 N. H. 533; *Curry v. Rogers*, 1 Fost. 247; 1 Whart. Cont. 719.

Here it is not alleged in the complaint that the plaintiff entered into any contract, incurred any liability, or expended any money for the erection of an addition to the home for orphans before the death of Farnham. His subscription was therefore withdrawn by his death, and was not a valid claim against his estate.

Counsel for appellant cite *Christian College v. Hendley*, 49 Cal. 347, but that case is not in conflict with what has been said; and, besides, the matter quoted from *Watkins v. Eames*, 9 Cush. 539, has since been held by the same court, in *Cottage-street Church v. Kendall*, *supra*, to be *obiter dictum*, and inconsistent with elementary principles.

We think the demurrer was properly sustained, and the judgment should be affirmed.

We concur: SEARLES, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(70 Cal. 204)

PEOPLE v. LAMPSON. (No. 20,099.)

(Supreme Court of California. July 23, 1886.)

CRIMINAL LAW—CONTINUANCE—REFUSAL FOR LACK OF DILIGENCE.

A continuance is properly refused if, at the trial when the motion therefor is made, the affidavits fail to show that proper diligence was used to procure the attendance of the witness, and do show that no such subpoena as would compel the attendance of the witness was ever issued at all, and it does not appear that the sheriff of the county where the witness resided was informed of the address of the witness, that he might serve the subpoena that was issued.

In bank. Appeal from superior court, county of Monterey.

M. C. Beecher and *Reddick & Solinsky*, for appellant. *The Attorney General*, for respondent.

Ross, J. The only point relied on for a reversal of the judgment in this case is the refusal of the court below to grant the defendant a continuance of the trial. It appears from the bill of exceptions that on the sixth of April, 1885, the case was set for trial on the fourth of May following. At the time thus fixed the defendant moved for a continuance, on the ground that a material witness on his behalf, one Mrs. Cook, was absent. In support of the motion he filed his own affidavit, and that of one of his counsel. The affidavits failed to show that proper diligence was used to procure the attendance of the witness. No such subpoena as would compel the attendance of the witness was ever issued at all, and it does not appear that the sheriff of the city and county of San Francisco was informed of the address of the witness, that he might serve the subpoena that was issued. It is provided by section 1330 of the Penal Code that "no person is obliged to attend as a witness be-

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fore a court or magistrate out of the county where the witness resides, or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a judge of the superior court, upon an affidavit of the district attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness."

The excuse given in the affidavit of the defendant for the failure to obtain the order provided for in the statute is that the superior judge of the county was absent therefrom during the week prior to April 26th. But the affidavit shows that the only subpoena that was issued was issued on the twenty-eighth of April, which was subsequent to the expiration of the period during which the judge was absent. There was ample opportunity, both before and after that period, for the procurement of the subpoena required by the statute, and the failure to obtain it was a want of due diligence. Judgment affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.; THORNTON, J.; SHARPSTEIN, J.

2 Cal. Unrep. 663

HEGAR *v.* CALIFORNIA INS. CO. (No. 11,073.)

(*Supreme Court of California.* June 29, 1886.)

1. EVIDENCE—JUDICIAL NOTICE OF LEGAL DISTANCES.

Courts in California will take judicial notice of the legal distances from place to place in the state of California, as established by the Political Code in sections 150 to 202, inclusive, for the purpose of computing the time within which notice of intention to move for a new trial must be served.

2. FIRE INSURANCE—FINDINGS—EVIDENCE—INSURANCE.

Findings in an action on an insurance policy that plaintiff had not misrepresented his ownership of the property insured, nor its value, *held* sustained by the evidence.

3. PLEADING—COMPLAINT—DEFECTS CURED BY ANSWER.

Where a plaintiff in his complaint fails to state material facts, as, in an action on an insurance policy, failing to set out or attach and make a part of the complaint the application for insurance, so that no cause of action is stated, if these facts are supplied by the averments of the answer, the omission is immaterial, and the defect is cured.

4. FIRE INSURANCE—ACTION—PLEADING—MATTERS OF EVIDENCE NOT TO BE ALLEGED—INSURANCE.

The fact that a policy of insurance declared the measure of recovery for loss sustained on an insurance policy must be "in no case greater than the actual damage to or cash value of the property at the time of the fire," only established a rule as to the proof necessary to be made in order to show the damage or loss sustained, and it is unnecessary to allege in the pleading the actual cash value of the premises; this being a matter of evidence.

5. SAME—COMPLAINT—PRAYER—INSURANCE.

If, in an action on an insurance policy covering several classes of property, the complaint states the amounts of the losses upon the various kinds of property insured separately, and demand for judgment for the aggregate sum of such losses is made, this will be sufficient for the purpose of informing the defendant how much, and on what account, the plaintiff claims to recover it.

6. SAME—RECOVERY ON POLICY—ACTUAL CASH VALUE—FINDINGS.

Where an insurance policy provides that in no case shall the recovery be greater than the actual damage or cash value of the property, a finding that the loss sustained on account of the destruction of a building by fire was a certain sum, the amount insured for, is sufficient, and the court need not state the evidential fact that the cash value of the property when destroyed was a certain sum.

7. SAME—DEPRECIATION OF PROPERTY—EVIDENCE.

Under an insurance policy providing that "the cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same, and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of

replacing the same shall be made to ascertain the actual cash value," the court does not err in refusing to allow the defendant to prove depreciation in the value of the building which occurred anterior to the time of its being insured.

8. SAME—FIXTURES—EVIDENCE.

Parol evidence is not admissible as to what is meant by the words "bar-room fixtures" as used in an insurance policy.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

E. W. McGraw, for appellant. *W. W. Kellogg* and *R. H. F. Variel*, for respondent.

FOOTE, C. The respondent, Hegard, makes the point that this cause should be considered here upon the judgment roll only, for the reason that the notice of intention to move for a new trial on the part of the appellant, although served within the statutory period of 10 days, was not so filed. From the statement on motion for a new trial it appears that findings were filed on the fifth day of February, 1885; that the attorneys for Hegard, at all times during the pendency of this action, resided and had their offices at Quincy, Plumas county, state of California, and that the attorney for the defendant resided and had his office at San Francisco, in the same state, and there was at all times regular communication by mail between those two places; that on the sixth day of February, 1885, one of the attorneys for the plaintiff deposited in the post-office at Quincy an envelope addressed to the defendant's attorney at San Francisco, California, which envelope contained two duplicate notices signed "W. W. KELLOGG and R. H. F. VARIEL, Attorneys for Plaintiff," to the effect that the trial court, on February 5, 1885, had filed its findings and decision in favor of the plaintiff, which notices were entitled in the proper case, and the envelope also contained a note from Mr. Variel to Mr. McGraw, the defendant's attorney, requesting him to indorse service of notice of decision, and return the same to him, (Variel.) That envelope and its contents were received by Mr. McGraw at San Francisco on the tenth of February, 1885, and he indorsed acknowledgment of the receipt of one of the notices as of that date, and on the sixteenth of the same month mailed it, and a notice of intention to move for a new trial in the cause, to Mr. Variel at Quincy, California, prepaying the postage thereon. That notice was in due and proper form, and specified that the motion would be made on a statement thereafter to be prepared, and would be made on the following grounds: Insufficiency of the evidence to justify the decision of the court, and that it was against law; error in law occurring at the trial, and excepted to by the defendant. On said February 16th, Mr. McGraw also mailed, at San Francisco, a duplicate of that notice of intention to move for a new trial, together with a request to file the same, to the county clerk at Quincy, California. Mr. Variel received the notice addressed to him on the night of February 20, 1885. The county clerk received that addressed to him on February 21, 1885, and filed it on that day. On February 24, 1885, defendant caused to be served on R. H. F. Variel, at Quincy aforesaid, by the sheriff of Plumas county, a certified copy of the notice of intention, which the county clerk had filed as above stated. Mr. Kellogg was not at any time during the month of February, 1885, in Plumas county, but (as was known by the attorney for defendant) was at Sacramento, California, performing his duties as a member of the state senate.

The contention of the respondent is that, as it appears from the record that the notice of motion to move for a new trial was not filed until one day after the statutory time, the appellant cannot be heard here on its appeal from the order refusing a new trial; that there is no evidence of a proper character in the record which shows that Quincy, in Plumas county, is 25 miles or any

other distance from San Francisco; and that this court will not take judicial notice of the legal distances from place to place in the state of California as established by the Political Code in sections 150 to 202, inclusive. In support of this proposition the case of *Neely v. Naglee*, 23 Cal. 152, is cited. There this court held that the statute of 1858 establishing legal distances in this state from each county-seat to the capital, lunatic asylum, and state prison, had no application to the question of notice then before the court, but referred to the amount of mileage that county treasurers and sheriffs might charge for certain purposes.

The sections of the Political Code, *supra*, established the legal distances therein set out without any qualification, and hence they are established for any and all purposes. By section 177 thereof it appears that the legal distance from Quincy, the county-seat of Plumas county, to Sacramento, is 136 miles; by section 182, same Code, that San Francisco is 84 miles from Sacramento. The legislature, in fixing the boundaries of the different counties of this state, does not locate Plumas county as touching Sacramento county at any point, nor San Francisco county as adjoining either Sacramento or Plumas county; and, as geographical facts, it is well known that Plumas county is in the north-eastern part of this state, and that San Francisco is on the bay of that name near the Pacific ocean, south-westerly from the former county, and that several other counties intervene between them. And Quincy is established by law as the county-seat of Plumas county, and San Francisco as that of the county of the same name; thus making those points well known geographically.

If San Francisco, in the absence of all judicial knowledge as to its geographical position, was presumed to be 84 miles in a direct line between Sacramento and Quincy, the first mentioned would still appear to be 52 miles from Quincy, which would give one day more of time in which to file the notice in question than was actually taken. It appears, therefore, proper that this court should take judicial notice of those things established by law, as being such as ought to be generally known within the limits of its jurisdiction, and therefore should hold that the notice objected to as insufficient was filed and served in time.

The action under consideration was commenced to recover for loss by fire on an insurance policy issued to Hegard by the appellant. The plaintiff recovered a judgment for \$1,950, and from that, and an order denying a new trial, the defendant appealed.

In the answer it was pleaded, in bar of the plaintiff's right to recover, that the latter had overvalued the property insured, and was not the sole owner of the building burned, which was a portion of such property. Upon both of those contentions the court found against the defendant.

The policy recites, among other things, that "reference is had to application and survey No. —, hereby made a part of this policy, and a warranty by the assured. The application and survey, if referred to in this policy, shall be considered a part of it, and a representation by the assured. If the assured in a written or verbal application for insurance, or by a survey, plan, or description, makes any erroneous representations, * * * or overvalues the property, * * * or if the interest of the assured be any other than the entire unconditional and sole ownership of the property, and is not so expressed in the written portion of the policy, * * * or if the building insured stands upon leased ground, and is not so represented to the company, and so expressed in the written portion of this policy, then, in every such case, this policy shall be void."

The interest of the assured in the property insured, including the building and the amount of insurance, was described in the written portion of the policy as follows: "\$2,000; \$1,200 on his one and one-half story frame building occupied by the assured as a saloon and chop-house, situate on the S. side

of Main street, in the town of Quincy, Plumas Co., Cala.; \$250 on his bar-room fixtures; \$400 on his stock of liquors and cigars; and \$150 on his stove and cooking utensils, counter, tables, and chairs, all while contained in the above-described building. It is understood that the above-described building stands on leased ground." It will be seen, therefore, that the assured did not represent himself as the owner of the land on which the building stood, and the defendant was thus informed that the plaintiff claimed the building only, and not the land.

There is some apparent conflict between the statements which the latter made in his affidavit of proof of loss, and those contained in a certain deed and agreement introduced in evidence, and his oral statement when testifying as a witness on the trial of the cause; but the court heard his testimony, observed his manner, conduct, and method of testifying, and must have come to the conclusion that there had been no dishonest or intentional misrepresentation on his part as to his ownership of the building insured at any time, and must have believed his statement and explanations on the point as to how he was really the owner of the entire building, as separate from any interest in the land on which it stood, and we cannot say that such conclusion, or the finding upon this fact, in the case, was wrong. Nor do we perceive that the trial court was not warranted from all the evidence in finding that there was no such overvaluation by the plaintiff of the property insured as would render the policy void on that account. *Clark v. Phoenix Co.*, 36 Cal. 176; *National Bank v. Insurance Co.*, 95 U. S. 673.

The appellant further contends that upon the judgment roll reversible errors appear as follows: In that the complaint did not have attached thereto as an exhibit, or otherwise made a part thereof, the application for insurance, within the rule established by this court in *Gilmore v. Lycoming Ins. Co.*, 55 Cal. 124; in that the complaint contained no allegation of a loss within the policy, because, as appellant alleges, no allegation appears therein as to any value, or actual cash value, of any of the property; in that no finding was made by the court of the cash or any other value of the building insured. As to all those positions, thus assumed, we are of opinion that they are not well taken.

The plaintiff, it is true, did not follow the rule of pleading as required in the case in 55 Cal., *supra*, but the *defendant* in its answer set out the tenor and effect of the application, and pleaded two breaches of the contract of insurance by the assured, based thereon, in bar of the plaintiff's right to recover, and evidence upon all the issues thus raised by the pleadings was heard and passed upon by the court, as shown by the findings, and the defect in the complaint was cured by the averments of the answer. Pom. Rem. § 579.

The complaint, we think, contains all the necessary allegations, under the policy, as to value of property insured, and loss occasioned by its being burned. The fact that the policy declared the measure of recovery for loss sustained must be "in no case greater than the actual damage to or cash value of the property at the time of the fire," only established a rule as to the proof necessary to be made in order to show the damage or loss sustained, and it was unnecessary to allege matters of evidence in the pleading.

In the complaint the amounts of the losses upon the various kinds of property insured were stated separately, and demand for judgment for the aggregate sum of such losses was made, and that was sufficient for the purpose of informing the defendant how much, and on what account, the plaintiff claimed to recover against it. Boone, Code Pl. § 18. The court found that the loss sustained by the plaintiff on account of the destruction of his building by fire was \$1,200, the amount it was insured for; and, more, it does not seem necessary that the learned judge should have gone further, and stated the evidential fact that its cash value, when so destroyed, was a certain sum.

The evidence relative to the value of the building when burned was perti-

ment as far as it went, and tended to prove the loss as claimed, and we do not feel warranted in condemning the findings upon that matter as not being supported by evidence. Nor do we think the court erred in refusing to allow the defendant to prove depreciation in the value of the building, which occurred anterior to the time of its being insured.

The policy, with reference to measure of recovery for loss of the building, reads as follows: "The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value."

We have been cited to no case, nor have we been able to find any after diligent search, which declares what construction shall be given to such language in its entirety as to the measure of damages. But it seems fair to conclude that the parties to this contract, when they entered into it, had in view the value of the building as it then stood, and that they did not intend to provide for any deduction for depreciation in value thereof which had occurred from the time when it was built, many years before that time, up to that when it was insured. It is much more reasonable, and fairer to all parties, to construe that language (so far as it relates to the question of a suitable deduction from the cash cost of replacing the building) to mean such depreciation as might take place after the defendant insured the property, as before that time the defendant is not shown to have had any connection with the building, or interest in its preservation. This is in accordance with the general rule that, if there exists any ambiguity in a policy of insurance, it should be taken most strongly against the insurers, (*May, Ins.* §§ 175, 176;) and since the defendant did not avail itself of the offer made by the court to allow evidence to be introduced as to depreciation in value of the building after its insurance, it is but fair to presume that none had taken place.

The plaintiff was allowed, against the objection of the defendant, to introduce in evidence explanatory of his and the insurance agent's understanding, at the time the policy was taken out, as to what articles of property were to be insured under the head of "bar-room fixtures." We do not think that there was anything in those words of such ambiguity as to admit of parol testimony to explain what was meant by the parties to the contract in making use of them. The term "fixture" has a well-ascertained and certain meaning, as something *affixed* to realty; and the words "bar room" have a certain meaning, and there could be no doubt that bar-room fixtures inserted in the policy could only be reasonably interpreted to mean fixtures in a bar room. Hence all the evidence which was admitted to prove the loss of property as being included in those words of the contract, which would not be held to be so included by the use of such words as ordinarily understood, and as we understand their meaning in such an instance as above stated, should have been ruled out by the court, and the plaintiff was not entitled to recover anything based on that evidence.

We perceive no further prejudicial error in the record, but for that heretofore indicated the judgment and order should be reversed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

70 Cal. 108

ROBERTS v. DONOVAN. (No. 9,069.)

(Supreme Court of California. June 30, 1886.)

1. SET-OFF AND COUNTER-CLAIM—ACTION ON JOINT LIABILITY.

In an action on a joint liability against two or more defendants, one of them cannot set up, as a counter-claim, a cause of action existing in his favor alone; affirming S. C. 9 Pac. Rep. 180.

2. PRINCIPAL AND SURETY—BOND FOR FAITHFUL PERFORMANCE—AVOIDANCE OF.

Sureties on a bond for the faithful performance of duties under a contract of the principal in the bond, as agent of another, are discharged if the person to whom the bond was given continued the principal in his employ after knowledge of the latter's criminal misappropriation of funds under the contract; or if such party and the principal materially altered the contract, the sureties being ignorant of such facts.

In bank. Appeal from superior court, city and county of San Francisco.

The facts are stated in the opinion in Department 1, reported in 9 Pac. Rep. 180. The court there held that in an action on a joint liability against two or more defendants one of them cannot set up, as a counter-claim, a cause of action existing in his favor alone.

Geo. D. Shadburne, for appellant. E. P. Cole and A. N. Drown, for respondent.

Ross, J. As far as it goes, we are satisfied with the opinion delivered when this case was pending in department, which will therefore stand as the opinion of the court upon the question therein discussed. 9 Pac. Rep. 180. But it is proper, also, to decide whether the sureties upon the bond sued on were released by the conduct of the plaintiffs. The bond, as stated in the opinion already delivered, was executed by defendant Tobin as principal, and defendants Donovan and McGrath as sureties, to the plaintiffs, conditioned for the faithful performance by Tobin of a contract with plaintiffs by which he became their San Francisco agent for the sale on commission of certain brick, in such quantities as plaintiffs might deem it to their interest to furnish.

The agreement, for the faithful performance of which it is alleged the bond was executed, was of date July 29, 1878. Upon the trial in the court below it was found as a fact "that on the ninth day of April, 1879, without the assent of either of the defendants Donovan or McGrath, the plaintiffs and defendant Tobin entered into a new agreement and contract by which they modified, varied, altered, and changed the agreement of employment of July 29, 1878, and sued on in the complaint; and the said agreement and contract of the ninth day of April, 1879, was in writing, and was valid and binding on the said plaintiffs and defendant Tobin." The court further found that in December, 1880, an accounting was had between plaintiffs and Tobin by which it was ascertained that the latter had appropriated to his own use, without the knowledge or consent of plaintiffs, the sum of \$150 which he had collected as the agent, and that plaintiffs, knowing that fact, continued him in their employ, and failed to notify the sureties of the default, and, further, that the sureties had no notice thereof until after June 23, 1881. It was further found that in December, 1880, plaintiffs and defendant Tobin "entered into a new and binding agreement by which plaintiffs agreed still to employ the said Tobin as their agent for the sale of bricks in the city and county of San Francisco, and to wait on him for the payment of his indebtedness to them until his commissions for the sale of bricks should liquidate the same,—he, the said Tobin, agreeing to repay the said indebtedness by allowing plaintiffs to retain and keep back his commissions to an amount sufficient to liquidate the same,—and said plaintiffs agreed to wait on said Tobin for the repayment of his said debt for at least one month; that said Tobin before June 23, 1881, had paid to plaintiffs all sums of money he owed them by applying his commissions on the sale of brick thereto; that the said new

agreement of December, 1880, was without the consent or knowledge of either of the defendants Donovan or McGrath."

These acts on the part of the plaintiffs operated a release of their sureties from liability upon the bond sued on—*First*, because of the alteration of the contract made in April, 1879, without the consent of the sureties, (*Victor S. M. Co. v. Scheffler*, 61 Cal. 530;) and, *secondly*, because of the continuance by plaintiffs of Tobin in their employ, with knowledge of his misappropriation of their funds, the sureties being ignorant thereof. Where there is a continuing guaranty for the honesty of a servant, if a master discover that the servant has been guilty of dishonesty in the course of the service, and, instead of dismissing, continues him in such service without the knowledge or consent of the guarantor, express or implied, he cannot afterwards have recourse to the guarantor to make good any loss which may arise from the dishonesty of the servant during the subsequent service. If the dishonesty had existed before the surety became bound, and the master had concealed it, the surety would not have been liable; and the cases are the same in principle. *Brandt*, Sur. § 368.

The findings are not sufficiently definite to enable us to determine the relative rights of plaintiffs and defendant Tobin.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J; SHARPSTEIN, J; MCKINSTRY, J.

2 Cal. Unrep. 671

PICO v. WILLIAMS, Judge, etc. (No. 11,680.)

(*Supreme Court of California*. July 2, 1886.)

COURTS—SUPERIOR COURT—JURISDICTION—AUTHORITY OF GOVERNOR.

The request of the governor of the state of California to the judge of the superior court of one county to hold a superior court in another county is sufficient authority to entitle the latter to take jurisdiction of causes brought before him for trial in such county.

Department 2. Application for writ of prohibition.

The petition alleged that the petitioner was a party to an action before the superior court of Los Angeles county, CHENEY J.; that some of the parties to such action, desiring a speedy trial, made application for advancement of the cause on the calendar, but that such application was denied because of the precedence on the calendar of other causes of as much public importance; that such parties then applied to the governor of the state of California, and requested Judge WILLIAMS, of Ventura county, to hold a superior court in Los Angeles county for the purpose of trying this among other cases. Petitioner then alleged that the facts as stated, that a speedy trial could not be had in Judge CHENEY's court, are untrue, and the petitioner asked for a writ of prohibition to restrain Judge WILLIAMS from so holding court, or trying such cause.

Glassell, Smith & Patton, for petitioner. *Stephen M. White*, for respondent.

BY THE COURT: We are of opinion that, from the facts stated in the petition, the petitioner is not entitled to a writ of prohibition. The request of the governor, as set forth in the petition, was sufficient authority for Judge WILLIAMS to hold a superior court in the county of Los Angeles. It is therefore unnecessary to consider any issue raised by the answer of respondent.

The application for a writ of prohibition is denied, and the alternative writ heretofore issued is annulled.

(70 Cal. 125)

McCANTS v. BUSH. (No. 11,444.)

Supreme Court of California. July 12, 1886.)

MECHANICS' LIENS—NOTICE—CALIFORNIA STATUTE.

Under the California mechanic's lien law as it existed prior to March 18, 1885, if the owner of property erecting a building paid the original contractor, in good faith, all that remained due on the contract, in pursuance of its terms, and before any mechanics' liens were filed, his property would no longer be liable for the claims of mechanics and material-men, notwithstanding they subsequently filed liens for debts due them by the contractor; and a notice in writing, given prior to such final payment, that the contractor owed the party so giving notice a specified sum for labor and materials, would not, under such law, affect the rights of the parties, nor impose on the owner the duty of retaining a portion of the contract price to satisfy any lien which such party might subsequently file.

Department 1. Appeal from superior court, county of Sacramento.

Action on a mechanic's lien. Defendant, who was the owner of property, contracted for the erection of a certain building, which was completed on the nineteenth day of November, 1884. On the next day he paid to the contractors the balance of the money due on the contract, and which, by the terms of the contract, was to be paid at the completion of the building, so that there remained nothing due or to become due on the contract. Plaintiff, who had done work and furnished materials for said building under agreement with the original contractors, not receiving payment therefor, had, on the sixteenth of October, 1884, notified defendant in writing that a certain sum was due him, stating the sum and what for, but did not file any claim of lien against the building until the sixth day of December, 1884, after defendant had fully settled with the contractors. The court on the trial found the facts as above, and as a conclusion of law found that if the owner of the building in good faith paid the original contractors all that was due, in accordance with the terms of the contract, before any mechanic's lien was filed, his property was thereby released from plaintiff's or any other mechanic's or material-man's claim, and that a notice served as above by plaintiff did not affect the rights of the parties, or impose on defendant the duty of retaining a portion of the contract price to satisfy any lien which the plaintiff might and did subsequently file.

D. E. Alexander and J. R. Brown, for appellant. *J. F. Ramage, S. Solon Holl, Young & Dunn, W. H. Beatty, S. C. Denson, and Matt. F. Johnson*, for respondent.

McKINSTRY, J. The facts on which the plaintiff sought to recover in this action all occurred before the amendments to the chapter of the Code of Civil Procedure treating of the "Liens of Mechanics," which were adopted March 18, 1885. We agree with the court below that, as the law then stood, the service of the notice of the sixteenth October, 1884, set forth in complaint, did not affect the rights of the parties, nor impose on defendant, Bush, the duty of retaining a portion of the contract price to satisfy any lien which the plaintiff might subsequently file. Judgment affirmed.

We concur: MYRICK, J.; ROSS, J.

(70 Cal. 127)

HAYES v. EWING. (No. 11,163.)

(Supreme Court of California. July 12, 1886.)

STATUTE OF LIMITATIONS—ACTION FOR NEGLIGENCE OF ATTORNEYS.

An action against an attorney at law for neglect of duty in the management of a case is, under the statute of limitations in California, barred after two years.

Department 1. Appeal from superior court, county of Modoc.

E. V. Spencer, for appellant. *F. W. Ewing* and *C. L. Claflin*, for respondent.

MCKINSTRY, J. This action is against an attorney at law for neglect of duty in the management of a certain action brought by the present plaintiff against Cogswell and others. The defendant demurred generally, and also on the special ground that the complaint shows that the statutory limitation has run against the alleged cause of action. The judgment for defendant in *Hayes v. Cogswell* was made November 19, 1881. This action was commenced June 16, 1884, and, so far as it is based on any neglect of the defendant prior to the judgment of November, 1881, was barred by section 339 of the Code of Civil Procedure.

The complaint herein avers that the plaintiff, subsequent to and within one year after the judgment in *Hayes v. Cogswell*, demanded of the defendant herein that he should take an appeal on behalf of the plaintiff in that action. But the facts stated in this complaint show that an appeal would have been of no avail. Judgment affirmed.

We concur: **MYRICK, J.**; **ROSS, J.**

PLACER CO. v. CAMPBELL. (No. 11,275.)

(Supreme Court of California. July 12, 1886.)

COUNTIES—BOARD OF SUPERVISORS—CLAIM AGAINST COUNTY.

The board of supervisors of a county in passing upon a claim against the county act as a quasi judicial body, and their allowance and settlement of the claim is an adjudication which is conclusive. *Colusa Co. v. De Jarnett*, 55 Cal. 375, followed.

Department 1. Appeal from superior court, county of Placer.

This was an action by the county of Placer against Campbell, one of its road-masters, to recover money which had been paid him upon a warrant in his favor for the amount of his claim against the county for services and for work done, the claim having been allowed by the county board of supervisors in due form and without any contest. The complaint set up fraud of the defendant, alleging that the claims were false and spurious, and verified by false oath. Defendant demurred generally. Demurrer sustained. Plaintiff appealed.

J. E. Prewett, for appellant. *C. A. & F. P. Tuttle*, for respondent.

BY THE COURT. On the authority of *Colusa Co. v. De Jarnett*, 55 Cal. 375, judgment affirmed.

(73 Cal. 29)

GREEN and another v. STATE. (No. 11,169.)

(Supreme Court of California. July 14, 1886.)

1. WATERS AND WATER-COURSES—CANALS—ACTION FOR DAMAGES—STATUTE OF LIMITATIONS.

Prior to the California act of March 12, 1885, authorizing such suits to be brought, no one was authorized to institute action against the state of California for damages caused by destruction of property resulting from the cutting of a canal by order and direction of the levee commissioners, for the purpose of diverting the wa-

ters of the American river into the Sacramento river under and by virtue of the authority conferred upon them by an act of the legislature entitled "An act concerning the construction and repair of levees in Sacramento county, and the mode of raising revenue therefor," approved April 9, 1862. Hence an action for such damage brought in 1885 is not barred by the statute of limitations, though the injury occurred more than three years prior to the commencement of the action.

2. SAME—EMINENT DOMAIN—TAKING LAND FOR PUBLIC USE.

Under the language of the California constitution as it existed prior to the adoption of the new constitution of 1879, if, in pursuance of an act of the legislature, the channel of a river be turned or straightened where it empties into another river, so that the land on the opposite side of the river is destroyed or injured, the damage thus sustained is not a taking of land for public use.

Department 1. Appeal from superior court, county of Sacramento.

This was an action against the state, under the act of March 12, 1885, as stated in the opinion, for damages for an injury suffered in 1867 by reason of the overflowing of water upon his land while cutting the canal for the purpose of diverting the waters of the American river, in accordance with the act of April 9, 1862.

A. L. Hart and C. T. Jones, for appellant. E. C. Marshall and John T. Carey, for respondent.

MCKINSTRY, J. The action was brought under the act of March 12, 1885, authorizing the plaintiffs to institute an action against the state of California " * * * for damages which may be alleged to have been caused by the destruction of their property by reason of a canal which was cut by the order and direction of the levee commissioners, diverting the waters of the American river into the Sacramento river, under and by virtue of the authority conferred upon them by an act of the legislature of said state entitled 'An act concerning the construction and repair of levees in Sacramento county, and the mode of raising revenue therefor,' approved April 9, 1862." St. 1885, p 107.

The sole purpose of the act is to permit an action against the state, and to regulate to some extent the proceedings in such action. Respondent contends that the act of March 12, 1885, is unconstitutional and void. But we do not find it necessary to pass on the question of its constitutionality.

Assuming the act to be valid, the demurrer on the ground that the "cause of action" arose more than the statutory period of limitation before the action was brought, should have been overruled. The plaintiff had no capacity or right to sue the state until the enactment of March, 1885.

It is admitted that the act of April, 1862, is a valid act. It was so decided in *Green v. Swift*, 47 Cal. 536. If not valid for any reason, it would have constituted no defense for the defendants in *Green v. Swift*. And, if the damages sustained by the work done by or under the direction of the levee commissioners arose from the taking of private property, (within the meaning of the constitutional provision which prohibits such taking without compensation.) the act of 1862, and the work done by the levee commissioners in accordance with the act, would have constituted no defense in *Green v. Swift*. But in that case the court held that the injuries done to the plaintiffs therein, (plaintiffs herein,) being a destruction of property of a like character to that alleged in this complaint, was not a taking of property entitling the plaintiffs to recover compensation, but that any such alleged injury was *damnum absque injuria*; and it was there held that the act of 1862 furnished a sufficient defense to the defendants, the levee commissioners and contractors. It is therefore a defense for the state.

If the question had not been determined by the highest judicial tribunal existing under the former constitution, and the canal had been dug after the adoption of the present constitution, we might hold, in view of the language of the present constitution, that injury such as that alleged in the complaint

was a "damage" to property for which the plaintiffs were entitled to compensation; but the acts which caused the alleged injuries were done while the former constitution was in force, and similar injury caused by the same acts was held by the supreme court created by that constitution not to be a "taking" within the meaning of the clause thereof which prohibited a taking without compensation. We have held heretofore that, under such circumstances, we must consider a question *stare decisis*. Judgment affirmed.

We concur: ROSS, J.; MYRICK, J.

TODHUNTER v. STATE. (No. 11,283.)

(Supreme Court of California. July 14, 1886.)

WATERS AND WATER-COURSES—JUDGMENT AFFIRMED.

Department 1. Appeal from superior court, county of Sacramento.

The facts in this case are identical with those in *Green v. State*, ante, 602, (No. 11,169.)

John Head and Freeman, Johnson & Bates, for appellant. *E. C. Marshall and John T. Carey*, for respondent.

BY THE COURT. On authority of *Green v. State*, ante, 602, (No. 11,169, this day filed,) judgment affirmed.

(2 Cal. Unrep. 673)

MILLER v. DUNN. (No. 11,288.)

(Supreme Court of California. July 15, 1886.)

TAXATION—POWER TO TAX—TAXATION FOR VOID DEBT.

The legislature in California has no constitutional power to tax the people to pay a void debt. So held where, after the courts had declared unconstitutional and void the act of April 23, 1880, entitled "An act to promote drainage," the legislature attempted to pass another act on March 10, 1885, providing for the payment of indebtedness incurred under said act of April 23, 1880.

Department 1. Appeal from superior court, county of Sacramento.

D. M. Delmas, for appellant. *A. L. Hart*, for respondent.

MYRICK, J. Under a contract made in pursuance of the act of April 23, 1880, entitled "An act to promote drainage," (St. 1880, p. 123,) the plaintiff performed work and furnished material, and his claim therefor was audited and allowed by the state board of drainage directors, as provided for in the act. That act was declared unconstitutional by this court. *People v. Parks*, 58 Cal. 624. On the tenth of March, 1885, an act was approved to appropriate money to pay the indebtedness incurred under the act of April 23, 1880, which act of March 10, 1885, provided for the payment of all audited claims out of the state drainage construction fund, so far as that fund was sufficient, the remainder to be paid out of the general fund. The comptroller refused to issue his warrant for the amount of plaintiff's allowed claim, and this action for a writ of mandate was brought. The court below ordered the writ to issue.

It is not averred in the complaint, nor does it appear in the case, that any moneys were collected under sections 15 and 16 of the act of April 23, 1880; therefore we are not called upon to consider the power of the legislature to dispose of any funds so collected. We treat the case as if the whole amount was directed by the act of March 10, 1885, to be paid out of the general fund of the state treasury.

The constitution, art. 4, § 32, declares that the legislature shall have no power "to pay, or to authorize the payment of, any claim against the state,

or any county or municipality, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." This court declared the act of April 23, 1880, to be unconstitutional; therefore it was void, and the contract made in pursuance of it was also void. The legislature was and is prohibited from paying, or authorizing to be paid, any claim under it.

The argument that there was a statute in the statute book which authorized the contract, and that it is sufficient to take plaintiff's claim out of the prohibition of the constitution, is not of apparent force. It was said by this court in *Nouques v. Douglass*, 7 Cal. 70: "If, then, the legislature had no right to create a state debt beyond the limit fixed by the constitution, that body has no constitutional right to tax the people to pay a void debt. The power of taxation for purposes contemplated by the constitution is unlimited in the legislature, but such power does not exist for purposes not sanctioned by that instrument, but expressly prohibited. The restriction upon the power of the legislature would be nugatory if the same end could be accomplished by other modes. The evil intended to be prevented would still exist, and the injury to the people would be the same. If the power to create a debt is denied, the power to levy taxes to pay it must equally be denied. The power to pay is a necessary incident to the power to contract, and they both must stand or fall together."

We do not perceive how the legislature can authorize the payment of moneys which it is prohibited from authorizing to be paid.

The judgment is reversed, and cause remanded.

We concur: MCKINSTRY, J.; ROSS, J.

(70 Cal. 193)

PEOPLE v. LOWREY. (No. 20,201.)

(Supreme Court of California. July 21, 1886.)

1. BURGLARY—JURY—VIEW OF LOCUS IN QUO.

A view of the *locus in quo* pending a trial for burglary must be had in the presence of the defendant; and, if such view is had in his absence, it is a violation of the rights secured to him by article 1, § 13, of the California constitution, to appear and defend in person and with counsel, etc. *People v. Bush*, 10 Pac. Rep. 169, followed.

2. SAME—CIRCUMSTANTIAL EVIDENCE—GUILTY POSSESSION OF PROPERTY.

On a trial for burglary, where the evidence against the defendant is circumstantial, evidence is admissible which tends to identify shoes found in the possession of the defendant the next morning after the crime, some miles from the place where the crime was committed, as shoes that were in the house burglarized, as such evidence tends to connect the defendant with the offense.

In bank. Appeal from superior court, county of Amador.

Information for burglary. Pending the trial a view of the *locus in quo* by the jury was had in the absence of the defendant.

Rust & Caminetti, for appellant. *The Attorney General*, for the People.

ROSS, J. The judgment in this case must be reversed upon the authority of *People v. Bush*, 10 Pac. Rep. 169, decided since the trial of this case in the court below. Anticipating the result, counsel on both sides have asked the court, in the event a new trial should be ordered, to decide whether or not the evidence in the case is sufficient to sustain the verdict. We do not think it proper to do so; for, if we should decide that it is, such determination might, and probably would, be used on the new trial to the prejudice of the defendant.

One other question we are asked to determine, and, as that relates to the admission of certain shoes in evidence, it is proper that it should be decided. The crime charged against the defendant is burglary, and the evidence against

him circumstantial. There was evidence tending to identify the shoes, and that they were in the house burglarized, and were found in the possession of defendant the next morning some miles from the place the crime was committed. All this was clearly admissible as tending to connect defendant with the offense.

Judgment and order reversed, and cause remanded for new trial.

We concur: MCKEE, J.; MYRICK, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

(70 Cal. 186)

JOHNSON v. KLEIN. (No. 11,491.)

(Supreme Court of California. July 21, 1886.)

APPEAL—FINDINGS—DAMAGES WHERE APPEAL TAKEN FOR DELAY.

A finding that all the averments of the complaint are true is a sufficient finding of facts; and this rule is so well settled that an appeal grounded on alleged insufficiency of such findings will be held to have been taken for delay.

Department 1. Appeal from superior court, county of Sacramento.

Taylor & Holl, for appellant. *Freeman, Johnson & Bates*, for respondent.

Ross, J. It has been so often held here that a finding that all the averments of the complaint are true is a sufficient finding of facts, that an appeal grounded on its alleged insufficiency must be held to have been taken for delay. The answer contained nothing but denials and an admission of matters alleged in the complaint, so that the finding that all of the allegations of the complaint are true necessarily covers all of the issues made by the pleadings.

Judgment affirmed, with \$50 damages.

We concur: MCKINSTRY, J.; MYRICK, J.

STATHAM v. DUSY. (No. 11,287.)

(Supreme Court of California. July 22, 1886.)

EQUITY—ACTION TO QUIET TITLE—COMPLAINT.

A complaint which alleges that the plaintiff is the owner and in possession of certain land, and that the defendant claims an estate or interest therein adverse to plaintiff, but that defendant really has no right, title, or interest in such land, states a cause of action. *Rough v. Simmons*, 65 Cal. 227, S. C. 3 Pac. Rep. 804, followed.

Department 1. Appeal from superior court, county of Fresno.

Action to quiet title. Plaintiffs alleged that they are the owners of certain lands; that defendants are in possession of 80 acres of said premises, but assert a claim to the whole thereof, and claim an estate or interest in said property adverse to the plaintiffs, which interest or estate the plaintiffs allege to be without right or title, and without color of right or title, as against the plaintiffs. Defendants demurred to the complaint on the ground that it did not state a cause of action. The demurrer was overruled, and defendants, declining to answer, appealed.

Bennett & Wigginton, for appellants. *E. C. Winchell*, for respondents.

BY THE COURT. On the authority of *Rough v. Simmons*, 65 Cal. 227, S. C. 3 Pac. Rep. 804, judgment affirmed.

(70 Cal. 187)

RICHARDS v. SHEAR and Wife. (No. 11, 188.)*(Supreme Court of California. July 21, 1886.)***MECHANIC'S LIEN—HOMESTEAD—LIENS OF MATERIAL-MEN.**

Under section 1241 of the California Civil Code, providing that "the homestead is subject to execution or forced sale in satisfaction of judgments obtained * * * on debts secured by mechanics', laborers', and vendors' liens upon the premises," no lien is given to material-men; nor does any other statute in California confer such a lien.

Department 1. Appeal from superior court, county of Sacramento.

Freeman, Johnson & Bates, for appellant. *Armstrong & Hinkson*, for respondent.

Ross, J. It is sought in this case to charge the homestead of the defendants, who are husband and wife, with a lien for materials furnished by the plaintiffs to the husband to be used, and which were used, in the construction of a building thereon; the materials having been furnished after the property had been impressed with the homestead character. Sections 1240 and 1241 of our Civil Code read:

"Sec. 1240. The homestead is exempt from execution or forced sale, except as in this title provided.

"Sec. 1241. The homestead is subject to execution or forced sale in satisfaction of judgments obtained (1) before the declaration of homestead was filed for record, and which constitute liens upon the premises; (2) on debts secured by mechanics', laborers', or vendors' liens upon the premises; (3) on debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant; (4) on debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record."

It is said for the appellants that it was not the intent of the legislature to subject the homestead to execution or forced sale in satisfaction of judgments obtained on debts secured by the liens of mechanics and laborers who perform manual labor in and about the building, and withhold such privilege from the men who furnish the materials therefor. We can see great force in the suggestion of Mr. Thompson, in his work on Homesteads and Exemptions, (section 312,) that there is no difference in principle between a debt due to A., who has provided me with the land on which I have erected my building, and a debt due to B., who has furnished the materials to build it, and a debt due to C., whose labor has built it. But where the legislature has undertaken to deal with the subject, and has declared from what the homestead shall be exempt, and with what it shall be charged, it only remains for the courts to give effect to its provisions. Admittedly, the language of the section of the Code specifying in what instances the homestead shall be subject to execution and forced sale does not include the liens of material-men. The language is: in satisfaction of judgments "on debts secured by mechanics', laborers', or vendors' liens upon the premises." The chapter of the Code of Civil Procedure which provides for liens of the nature of that claimed by the plaintiffs is headed "Liens of Mechanics and others upon Real Property," and gives to "mechanics, material-men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction," etc., a lien, etc. Section 1183, Code Civil Proc.

The section of the Civil Code first above cited does not provide that the homestead shall be subject to all the liens authorized to be created under the chapter of the Code of Procedure headed "Liens of Mechanics and others," but subjects it only to two classes of those liens, to-wit, "mechanics' and la-

borers' " liens. The latter terms no more include the liens of material-men than they do those of architects or contractors or subcontractors.

The findings sufficiently show that the property in question constitutes the homestead of the defendants. There is no presumption that it was so used as to defeat the object for which it was dedicated. *Holden v. Pinney*, 6 Cal. 234.

Judgment affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 196

WILSON v. PROUTY. (No. 11,163.)

(*Supreme Court of California*. July 23, 1886.)

CHATTEL MORTGAGES—GROWING CROPS—LIENS—CONVERSION.

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor," (section 2972, Civil Code Cal.) and such lien is not lost in consequence of the tortious removal of the crop by a third person, and in such case the person having the lien may maintain against the person removing the crop an action for the conversion thereof.

Department 1. Appeal from superior court, county of Sacramento.

Grove L. Johnson, for appellant. *Freeman & Bates*, for respondent.

ROSS, J. The case shows that the plaintiff leased to one McCafferty a tract of land upon which he planted a crop of barley, and upon which crop he executed to plaintiff a chattel mortgage, which was duly recorded. After the crop was harvested, and while it yet remained upon the land on which it was grown, McCafferty, who was indebted to the defendant, turned over to the latter a certain portion of it, which portion defendant caused to be hauled away and converted to his own use.

It is contended for the appellant that, in so far as the barley in question is concerned, the lien held by the plaintiff terminated upon its removal from the land upon which it was grown, by virtue of section 2972 of the Civil Code, which reads: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor." It was held in *Martin v. Thompson*, 63 Cal. 4, that there is nothing in this language which demands such construction as that the lien shall be lost as a consequence of the tortious removal of the crop by a third person. In the present case, defendant, who at least had constructive notice of plaintiff's lien, went upon the land on which the grain was grown, and upon which it then was, and upon which grain there was then a valid, subsisting lien in plaintiff's favor, and himself caused the grain to be removed from the land and converted. He could not thus destroy the lien of plaintiff. In principle, the case is covered by that of *Martin v. Thompson*. The lien continuing, there can be no doubt of the plaintiff's right to maintain the action for the conversion. *Jones, Chat. Mortg.* §§ 445, 490.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 132

In re RUSSELL. (No. 11,094.)

(*Supreme Court of California.* July 13, 1886.)

1. INSOLVENCY—PETITION—PARTNERSHIPS AS CREDITORS.

A petition of creditors, under section 8 of the California insolvent law of April 16, 1880, describing the alleged creditors therein as firms or copartnerships, but not giving the names of the persons comprising the firms, complies with the requirements of the statute, and is sufficient.

2. SAME—PETITION—FACTS SHOWING PETITIONERS TO BE CREDITORS.

Petition in insolvency, in California, should show that at least five of the petitioners are creditors, and therefore the respondent should have an opportunity to deny and contest their respective claims prior to an adjudication of insolvency; and, in order to enable him to do so, it is requisite that the petition should state facts showing the indebtedness with the same degree of certainty and fullness as is necessary in an ordinary action to recover the indebtedness.

Department 1. Appeal from superior court, county of Sacramento.

Devlin & Clarkson and *Armstrong & Hinkson*, for appellants. *Freeman, Johnson & Bates*, for respondent.

McKINSTRY, J. In *Campbell v. Judd*, 7 Pac. Rep. 804, it was held that a petition of creditors, under section 8 of insolvent law of April 16, 1880, when the alleged creditors are described therein as firms or copartnerships,

and the names of the persons comprising the firms are not given, "complies with the requirements of the statute, and is sufficient." Respondent herein contends that the petition is insufficient, and subject to general demurrer, in that it does not show that the petitioners have each a cause of action against respondent. The averment is that "W. H. Russell is indebted to your petitioners as follows: To A. A. Van Voorhies & Co. in the sum of \$721.75," etc. In *Campbell v. Judd, supra*, the averment was that the alleged insolvents were "indebted to the petitioners as follows: To Wilcox, Powers & Co. in the sum of \$346, for goods delivered to them during the year 1883," etc.

It is said by appellants (petitioners) that the debts due petitioners must be proved like debts due other persons, (section 37, St. 1880, p. 91,) and that the statement in the petition that petitioners are creditors is merely by way of inducement to the matter which constitutes the *gravamen* of the petition,—the statement of the respondent's acts of insolvency. But a person can be adjudicated an "involuntary insolvent" only on the petition of five or more *creditors*. What would be the result if, without proof of the claims of the petitioners, the respondent should be adjudicated an insolvent, and some or all of the five petitioners should subsequently fail to prove that they were creditors? It seems clear that the petition should show that at least five of the petitioners were creditors, and that respondent should have an opportunity to deny and contest their respective claims prior to an adjudication of insolvency. And, if so, it is equally clear that the respondent should have notice of the facts on which the claims of indebtedness are based, or that the facts showing indebtedness should be stated with the same degree of certainty and fullness as in a complaint in an ordinary action to recover the indebtedness. The insolvent act, § 11, provides that the alleged debtor may demur to the petition for the same causes as is provided for demurrer in other cases by the Code of Civil Procedure. Judgment affirmed.

We concur: MYRICK, J.; ROSS, J.

70 Cal. 161

GRANDONA v. LOVDAL. (No. 11,376.)

(*Supreme Court of California.* July 14, 1886.)

1. NUISANCE—GROWING TREES—ABATEMENT—DAMAGES.

Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land, but to that extent they are nuisances; and the person over whose land they extend may cut them off, or have his action for damages and an abatement of the nuisance against the owner or occupant of the land on which they grow; but he may not cut down the trees, nor can he cut the branches beyond the extent to which they overhang his soil. Likewise, roots projecting into another's soil are a nuisance which may be abated, if actual damage is suffered thereby.

2. SAME—COMPLAINT—MISJOINDER OF CAUSES OF ACTION.

There is no misjoinder of causes of action in a complaint which seeks an abatement of a nuisance consisting of growing trees overhanging and projecting into plaintiff's premises, and also seeks to recover damages for the injuries resulting therefrom. Such a complaint states but one count.

Department 1. Appeal from superior court, county of Sacramento.

Plaintiff, by this action, sought to abate an alleged nuisance, consisting of growing trees which plaintiff alleged caused damage by casting a shade on the land, and injuring the crops; breaking division fences, whereby cattle and hogs passed through, and also injured such crops; filling plaintiff's soil with roots; and generally destroying the value of the land for agricultural purposes, so that its sale for a good price was prevented. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, "because several causes of action are improperly joined, and

not separately stated, to-wit: (1) A cause of action for damages inflicted by defendant's hogs and cattle; (2) a cause of action for damages inflicted by the roots of certain trees; (3) a cause of action for damages resulting from the foliage and bodies of the trees; (4) a cause of action to abate an alleged nuisance; and he further demurred on the ground that such complaint was ambiguous, unintelligible, and uncertain, in that "it cannot be ascertained therefrom what amount of damages resulted from the growth of the trees, and their extracting substance and richness from plaintiff's land; nor what amount of damages from the limbs and foliage; nor what amount from the sale of the land." The demurrer was sustained, and plaintiff appealed.

Henry Starr and A. P. Catlin, for appellant. *Freeman, Johnson & Bates*, for respondent.

McKINSTRY, J. The court below sustained a demurrer to the complaint. "Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land." To that extent they *are* nuisances, and the person over whose land they extend may cut them off, or have his action for damages and an abatement of the nuisance against the owner or occupant of the land on which they grow; but he may not cut down the *tree*, neither can he cut the branches thereof beyond the extent to which they overhang his soil." Wood, Nuis. § 112, citing *Com. v. Blaisdell*, 107 Mass. 234; *Com. v. McDonald*, 16 Serg. & R. 390. So, it would seem, he may have abated the roots projecting into his soil, at least if he has suffered actual damage thereby. The general demurrer should have been overruled.

The defendant also demurred on the ground of the misjoinder of actions. There is only one count in the complaint. There is no direct averment therein that the trees have so grown as that any portion of the trunks are on plaintiff's land. The averments as to the trunks having so grown as to break the dividing fence, and thus let in hogs which have destroyed plaintiff's crops, may be rejected as surplusage, and are not to be treated as a statement of a separate cause of action. While we are compelled to hold that the complaint is not subject to general demurrer, nor to a demurrer for misjoinder of actions, we think that it is ambiguous and uncertain. Judgment affirmed.

We concur: **MYRICK, J.; ROSS, J**

70 Cal. 184

Estate of OLVERA. (No. 11,520.)

(*Supreme Court of California.* July 20, 1886.)

INTEREST—CLAIMS AGAINST DECEDENT'S ESTATE.

A claimant against the estate of a decedent is entitled to interest at the rate of 7 per cent. per annum, on claims allowed against the estate by decree of the probate court, from the date of such decrees, notwithstanding the indebtedness which was the basis of the claim did not of itself draw interest.

Department 1. Appeal from superior court, county of Los Angeles.

Bicknell & White, for appellant. *Smith, Brown & Hutton*, for respondent.

McKEE, J. On settlement of the final account of the administration of the estate in this case, it appeared that five claims had been presented to the administrator, which were allowed and approved, and were afterwards, by a decretal order of the probate court, entered on the eleventh of February, 1878, "ordered to be paid in due course of administration." One of the claims was for the amount of a promissory note bearing interest at the rate of $1\frac{1}{2}$ per cent. per month, compounded, and the other four were for balances due upon current accounts, without interest. On the twenty-first of Octo-

ber, 1885, the administrator paid the claimant the principal and interest due upon the claim based on the note, and the principal of the sums due upon the claims based on the accounts. But upon the last the claimant demanded interest from the eleventh of February, 1878, which the administrator refused to pay, unless the court allowed it. The estate is solvent, and the administrator has sufficient moneys of the estate in hand to pay the principal and interest of all claims against the estate. The court decided that the claimant was not entitled to interest upon the claims based on the accounts, and disallowed it on the ground that they did not bear interest. From the judgment the claimant appeals.

Undoubtedly the claimant was not entitled to recover interest upon the original accounts, for the reason that there was no rate of interest charged in them. But the accounts were merged in the decretal order of the eleventh of February, 1878, which ordered them to be paid in due course of administration. That order had the force and effect of a judgment against the estate, (section 1504, Code Civil Proc.; *Hidden's Estate*, 23 Cal. 362;) and, under the Code law, interest is payable at the rate of 7 per cent. per annum on all judgments recovered in the courts of this state, (section 1917, Civil Code; *White v. Lyons*, 42 Cal. 279.) Therefore the claimant was entitled to be paid interest upon the claims from the date of the judgment upon them.

Judgment reversed, and cause remanded for further proceedings.

We concur: THORNTON, J.; SHARPSTEIN, J.

70 Cal. 189

CHARNOCK v. ROSE and others. (No. 11,464.)

(*Supreme Court of California*. July 21, 1886.)

1. WATERS AND WATER-COURSES—RIPARIAN RIGHTS—CALIFORNIA STATUTE OF MAY 15, 1854.

The act of the California legislature entitled "An act creating a board of commissioners and the office of overseer, in each township of the several counties in the state, to regulate water-courses within their respective limits," approved May 15, 1854, and the acts amendatory thereof, did not confer any power upon such board of water commissioners as such, or otherwise, to enter upon private water-rights, and deprive or disturb the owners in the use and enjoyment thereof.

2. SAME—RIPARIAN RIGHTS—CALIFORNIA ACTS OF MAY 15, 1854, AND MARCH 10, 1874.

The California act of May 15, 1854, creating a board of water commissioners, etc., was, so far as Los Angeles county is concerned, expressly repealed by the act of March 10, 1874.

Department 2. Appeal from superior court, county of Los Angeles.

Mills, Van Dyke & Lee, for appellants. *Howard & Scott*, for respondent.

McKEE, J. This is an appeal from a judgment which perpetually enjoins the defendants from interfering in any way with the possession, use, and control of a ditch in which is conducted, for the purpose of irrigation, the water of a natural water-course on the plaintiff's land. The water-course is known as the "Bellona Creek," which rises on private property above the Bellona ranch, in Los Angeles county, and has, "from time immemorial, flowed through the ranch." It appears that prior to the year 1850 the owners of the ranch constructed two ditches, by which they diverted and conducted the water of the creek to the irrigable lands of the ranch. In that way they occupied and used the ranch until the year 1868, when it was, by judicial proceedings, partitioned among them, and in the partition there was allotted to them, respectively, certain parts of the irrigable lands, in proportion to their respective interests in the ranch, and assigned, as appurtenant to each allotment, a proportionate right to the use of the water of the creek running in the ditches. Having become the owner of two of those allotments, and the water-right appertaining to them, the plaintiff entered into

possession, and exercised his rights of ownership and possession, unchallenged by any one, until February, 1885, when the defendants, without his consent or permission, entered upon the ditches, and, claiming the right to appropriate the water running in them, assumed the use and control of the same. This entry was not made by the defendants upon any personal claim of private ownership to the property. They do not assert any right to the land, or the water, founded upon grant or appropriation, nor do they question the private ownership of the plaintiff to both land and water; but, admitting that he is the owner of the property, they say that they entered upon it, and assumed to use and control it, in the exercise of authority conferred upon them by an act of the legislature entitled "An act creating a board of commissioners and the office of overseer, in each township of the several counties in the state, to regulate water-courses within their respective limits," approved May 15, 1854, and the acts amendatory thereof. The plaintiff denies that the statute conferred any power upon the defendants, as a board of water commissioners, or otherwise, to enter upon his property, and deprive or disturb him in its use and enjoyment; and that, even if that was the purpose of the statute, it was wholly ineffectual for such purpose, and has been repealed.

Undoubtedly the legislature has no power to expropriate the property of any person by a mere legislative enactment. That the legislature could not do without violating the first principles of constitutional law. Under the constitution and laws of the state, framed to secure and protect every citizen in his rights of life, liberty, and property, private property cannot be taken, except for a public use, upon payment to the owner of a just compensation therefor, ascertained and adjudged to him according to law. Indeed, the statute itself, invoked by the defendants to justify their attempted appropriation of the property of the plaintiff, contains provisions declaratory of those first principles of law, for it provides:

"Sec. 9. Where water rises on land owned by any person it shall not be subject to the provisions of this act. * * *

"Sec. 14. No person or persons shall divert the waters of any river, creek, or stream from its natural channel, to the detriment of any other person or persons located below them on such stream." St. 1854, p. 76.

Subject to these provisions for the security and protection of private property and its incidents, the object of the statute was the election of township officers to regulate and control the water-courses of the county. For that purpose it authorized the commissioners elected under its provisions to examine and divert such water-courses as they might adjudge ought to be appropriated to public use, and apportion the water thereof among the inhabitants of their districts, and determine the times for using the same. St. 1862, p. 235.

But at the time of the defendants' entry the entire subject-matter of the statute, so far as it related to Los Angeles county, had been revised by the legislature by an act entitled "An act to promote irrigation in the county of Los Angeles," approved March 10, 1874, (St. 1873-74, p. 312.) Instead of a board of water commissioners and an overseer for each township in the county, as provided by the statute of 1854, the statute of 1874 provided that there should be elected at the general election of 1875 a superintendent of irrigation for the county at large, and three water commissioners in each water-district, whose duty should be to acquire water-rights by condemnatory proceedings, regulate the water-courses of the districts, and fix water-rates for the sale of water for purposes of irrigation. These provisions were in some respects additional to, and in others in conflict with, those of the statute of 1854 upon the same subject-matter. Manifestly, therefore, the statute of 1874 was intended as a substitute for the statute of 1854, as to Los Angeles county. Where that is the case with two statutes, the latter or substi-

tuted statute repeals the former. *Treadwell v. Yolo Co.*, 62 Cal. 564; *People v. Lon Me*, 49 Cal. 353. Besides, the statute of 1874 expressly repealed all acts, and parts of acts, inconsistent with the provisions of the act, so far as they referred to Los Angeles county. Section 14, St. 1874, p. 312.

Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

70 Cal. 198

ADAMS v. SOUTH BRITISH and NAT. F. & M. INS. COS. (No. 11,416.)

(*Supreme Court of California.* July 23, 1886.)

FIRE INSURANCE—ADJUSTMENT OF LOSS—ARBITRATION.

Under the language of the stipulations of an insurance policy stated in the opinion, *held*, that the contract of the parties was that, if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose.

Department 1. Appeal from superior court, city and county of San Francisco.

T. C. Van Ness, for appellant. *Freeman & Bates and Grove L. Johnson*, for respondent.

Ross, J. This is an action upon a policy of fire insurance wherein the defendants agreed that in case of the destruction of or damage to the property insured by fire, they would pay to the plaintiffs the amount of such loss or damage, not exceeding the amount in the policy mentioned: "provided, always, that this insurance shall, at all times and under all circumstances, be subject to the following conditions and stipulations, which conditions and stipulations constitute the basis of this contract, and are to be considered as incorporated in and forming part of this policy."

Among the conditions and stipulations referred to are the following:

"(4) In case of loss, the assured shall give immediate notice thereof, and shall render to the companies a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building herein described; other insurance, if any, and copies of the written portion of *all policies*; the whole cash value and ownership of the property, and the amount of loss or damage; and shall produce, if required, the certificate of the chief of the fire department, or his assistant, (or if there be no such official, then the certificate under seal of a magistrate, notary public, or commissioner of deeds, doing business nearest the place of the fire,) not concerned in the loss, or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property herein described to the amount claimed by the said assured. The assured shall, if required, submit to examinations, under oath, either before or after furnishing the proofs herein required, by any person appointed by the companies, and shall answer all questions relating to the alleged loss or damage, and to their claims therefor, and subscribe to such examinations when reduced to writing; and shall also produce their books of account, invoices and inventories, and other vouchers, and exhibit the same for examination at the office of the companies, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the originals of which have been lost or destroyed; and shall also exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by these companies. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at

the time of the fire; nor shall the assured be entitled to recover under this policy any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether the such other insurance be by specific, or by general or floating, policies. Assignors, unless the assignee owns the property, must make the proofs hereby required. And if there appear any fraud or false declaration, or that the fire shall have happened by the procurement or willful act, means, or connivance of the assured or claimants, or that the assured failed to use his best endeavors in saving and protecting the property from damage, at and after the fire, he, she, or they shall be excluded from all benefit under this policy.

"(5) In case differences shall arise touching any loss or damage, the matter shall, at the written request of either party, be submitted to two impartial appraisers, mutually chosen, (who, in case of disagreement, shall choose a third,) and whose detailed estimate, made in writing, and signed by any two of them, under oath, shall, as to the amount of such loss or damage only, be binding on both parties, but shall not decide the liabilities of these companies on this policy. * * *

"(11) It is further expressly covenanted by the parties hereto that no suit or action for the recovery of any claim by virtue of this policy shall be sustained in any court until after an award shall have been demanded and obtained, fixing the amount of such claim in the manner above provided. * * *

The language of the stipulations brings the case within the principle of the case of *Old Saucelito Land D. D. Co. v. Commercial Union A. Co.*, 5 Pac. Rep. 232, and of the cases there cited, on the authority of which the judgment and order in the present case must be reversed. Here, as it was in the *Saucelito Case*, the clear meaning of the contract is that, if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; MCKEE, J.

10 Cal. 201

PHELPS v. COGGSWELL. (No. 9,312.)

(*Supreme Court of California.* July 23, 1886.)

DAMAGES—EXCESSIVE DAMAGES—MALICIOUS PROSECUTION.

In an action for malicious prosecution, in having the plaintiff arrested on a charge of assault, where he was never put in jail or subjected to any real hardship or act of oppression, and the charge was subsequently dismissed, and the testimony as to probable cause for the arrest was conflicting, *held*, that a verdict of \$4,000 was excessive, and should be reduced to the sum of \$1,000.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Henry E. Highton, for appellant. *Fox & Kellogg*, for respondent.

FOOTE, C. This action was for malicious prosecution. The plaintiff, Phelps, it appears, was arrested by a police officer of the city of San Francisco, under a warrant which was issued under a complaint verified by Coggs-well, charging the former with having assaulted him on a street of said city. In making this arrest the officer went to a dwelling-house where the plaintiff in the present action was then sojourning with his wife, and informed him that he would have to accompany him (the officer) or procure and give bail for his appearance to answer the charge thus made against him. The plain-

tiff, with the officer, proposed to proceed to Bancroft & Co.'s place of business in order to procure money to deposit as bail. The officer, objecting, said that it was too late in the evening to go there, and that he would wait for the deposit of the amount of the bail until the following Monday. Upon that day so fixed the plaintiff obtained the money needed, and handed it to the officer. Afterwards the former appeared twice in the police court, prepared to meet the accusation against him and to go to trial thereon. Upon neither of these occasions did the defendant appear, and upon the last one the charge was dismissed. The plaintiff was never put in jail, or subjected to any real hardship or act of oppression. The charge made, that of assault, was not at all infamous in its nature, nor does it appear seriously to have injured the plaintiff in his business affairs, or in the estimation in which, as a gentleman and an honest man, he had been previously held by his friends and acquaintances. The jury, by their verdict, found, as they had a right to do, upon a conflict of testimony, that the defendant had no probable cause to have the plaintiff arrested as he did. They must also have found, under the trial court's instructions, that the defendant was actuated by actual malice, and although, upon the evidence, we would perhaps have come to a different conclusion as to that matter, yet we do not feel warranted in altogether setting aside their verdict, as being upon that issue entirely unwarranted by the evidence.

Yet we feel constrained to say that this case is by no means on a parallel, as to the features which it discloses, with that of *Russell v. Dennison*, 45 Cal. 338-341. That was an aggravated case of willful, open, malicious oppression, which carried with it wrong, injury, and great bodily and mental suffering to the victim of a man's vile displeasure, and the judgment was afterwards reduced. 50 Cal. 243. No such elements appear in this case. The plaintiff was accused of no moral turpitude, he was subjected to no physical suffering, he received no large damage to his business or property; and a reasonable man should not have experienced any very poignant and overwhelming sorrow and laceration of feeling at an arrest on a mere charge of simple assault, where the party making the charge did not appear to press it, and the officer of the law dismissed it in a reasonable time, and plaintiff's friends met him with merely a smile or word of gentle pleasantry.

We are of opinion that there was no error in the charge of the court to the jury, or in any other ruling by that tribunal on the trial.

The court below granted defendant's motion for a new trial unless the plaintiff would consent to release \$3,500 of the verdict, which was for \$7,500. The plaintiff remitted the sum as required, and the new trial was denied. From this order defendant appealed. Under the facts of the case as they appear in the record, we think that the verdict, when reduced as above, was excessive, and that it should be reduced to the sum of \$1,000. Unless the plaintiff shall consent within 30 days after the filing of the *remittitur* herein from this court in the court below, to release all but \$1,000 of such verdict, the order denying a new trial should stand reversed, and a new trial be granted. If such consent of plaintiff is filed as required above, then a new trial should be denied.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. The foregoing is approved, and the clerk of this court will enter the order as above indicated; and the court below, after the filing therein of the *remittitur*, will make such orders as shall become necessary to carry out the directions of this court.

70 Cal. 291

Ex parte WINTER. (No. 20,202.)

(Supreme Court of California. July 30, 1886.)

HUSBAND AND WIFE—DIVORCE—ALIMONY—COUNSEL FEES—JURISDICTION.

The trial court is vested with power, in an action of divorce, to make an order for the payment, by the defendant, of a sum for counsel fees, to enable his wife, who was without any means or property otherwise than as obtained from him, to prosecute her action then on appeal. Ross, J., dissenting, on the ground that the power to allow a wife counsel fees in the appellate court is properly vested in the appellate court.

Commissioners' decision.

In bank. Application for writ of *habeas corpus*.

Geo. D. Collins, for petitioner.

FOOTE, C. A wife brought an action against her husband for permanent support and maintenance. The court, *pendente lite*, upon application by the plaintiff, made an order for the defendant to pay counsel, for her use, \$250 as counsel fees; it appearing that he was amply able to do so, and she having no means otherwise to prosecute her action. From that order the defendant appealed, and that appeal is still pending in this court. Afterwards the court below, on motion duly made, ordered the defendant to pay the further sum of \$250 counsel fees to the plaintiff's counsel for her use, in order that she might prosecute her action then upon appeal as aforesaid. The defendant failing and refusing to obey that order of the court, or to appeal therefrom, he was ordered to show cause why he should not be committed for contempt in disobeying such order.

Upon the hearing in the matter it appeared that the plaintiff had no money or property, and that the defendant had community property and funds in his hands amounting to several thousand dollars; and that it was necessary that the plaintiff should be furnished with money to enable her to answer the appeal from the first order, commanding the payment of counsel fees by the defendant as aforesaid, and that the sum of \$250 was a reasonable amount for that purpose; and that the defendant was amply able to pay the same. Whereupon the court ordered the defendant to pay to plaintiff's counsel, for her use, the sum of \$250, within one day of the date of the service upon him of a copy of said order. The order last mentioned was not complied with, or any appeal taken therefrom.

The motion for contempt against the defendant then came on to be heard, and the defendant appeared by his counsel. It was then shown that a copy of the order of date March 3d had been duly served upon the defendant upon that day, and demand made upon him for the payment of the sum of money mentioned therein; that the defendant was able to pay the same, but refused to do so, showing no cause for such refusal, his counsel contending that the trial court had no power or authority to make or to enforce its order in the premises. An order was then made of date the eleventh day of March, 1886, adjudging the defendant guilty of contempt for his disobedience of said order of March 3, 1886, and ordering him to pay a fine of five dollars; and it further appearing that said defendant was still able to pay the sum of money mentioned in said order of March 3, 1886, he was ordered to be taken into the custody of the sheriff of the city and county of San Francisco, and to be imprisoned in the county jail thereof, until he complied with the order of the court in the premises. On the twenty-second day of April, 1886, the defendant applied for and obtained from the chief justice of this court a writ of *habeas corpus*, directed to Peter Hopkins, the sheriff aforesaid; and the defendant was admitted to bail pending the determination of his application to be discharged from custody.

To us it appears that the learned judge below was by law vested with the power, within the bounds of a proper discretion, to make the order for the

payment by the defendant of the sum of \$250 counsel fees, to enable his wife, who was without any means or property otherwise than as obtained from him, to prosecute her action then on appeal. No abuse of that discretion is shown by the record. The defendant has all the community property in his possession, and seeks to retain it in defiance of a legal order of the court to furnish therefrom his destitute consort with the means to pay counsel to represent her in this court. Under the decision in the case of *Reilly v. Reilly*, 60 Cal. 625, 626, we are of opinion that the court below could make the order which was disobeyed, and it should be upheld.

The petition should be dismissed, and the defendant remanded to the custody of the sheriff.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the petition is dismissed, and defendant remanded to the custody of the sheriff.

ROSS, J., (*dissenting*.) I think the power to allow a wife counsel fees in the appellate court, in proper cases, is vested in the appellate court as an incident to the proper exercise of its jurisdiction, and that it does not come within the jurisdiction of the court from which the appeal is taken to make such allowance. It is provided by section 946 of the Code of Civil Procedure: "Whenever an appeal is perfected as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from. * * *" But, as was said in respect to a similar statute by the supreme court of Nevada in *Lake v. Lake*, 17 Nev. 243, I do not think the grant of power to proceed "upon any other matter included in the action, and not affected by the judgment or order appealed from," authorizes the court below to do what it cannot do if no appeal is taken. See, also, *Stafford v. Stafford*, 53 Mich. 522; S. C. 19 N. W. Rep. 201; *Lake v. Lake*, 16 Nev. 369.

For these reasons I think the petitioner illegally restrained, and that he should be discharged.

70 Cal. 337

BROWN v. PLUMMER. (No. 11,529.)

(*Supreme Court of California*. July 30, 1886.)

APPEAL—EFFECT OF—SECOND APPEAL.

Where there is a good and valid appeal from a judgment of the superior court pending in the supreme court, a second appeal from the same judgment is a nullity, for the reason that after the taking of the first appeal there would be nothing in the court below from which another appeal could be taken.

In bank. Appeal from superior court, county of Los Angeles.

Edwin Baxter, for appellant. Bicknell & White and G. Cabot, for respondent.

THORNTON, J. Motion to dismiss an appeal. In this case there were two appeals from a judgment taken by defendant,—one on the twenty-eighth of January, 1886, and the other on the first of March following. The judgment was entered on the fourth of January, 1886. The respondent (plaintiff below) moved to dismiss both appeals in one and the same notice. The motion to dismiss the appeal of the twenty-eighth of January was made on the ground that the party appealing did not file the transcript in time. The motion to dismiss the appeal of the first of March was made on the ground that the first appeal was pending when the second was taken. The motions came on to

be heard on the seventh of April last, and the appeal first taken was ordered to be dismissed on the ground above stated. As to the second appeal, it is urged that, as such appeal was taken while the first was pending, it was a nullity, as there cannot be two appeals pending at the same time from the same judgment. It appears that the first appeal was in all respects regularly taken and perfected by an undertaking on appeal. When the second appeal was taken the time for filing the transcript on the first appeal had not expired. The first appeal was then a valid, existing appeal to this court.

In *Hill v. Finnigan*, 54 Cal. 312, 313, a judgment was entered in the court below on the twelfth of August, 1879, and on the fifth of December an order was entered denying a motion for a new trial. On the twenty-third of December the defendant served and filed a notice of appeal from the judgment and order, and on the same day filed an undertaking on appeal. An exception to the sureties on the undertaking was filed, and the sureties failed to justify. On the third of February, 1880, the defendant, erroneously supposing that the appeal first taken had become ineffectual by reason of the failure of the sureties to justify, served and filed another notice of appeal from the judgment and order, and another undertaking. This court (department 1) held that the failure of the sureties to justify did not render the appeal ineffectual; that the appeal of the twenty-third of December was a valid one, and vested this court with jurisdiction of the cause. The opinion as to the second appeal thus proceeds: "It follows that the attempted appeal of February 3d was a nullity, for there was nothing then pending in the district court from which an appeal could be taken." 54 Cal. 314.

Concurring in the rule laid down in the case cited, and the reasons given for it, we must hold that the appeal in this case taken on the first of March was a nullity, as the appeal of the twenty-eighth of January was valid and binding when the appeal of the first of March was taken, and on the day last named there was nothing in the court below from which an appeal could be taken.

It follows from the foregoing that the appeal of the first of March must be dismissed. So ordered.

We concur: MORRISON, C. J.; MYRICK, J.; MCKINSTRY, J.; ROSS, J.; SHARPSTEIN, J.; MCKEE, J.

70 Cal. 335

BARLEY v. BUELL. (No. 11,173.)

(Supreme Court of California. July 30, 1886.)

ASSUMPSIT—CONTRACT—CONSIDERATION—STATEMENT OF CAUSE OF ACTION.

In an action to recover money in pursuance of an alleged contract, the complaint states a cause of action if it alleges a promise by defendant to pay the sum sued for, in consideration of services rendered by plaintiff in procuring a loan for defendant.

Commissioners' decision.

In bank. Appeal from superior court, county of Santa Barbara.

This was an action to recover the sum of \$10,000 for services alleged to have been rendered by plaintiff in procuring a loan for the defendant, and for which defendant promised to pay such sum. The opinion on the former hearing, in department 2, is reported in 9 Pac. Rep. 549.

W. C. Stratton, for appellant. W. H. H. Hart and A. R. Cotton, for respondent.

BELCHER, C. C. This action was commenced to recover the sum of \$10,000 for services alleged to have been rendered by the plaintiff in procuring a loan for the defendant. The defendant demurred to the complaint, and, his demurrer being overruled, answered. The case was tried by a jury, and a

verdict returned in favor of the plaintiff for \$3,000, on which judgment was entered. The appeal is from the judgment, and rests upon the judgment roll. It is claimed for the appellant that the complaint was insufficient, and that the court erred in overruling the demurrer. The complaint was undoubtedly somewhat ambiguous, but it was not demurred to on that ground. In our opinion, it stated a cause of action for the \$3,000 recovered, and that the alleged promise to pay that sum was based upon a sufficient consideration.

We think the judgment should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

THORNTON, J., (*concurring*.) When this cause was before department 2 of this court for decision, I drew up an opinion affirming the judgment, and stating the reasons for such conclusion. I adhere to that opinion, and file it herein as my opinion in the cause. See 9 Pac. Rep. 549.

70 Cal. 295

WINTER v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 11,488.)

(*Supreme Court of California*. July 30, 1886.)

HUSBAND AND WIFE—ACTION FOR SUPPORT AND MAINTENANCE.

There is no abuse of discretion on the part of a court in refusing to proceed to the trial of an action, by a wife against her husband, for permanent support and maintenance, until its order, made *pendente lite*, directing the payment to the wife of a sum of money as counsel fees, has been complied with, or reversed or annulled by an appellate court.

Commissioners' decision.

Department 1. Application for writ of mandate.

Geo. D. Collins and *Eugene Deuprey*, for petitioner.

FOOTE, C. The wife of Thomas P. Winter instituted against him an action for permanent support and maintenance. *Pendente lite*, the judge of the superior court to whom the cause had been assigned for trial made an order directing the payment to the wife of a sum of money as counsel fees. From that order the defendant took an appeal to this court, and, pending that, applied to the court below to proceed with the cause on the day upon which it had been set for trial, said day having been specified before the order to pay counsel fees was made. This, it is alleged by him, the court refused to do, and he applied for and obtained a writ of mandate from this court for such judge to show cause why he had not proceeded to the trial of the action of *Annie Winter v. Thomas P. Winter*. From the answer of the trial judge it appears "that he refused to compel the plaintiff to try said cause" until the order for the payment of counsel fees had been complied with, or until this court had reversed or annulled that order. It does not appear to be disputed in any quarter that the plaintiff is the wife of Thomas P. Winter. Under such circumstances, we cannot say that the learned judge abused the discretion vested in him as to when causes before him should be set for trial.

We are of opinion that the petition should be dismissed, and the writ denied.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the petition is dismissed, and writ denied.

70 Cal. 374

COUBROUGH v. ADAMS. (No. 9,450.)

(Supreme Court of California. August 2, 1886.)

1. PLEADING—EVIDENCE—JUDGMENTS.

A stipulation signed by the parties, and filed in an action, whereby it was admitted and agreed that the amount in controversy was involved in another action, and that the matters in the action, and the claim of plaintiff therein, should enter into and abide the event of such other suit, is admissible in evidence in support of a plea in bar of the judgment in such other action, notwithstanding such stipulation has not been specially pleaded.

2. SAME—AMENDMENTS—JUDICIAL DISCRETION—LIS PENDENS.

The allowance of amendments to pleadings is a matter within the discretion of the trial court, which has power to permit the same at any stage of the trial, when necessary to the purposes of justice. Under the circumstances stated in this case, *held*, that there was no abuse of discretion in permitting the amendment of an answer by setting up the pendency of another action at the end of the trial, and before judgment.

3. SAME—ABATEMENT—LIS PENDENS.

Where an action has been commenced for an accounting, and subsequently one or more items of the account are made the subject of a separate suit between the same parties, a defense of prior *lis pendens*, set up in the latter suit, is good.

4. SAME—ABATEMENT—JUDGMENT.

Where judgment is rendered for defendant in an action, on his plea that the action is barred by the judgment in another suit, the proper order should be that the action abate, and not that the plaintiff take nothing by his action, and the defendant recover costs.

Commissioners' decision.

Department 2. Appeal from superior court, county of Alameda.

W. S. Goodfellow, for appellant. Wm. M. Pierson, for respondent.

BELCHER, C. C. This is an action to recover the amount alleged to be due on a promissory note, executed by the defendant's testator to the order of McFarlane, Blair & Co., and by them indorsed to the plaintiff. The complaint is in the usual form, setting forth a copy of the note, and was filed in the district court of the Third judicial district for Alameda county on the twenty-eighth day of June, 1876. The defendant answered to the complaint, setting up the circumstances under which the note was given, and alleging that it was indorsed to plaintiff after its maturity, and had been fully paid.

At the time this action was commenced there was pending in the district court of the Nineteenth judicial district another action, which was commenced by James Oliver, administrator of the estate of Jonas Collycott, deceased, and John Shoenbar, as plaintiffs, against David B. Blair, McFarlane, Blair & Co., James Adams, the defendant's testator, and Henry Coubrough, the plaintiff herein, as defendants. The last-named action was commenced to dissolve a partnership alleged to have existed between the plaintiffs Collycott and Shoenbar and the defendant Blair, and for an accounting, and to compel Blair to surrender to the plaintiffs certain shares of stock alleged to belong to the plaintiffs. In the complaint it was alleged that Coubrough was the agent and employe of Blair and McFarlane, Blair & Co. Coubrough failed to answer to the complaint, and his default was entered. The defendant's testator answered, and, among other things, set up that he was induced by Blair to make the note in suit here as an accommodation, and that it had been fully paid. He also pleaded the commencement and pendency of this action.

Afterwards, on the tenth day of December, 1878, the parties to this action entered into a stipulation, as follows: "Inasmuch as the amount in controversy in this action is also involved in the suit in the Nineteenth district court of San Francisco, in the action No. 2,465, in which James Oliver (administrator of the estate of Jonas Collycott) and John Shoenbar are plaintiffs,

and David B. Blair and others are defendants, in which said last-named suits an accounting is being had between said parties, it is therefore agreed that the matters in this action, and the claim of plaintiff therein, enter into and abide the event of said suit in the Nineteenth district court. And it is further agreed that, in the event of a judgment being given against Adams in said action in the Nineteenth district court, he shall, upon satisfaction of the same, receive a clear receipt from said Coubrough against the judgment given in the Third district court of Alameda in said suit,—*Coubrough v. Adams*. All proceedings in said action in the Third district court shall be stayed until after final decision in the case in the Nineteenth district court, provided said case in the Nineteenth district court be settled within three months from date hereof."

On the twenty-third day of October, 1878, the case of *Oliver v. Blair* was referred to a referee to try the same, and all the issues therein, and to report a judgment. The case was tried before a referee, and he reported, on the nineteenth day of March, 1879, findings and a judgment, which was afterwards entered as the judgment in the case. Upon the trial the note now in suit was in issue, and it was found that it had been paid and extinguished. The defendants were Blair and McFarlane. Blair & Co. afterwards moved for a new trial, but, before their motion was acted upon, stipulated that the motion be denied, and then waived any appeal. Subsequently the defendant filed a supplemental answer in this case, setting up the judgment in the case of *Oliver v. Blair* as a bar to the action. When the case came to trial, the plaintiff introduced his note in evidence, and rested. The defendant then, against the objections of plaintiff, was permitted to read in evidence the stipulation hereinbefore recited, and also the judgment roll in *Oliver v. Blair*, and the reporter's notes of the evidence in that case, showing that the note here sued on, and the debt evidenced thereby, was involved in the accounting had before the referee. The plaintiff then, in rebuttal, introduced in evidence notices of appeal and undertakings on appeal by all of the defendants, with proof of service and filing; and the defendant, in surrebuttal, introduced and read in evidence the stipulation before referred to, that their motion for new trial be denied, and waiving an appeal. After argument of the case, the defendant was permitted by the court to amend his supplemental answer by setting up that there was, at the time of the commencement of this action, another action pending, to-wit, the said action in the Nineteenth district court, between the same parties, and for the same cause. Judgment was then entered in favor of the defendant. The plaintiff moved for a new trial, and, his motion being denied, appealed from the judgment and order.

The first point made by the appellant is that the court erred in admitting in evidence the stipulation first referred to, for the reason that no foundation for such evidence had been laid by supplemental answer or otherwise; and for the further reason that the stay of proceedings provided for in it was conditioned upon a final settlement of the case in the Nineteenth district court within three months. The stipulation was signed by the parties, and was filed in the case. By it the plaintiff admitted that the amount in controversy in this action was involved in the other action, and he "agreed that the matters in this action, and the claim of plaintiff therein, enter into and abide the event of said suit." The defendant had pleaded the judgment in the other action in bar of this, and he offered the stipulation in support of that plea. It was not necessary to plead the stipulation specially, and it seems to us that it was clearly admissible for the purposes for which it was introduced. The claim that the stipulation was inadmissible because the stay of proceedings for which it provided was dependent upon the final settlement of the other case within three months, cannot be maintained. It was not offered to obtain a stay of proceedings, as the case was then on trial, and, so far as appears, without objection from either side.

The second point made is that the court erred in permitting the defendant, at the end of the trial, to amend his answer by setting up the pendency of the other action at the time of the commencement of this action, and then ordering judgment. The allowance of amendments to pleadings is a matter within the discretion of the trial court, and this court can only interfere with the exercise of that discretion when it appears to have been abused. It has been frequently held that it is within the power of the trial court to permit amendments whenever, at any stage of the trial, they are necessary to the purposes of justice. *Lestrade v. Barth*, 17 Cal. 285. Here it had appeared that during the trial the defendants in the other action had appealed from the judgment in it to the supreme court, notwithstanding they had stipulated not to appeal, and the plaintiff here was thereby seeking to avoid the effect of that judgment as a bar to his action. Under the circumstances, we fail to see any abuse of its discretion in the action of the court below.

But it is claimed that the amendment was insufficient, because the defense of a prior *lis pendens* applies only when the plaintiff in both suits is the same person, and both are commenced by himself, and not to cases where there are cross-suits by a plaintiff in one suit who is defendant in the other; and *Ayres v. Bensley*, 32 Cal. 630, is cited to sustain the claim. Undoubtedly the rule stated is the general rule, but it ought not to apply to an action for an accounting between the same parties, where one or more items of the accounting are afterwards made the subject of a separate suit. In such an action all the parties are actors.

It is claimed, further, that the same matters were not in issue between the plaintiff and defendant in the other action. The answer is that it is shown by the stipulation of the parties, and by the record in that action, that they were. Besides, it was alleged in the complaint in that action, and admitted by his default, that the plaintiff here was the mere agent and employe of the other defendants; and as their appeal was dismissed, (5 Pac. Rep. 917,) and the judgment as to him was affirmed, both in department and bank, (6 Pac. Rep. 847; 8 Pac. Rep. 612,) he has nothing to complain of.

The last point made is that the judgment should have been that the action abate, and not in favor of the defendant on its merits. The judgment was that the plaintiff take nothing by his action, and that the defendant recover his costs. In our opinion, the proper judgment was not entered. It should have been a judgment abating the action. The judgment should therefore be reversed, and the cause remanded, with directions to the court below to modify the judgment as above indicated.

WE CONCUR: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order denying a new trial is affirmed. The judgment is reversed, and cause remanded, with directions to the court below to modify the judgment as indicated in said opinion.

70 Cal. 380

LAFARGUE v. HARRISON. (No. 8,535.)

(Supreme Court of California. August 2, 1886.)

JUDGMENT AFFIRMED.

In bank. Appeal from superior court, city and county of San Francisco.

The opinion of December 30, 1885, rendered by the commissioners, and adopted by the court in bank, is reported in 9 Pac. Rep. 259.

Wilson & Wilson, for appellant. *McAllister & Bergin*, for respondent.

BY THE COURT. For the reasons given in the opinion filed herein December 30, 1885, judgment and order affirmed.

THORNTON, J., dissenting.

(70 Cal. 216)

KEDROLIVANSKY v. NIEBAUM. (No. 9,062.)

(Supreme Court of California. July 27, 1886.)

LIBEL AND SLANDER—IMPUTING WANT OF CHASTITY TO WOMAN.

In an action for slander, where the complaint set forth that the words spoken of a woman were "that said plaintiff was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she [said plaintiff] had not lived with her husband for two years previous to his death, and that she was the cause of her husband's death; that she had driven him [her said deceased husband] to drinking; and that her husband fell while drunk, and was killed,"—and it is alleged that these words signified, and were understood by listeners to mean, that the plaintiff had deserted her husband, and had, prior to his death, led a dissolute and unchaste life, and had become *enceinte* while living separate and apart from her husband, and that such bad conduct on the part of plaintiff drove her husband to drinking, and caused his death: *held*, that such complaint stated a cause of action.¹

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

McAllister & Bergin, for appellant. *Henry E. Highton*, for respondent.

BELCHER, C. C. This is an appeal by the defendant from an order granting the plaintiff a new trial. The action is for slander, alleged to have been spoken of and concerning the plaintiff, by the defendant in the presence and hearing of a Mrs. Goodall. The complaint alleges that the plaintiff is the widow of Paul Kedrolivansky, who died at San Francisco on the nineteenth of June, 1878, a subject of the Russian government, and the mother of six children, the youngest born to her on the eighteenth of September, 1878, and that she is in good standing and reputation, and is entitled, under the laws of Russia, to a pension of \$112.50 per month for 15 years; that being poor and destitute, with six children on her hands to support and educate, she applied to the Ladies' Protection & Relief Society of San Francisco for assistance, and thereupon Mrs. Goodall was authorized to visit the family of plaintiff, which she did on the fifteenth of November, 1879; that Mrs. Goodall, while visiting the family of plaintiff, saw there some of the children, and particularly the youngest, and immediately thereafter, in consequence of information received from plaintiff, went to the office of defendant "to ascertain, if possible, why the pension of plaintiff was not paid according to custom and the laws of the government of Russia," and that the defendant then and there, in the presence and hearing of Mrs. Goodall, spoke and published of and concerning the plaintiff as follows: "That said plaintiff was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she [said plaintiff] had not lived with her husband for two years previous to his death, and that she [said plaintiff meaning] was the cause of her husband's death; that she had driven him [her said deceased husband] to drinking; and that her husband fell while drunk and was killed." It is then alleged that these words signified, and were understood by Mrs. Goodall to mean, that the plaintiff had deserted her husband, and had, prior to his death, led a dissolute and unchaste life, and had become *enceinte* while living apart and separate from her husband, and that such bad conduct on the part of plaintiff drove her husband to drinking, and caused his death.

The defendant answered, denying, among other things, that he spoke of and concerning the plaintiff as charged in the complaint, or that he spoke any

¹See, as to words actionable *per se*, *Dixon v. Allen*, *ante*, 179, and note, 181, and also *Stoke v. Miller*, (Pa.) 5 Atl. Rep. 621, and note, 622.

words which were slanderous or untrue. The case was tried before a jury, and a verdict returned in favor of the defendant, on which judgment was entered. The plaintiff moved for a new trial, and her motion was granted, upon the ground that certain testimony had been improperly admitted before the jury.

It is now claimed for the appellant—and this is the only point made—that the court erred in granting the motion for new trial, because the complaint stated no cause of action. Under our statute, words which impute to a woman a want of chastity are slanderous, and actionable *per se*. Section 46, Civil Code. The words complained of here are alleged to have signified and been understood to mean that the plaintiff was an unchaste woman. Did they admit of the meaning imputed to them? That they were understood by Mrs. Goodall to have the meaning charged is clear from her testimony. She said: "Well, he said she had driven him to drink, and I supposed she was an immoral woman and had been untrue to her husband, or this little nursing child would not have been around. That is the inference that I drew; that is what had driven him to drink."

The words are somewhat ambiguous, but charges of unchaste conduct are seldom made in plain and direct words. They are usually made by indirection or insinuation, and, however made, are slanderous when they convey to the minds of the hearers the meaning that the woman was unchaste.

When the words used are ambiguous, it is for the jury to determine what is their meaning. The rule is thus stated by Townshend in his work on Slander and Libel, (section 140): "Where the language is ambiguous, in that case the manner in which it was or might be understood by those to whom it was published is material, and will control in determining the meaning; but where the language is unambiguous, it is to be construed in its ordinary sense, and without reference to how those to whom it was published understood it, or what was intended by the publisher."

In *Kennedy v. Gifford*, 19 Wend. 300, it is said, it is the sense in which the hearers understood the words on which the jury are to pronounce; and in *Dorland v. Patterson*, 23 Wend. 422, it is said, the speaker "is accountable for the import of the words as they will naturally be understood by the hearer."

In *Riddell v. Thayer*, 127 Mass. 487, it was held that in an action for slander, if the slanderous words charged are that the plaintiff, a married woman, is a "bad woman," a "bitch," and a "whore," it is for the jury to determine the sense in which the word "bad" is used, and an instruction that for that purpose the jury may take into account the accompanying words and surrounding facts is not open to exception.

In *Vanderlip v. Roe*, 23 Pa. St. 84, the words spoken of the plaintiff were: "She is a bad character,—a loose character." After verdict for the plaintiff there was a motion in arrest of judgment, upon the ground that the words were not actionable. The supreme court said: "It is said that these words do not expressly charge fornication, and here lurks the whole error of the court below. This is, in fact, a return to the old doctrine of *mitior sensus*. They do charge it expressly, or not at all, unless we falsify their meaning by treating them too kindly. Such words are always understood as an assault upon the bright central virtue of a woman's character, and it is almost always made in a covert way. Such is the *norma loquendi*. There is some natural and instinctive decency still left, even in the most degraded characters, that prevents them from speaking of this offense in the most direct terms. * * *. The meaning of such expressions may be properly averred in the innuendo, and the jury must decide whether the averment is true." Judgment was then ordered to be entered upon the verdict.

In our opinion, the complaint stated a cause of action, and the order appealed from should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

70 Cal. 428

PEOPLE v. MANNERS. (No. 20,170.)

(Supreme Court of California. August 24, 1886.)

LARCENY—GRAND LARCENY—VERDICT—DEGREE OF CRIME.

On the trial of a defendant upon an information charging her with grand larceny, a verdict of "guilty as charged" is a sufficient finding of the degree of the crime.

In bank. Appeal from superior court, county of Sacramento.

The Attorney General and E. C. Marshall, for respondent. Henry T. Gage, for appellant.

MORRISON, C. J. The defendant was charged by information, prosecuted, and convicted, of the crime of grand larceny; the charge being that she feloniously took and carried away four \$20 gold pieces, the same being the property of the prosecuting witness. On the trial the court charged the jury that the form of the verdict should be, if they found the defendant guilty, as follows: "We, the jury, find the defendant guilty as charged." The jury did find the defendant "guilty as charged," and this presents the only point in the case on the appeal.

The question is not a new one in this court. In the case of *People v. Whitely*, 64 Cal. 211, this court, sitting in bank, held such a verdict good, and affirmed the judgment. In the more recent case of *People v. Price*, 7 Pac. Rep. 745, the *Case of Whitely* was cited with approbation by the entire court. These cases leave the question no longer open in this court, and, following the same, we must affirm the proceedings in the court below.

Judgment and order affirmed.

We concur: ROSS, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.

70 Cal. 250

BURKLE and another v. LEVY, Trustee, and others. (No. 11,465.)

(Supreme Court of California. July 23, 1886.)

1. HUSBAND AND WIFE—DEED BY MARRIED WOMAN—CONSIDERATION.

A deed of trust of her separate property executed by a married woman, empowering the trustee, in case of default on the part of her husband in making payment for certain indebtedness, to sell the property, and out of the proceeds to pay such indebtedness, is sufficiently supported by a good consideration where such deed is executed in consideration of the extension, by her husband's creditors, of the time to pay such indebtedness.

2. EQUITY—FRAUD—UNDUE INFLUENCE—RESCISSION OF CONTRACT.

One whose consent to execute a contract has been obtained through fraud or undue influence may rescind the contract, but he must do it promptly on discovering the facts which entitle him to rescind. In this case, where a trust deed by a married woman was executed on May 23, 1884, and the plaintiff, having full knowledge of the facts, did not commence the action to set aside the deed on the ground of undue influence or fraud until October 10, 1885, and the complaint then failed to allege any reason for such delay, *held*, that the delay was unreasonable, and fatal to the action.

3. SAME—DEEDS—UNDUE INFLUENCE.

Upon the facts as stated in the case, *held*, that the plaintiff, a married woman, was not induced, by fraud or undue influence, to execute the deed under consideration.

Commissioners' decision.

Department 2. Appeal from superior court, county of Los Angeles.

P. W. Dooner, for appellant. H. W. O'Melveny and Chapman & Hendricks, for respondent.

BELCHER, C. C. This is an action to set aside a deed of trust executed by the plaintiffs to the defendant Levy, as trustee. The defendants demurred

to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was sustained. The plaintiffs declined to amend, and thereupon judgment was entered against them.

Two points are made by the appellants: *First*, that the plaintiff Eliza V. Burkle executed the deed of trust complained of without any consideration coming to her for so doing; and, *second*, that she was induced to execute the deed by the fraud and undue influence of her husband and co-plaintiff, Ferdinand Burkle, and of the defendant Levy.

1. It appears from the complaint that the plaintiffs were husband and wife, and that the property conveyed by the deed was a parcel of land in Los Angeles county, which was the separate property of the wife, and on which she had filed a homestead claim and was residing with her husband. The husband was a merchant, and had become indebted to various parties in the aggregate sum of about \$3,000. The debts were all due, and the creditors were pressing for their payment. On the twenty-third day of May, 1884, the husband, in consideration of an extension of time to pay his debts being given him by his creditors, entered into a written agreement to pay them in 12 equal monthly installments; the first installment of $8\frac{1}{2}$ per cent. of the whole amount to be paid on the thirty-first day of July, 1884, and a like sum on the last day of each month thereafter, till the whole should be paid. At the same time, and as a part of the transaction, the plaintiffs executed to the defendant Levy, as trustee, the deed in question. The deed, a copy of which is set out in the complaint, recited the written agreement, and that it was made "in consideration of the said indebtedness, and of the extension of time for payment given, and in the further consideration of \$1 to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and for the purpose of securing the payment of said sums as provided in said agreement, under the provisions hereof." It then empowered the trustee, in case of default in making the payments as provided, to sell the property, and out of the proceeds of the sale to pay—*First*, all expenses incurred in making the sale, and any taxes he may have been compelled to pay on the premises; *second*, to the "creditors mentioned in said agreement the sums therein specified, *pro rata*;" and, *third*, the balance or surplus, if any, to Ferdinand Burkle.

From this statement it is apparent that there was a sufficient consideration for the execution of the deed. The extension by the creditors of the time of payment, and the agreement by them to accept payments in monthly installments, were both valuable considerations, and sufficient to support the deed on the part of Mrs. Burkle, as well as on the part of her husband. The fact that the consideration did not go directly to her is a matter of no consequence. In this state a married woman may enter into any engagement or transaction respecting her property which she might if unmarried. Section 158, Civil Code. She may mortgage it, or convey it by deed of trust, to secure her husband's debts, and, having done so, the creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers. *Alexander v. Bouton*, 55 Cal. 15; *Cartan v. David*, 18 Nev. 310; S. C. 4 Pac. Rep. 61.

2. To sustain the claim that Mrs. Burkle was induced to execute the deed by fraud and undue influence, it is alleged in the complaint that on the second day of May, 1884, her husband was arrested on a charge of felony, and compelled to leave his home and business; that he secured bail, and was again arrested and bailed on another charge; that two of his principal creditors were his bondsmen; that from the time of his release up to the twenty-third of May he was absent from his home and business a great portion of the time, consulting with his counsel and making arrangements for his examination; that she was informed, by his attorneys and others, that it would go hard with her husband, and that he would be very likely to suffer conviction and

incarceration in the penitentiary; that his creditors began to harass him for the payment of their demands, and he became discouraged, gloomy, and depressed, and communicated to her all his troubles and his apprehensions and fears, and frequently declared that his financial ruin was inevitable; that she believed all the reports and statements made to her concerning her husband's prospects, and became and was greatly agitated, and under extreme mental anguish and excitement, in consequence thereof; that on the morning of the twenty-third of May she was informed by her husband that his creditors had demanded a settlement, and that she and her husband convey to them the family homestead to secure the payment of their demands; that she hesitated to consent to the arrangement, and did not agree to sign the conveyance until she was informed by her husband that in case of her refusal his bondsmen would withdraw, and he would be immediately incarcerated in the county jail, and until she was further informed by him that the instrument demanded would not affect their homestead claim, and that in no event could she lose her home, and until she was informed by Levy that the instrument to be executed was not a deed in reality, but a mere security to satisfy the demands of her husband's creditors; that all the statements made to her by her husband, except that relating to the withdrawal of his bondsmen, were suggested and dictated by Levy, and that Levy acted in bad faith, with the view and for the purpose of securing an undue advantage over her, and that she was thereby imposed upon and deceived.

In all this we see nothing to support the claim of fraud and undue influence. It is not alleged that any of the statements made to Mrs. Burkle, and on which she acted, were untrue. She knew what the deed was, and its purpose, before she executed it. She acknowledged it before a notary, and on examination, without the hearing of her husband, was made acquainted with its contents. Levy told her it was a mere security to satisfy her husband's creditors; and when her husband told her it would not affect her homestead claim, and that in no event could she lose her home, he must have intended, and she understood, that he could and would pay the installments as they became due, and so she would suffer no harm.

But, if we are mistaken in this, another sufficient answer to the claim of appellants is found in the long delay in commencing the action. One whose consent to execute a contract has been obtained through fraud or undue influence may rescind the contract, but he must do it promptly on discovering the facts which entitle him to rescind. Sections 1689, 1691, Civil Code. Here, as has been seen, the trust deed was executed on the twenty-third day of May, 1884, and this action was not commenced till the tenth day of October, 1885. There is nothing in the complaint to account for this long delay, and, under the circumstances, we must hold it unreasonable and fatal to this action. *Barfield v. Price*, 40 Cal. 535.

We think the demurrer was properly sustained, and that the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 210

SANCHEZ and others v. NEWMAN and others. (No. 11,321.)

(Supreme Court of California. July 26, 1886.)

CONTEMPT—APPEAL.

There is no appeal from a judgment in a case of contempt.

Department 2. Appeal from superior court, county of Los Angeles.

Glassell, Smith & Patton, for appellant. Wells, Van Dyke & Lee and J. M. Damron, for respondent.

THORNTON, J. This is an appeal from an order in a proceeding for contempt against one B. Newman. By the order referred to, the proceeding against Newman was dismissed for want of jurisdiction. In *Tyler v. Connolly*, 65 Cal. 28, S. C. 2 Pac. Rep. 414, it was held that there is no appeal from a judgment in a case of contempt. We find nothing in this case which takes it out of the rule laid down in the case cited. For the reasons given in *Tyler v. Connolly* we are of opinion that there can be no appeal here. The appeal must therefore be dismissed, and it is so ordered.

We concur: **SHARPSTEIN, J.;** **McKEE, J.**

70 Cal. 221

BACON and others v. IRVINE and others. (No. 9,367.)

(*Supreme Court of California. July 27, 1886.*)

1. CORPORATIONS—ACTION BY STOCKHOLDERS, WHEN ENTERTAINED—EQUITY.

A court of equity will not entertain an action by stockholders against the directors of the corporation and others, for the purpose of compelling the defendants to an accounting, obtaining the appointment of a receiver, and to restrain the collection of an assessment on the capital stock, on the ground of conspiracy, fraud, and embezzlement by the defendants, if it appears that the plaintiffs, at the time they in writing requested the president and directors to institute the action on behalf of the stockholders, (which request was refused,) were aware that they had no cause of action against said directors, at least, and that the real object which they had in view in instituting the action was not stated to the directors; for in such case it is clear that the request to the directors to institute the action was not an earnest, but a simulated, one.

2. JUDGMENT HELD SUSTAINED BY THE EVIDENCE.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

McAllister & Bergin, for appellant. *C. T. Botts*, for respondent.

FOOTE, C. This is an appeal from a judgment of nonsuit, and an order denying a new trial. The plaintiffs, Henry D. Bacon and others, stockholders of the Morgan Mining Company, instituted an action in equity against that company; its president, Charles T. Botts; its treasurer, William Irvine; its superintendent, Robert Irvine; John Douglass, an employee; and James H. Wallace, Joseph M. Maguire, Robert Dixon, and T. K. Wilson, directors of said corporation. The purpose had in view by the plaintiffs in bringing their suit appears, from the complaint, to have been to procure the appointment of a receiver to take charge of the mine, and all the property thereto appertaining, and its products, and that each and all the defendants be compelled to account to the company; that an assessment before that time levied upon its capital stock be rescinded; and that an injunction be issued restraining the sale of any of said stock for the non-payment of said assessment, and for general relief. It was charged against each and all of the board of directors, including its president, C. T. Botts; the treasurer, William Irvine; the superintendent, Robert Irvine; and John Douglass, who was foreman of the mine,—that they had embezzled gold produced from the mine to the extent of more than \$100,000. The material allegations, charging conspiracy, fraud, or embezzlement, were denied by the answers of the several defendants.

So far as the proofs introduced by the plaintiffs on the trial of the cause (which was had before the court without a jury) threw any light upon the matter, it did not, in the remotest degree, connect Charles T. Botts, T. K. Wilson, James H. Wallace, Joseph M. Maguire, or Robert Dixon with any transaction whatever which showed them to have been guilty of the smallest degree of turpitude, or that they even had the least opportunity, in any connection whatsoever, to have been guilty of the charges made against them.

The evident effort, as disclosed by the proof adduced, was to show that William Irvine, Robert Irvine, and John Douglass had fraudulently appropriated a great amount of gold that had been obtained from the mine, so that they only of the defendants should be compelled to account for and pay over such products. There appeared to be an end to the project of forcing the directors to any accounting, or to restrain the collection of the assessment on the capital stock.

To us it appears that the plaintiffs, at the time they in writing requested the president and directors of the mining company to institute an action "against said William Irvine and the aforesaid present directors of said company," were aware that they had no cause of action against said directors, at least. It does not follow, even although in their answers they have sustained William Irvine in his acts, that if a full and fair presentment of real, tangible, and clear facts, going to show any bad faith in the management of the mine on his part, and that of his brother and John Douglass, had been made to them, that said directors would have declined to institute a suit against the three persons above named; for it is not fair to presume that men as untainted with fraud as those directors are shown to be, would have refused, in a proper case, to bring such an action. The real object had in view, as the evidence discloses, was not stated to the directors, and that was not fair-dealing towards them. From all of which conduct in the premises on the part of the plaintiffs, it is clear that their request was not an earnest, but a simulated, one. In such a case, a court of equity will not entertain such an action by stockholders as this. *Hawes v. Oakland*, 104 U. S. 450, 460, 461

We have examined all the evidence in the transcript with care, but have failed to find any *facts* proved which show William Irvine, his brother, Robert, or John Douglass to have, either singly or together, appropriated to their own use any of the products of the mine. The only things which have been made clear and certain are that all their acts were open and above-board; that the sum of \$9,305.62 was accounted for to the company as that which had come through the hands of the two Irvines and Douglass as part of the output of the mine; that some of the ores taken out therefrom had been stolen by an employe, the amount of which could not be ascertained; that samples of ore had been sent to the office of the incorporation, the exact value of which was unknown. Beyond this nothing is disclosed in the voluminous testimony of many witnesses, rising to the dignity of even probability, which touches the integrity of those complained of. The witnesses differ materially as to how much the mine produced, and as to what went with the ores taken out. It does not appear to us possible that the learned judge below could have formed even an approximate opinion as to what the real value of such ores was, or as to what disposition was made of them. To have rendered a judgment against any of the defendants, as prayed for, would have been to have substituted conjecture for necessary proof. We are therefore of opinion that the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 220

PALMER v. WHITE. (No. 11,518.)

(Supreme Court of California. July 27, 1886.)

CONTRACT—BUILDING CONTRACTS—RECORDING ACT—DAMAGES.

A contract between the owner of land and one agreeing to construct a building thereon for him is void, if not filed for record as provided for by section 1183 of the Code of Civil Procedure of California, and therefore it follows that no recovery can be had for damages for prevention of performance of such a contract, which has not been recorded.

Cal.Rep. 9-11 P.—54

Department 1. Appeal from superior court, county of San Diego.
Works & Titus, for appellant. *M. A. Luce*, for respondent.

MYRICK, J. Plaintiff and defendant entered into a contract in writing for the construction by plaintiff for defendant of a building. It is not averred in the complaint in this action that the contract was filed for record as required by section 1183, Code Civil Proc., as amended in 1885. This action is not brought to enforce a lien under chapter 2, tit. 4, Code Civil Proc., but is brought to recover damages for the non-performance of the contract on the part of the defendant. A general demurrer to the complaint was sustained, and judgment went for defendant. We gather from the briefs of counsel that the order sustaining the demurrer was based on the clause in section 1183, *supra*, which declares that a contract of the character referred to is wholly void, and no recovery can be had thereon by either party thereto unless it be filed for record. Notwithstanding the declaration of section 1183 above noted, that the contract in certain events is wholly void, and no recovery can be had thereon by either party thereto, it is provided in the same section that other persons than the contractor, furnishing materials and performing labor, may have a lien therefor; and it is also provided in section 1197 that, notwithstanding the other provisions of the chapter, any person to whom any debt may be due for work or materials may have a personal action to recover the debt. This action is not to recover for work or materials, but is to recover damages for prevention of performance of the contract. As by section 1183 the contract, as between the owner and contractor, was void, not being recorded, no recovery can be had for damages for prevention of performance. Judgment affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

70 Cal. 242

TIBBETTS v. FORE, Assignee, etc., and another. (No. 11,507.)

(Supreme Court of California, July 28, 1886.)

EQUITY—CLOUD UPON TITLE TO REALTY—SHERIFF'S DEEDS.

A married woman is entitled, as a preventive against a cloud upon her title, to an injunction to restrain a sheriff from selling, under an execution in which her husband is the debtor, property which she, by clear and decisive proof, establishes to be her separate property, because she would be compelled to show, in an action of ejectment, by proof outside of the deed, that such property was her separate property, in order to defeat a recovery; for the true test by which to determine the question whether a sheriff's deed under an execution sale would cast a cloud upon the plaintiff's title is this: "Would the owner of the property, in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence other than her deed, or her other muniment of title, to defeat a recovery?"

Commissioners' decision.

Department 2. Appeal from superior court, county of San Bernardino.
Wm. A. Harris, for plaintiff.

FOOTE, C. The wife of one Tibbetts brought an action against Gill, as sheriff of San Bernardino county, California, and others, which had for its object to enjoin a sale under execution (issuing by virtue of a judgment against her husband) of a certain house and lot in the town of Calico, claimed by her as her separate property. The cause was tried by the court, and judgment rendered in favor of the defendants. From that, and an order denying her a new trial, the plaintiff appealed.

The record contains only the judgment roll. From the findings it is disclosed that the plaintiff purchased the land threatened to be sold, for \$100, which was her own money and separate property; that she thereupon imme-

diately entered into possession of it, and with other money, also her separate property, erected a building thereon; that at the time of the purchase of the lot she was, and has ever since been, the wife of R. G. Tibbetts, the defendant in the execution, and that he never had any interest in the land, or building thereon; that before the bringing of the present action the assignee of the plaintiff in the execution which was issued upon a judgment rendered against the said R. G. Tibbetts caused that execution to be levied by Gill, as sheriff, upon the plaintiff's said property as that of R. G. Tibbetts, her husband, and said sheriff was, at the time of the institution of this action, threatening and about to sell it as belonging to said R. G. Tibbetts; that the plaintiff's title, and that of her grantors and predecessors, was a possessory claim only to the land, the legal title of which was still in the United States of America; that the plaintiff had never resided upon the premises; and that, at the time of the levy of the execution, she had leased the house and lot to a person who occupied them as her tenant, and that her husband did not have possession thereof; and, as a conclusion of law therefrom, it is held by the trial court that the threatened sale of the premises by the sheriff will not cast a cloud on the plaintiff's title.

The statutes with reference to community property "proceed upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer, or mere intent of parties, can overcome this positive rule of law. All property is common property, except that owned previous to marriage, or subsequently acquired" by gift, devise, bequest, or descent, with the rents, issues, and profits thereof. The presumption, therefore, attending the possession of property by either, is that it belongs to the community. "Exceptions to the rule must be proved." And if it is sought to be shown that a purchase of property has been made with the separate funds of either husband or wife, it should be "affirmatively established by clear and decisive proof;" for, in the absence of such proof, the presumption would be absolute and conclusive in favor of the community, and it would make no difference whether a conveyance of such property was taken in the name of the wife or the husband, or both. *Meyer v. Kinzer*, 12 Cal. 252, 253.

The husband has the entire control, during his life, of the community property. Section 172, Civil Code; *Greiner v. Greiner*, 58 Cal. 115. Such property is liable to his debts. *Adams v. Knowlton*, 22 Cal. 283-288. And the burden of proof is on the wife to show that property which *prima facie* belongs to the community is her separate property. *Id.* Possession of the wife is the possession of the husband. *Schuler v. Savings & Loan Soc.*, 64 Cal. 397; S. C. 1 Pac. Rep. 479. According to the findings, Mrs. Tibbetts was in possession of the property by her tenant. It had been acquired during the existence of the marriage between herself and her husband. The defendant in the execution, the execution creditor, and the sheriff were seeking to sell it to satisfy the judgment, and that property was *prima facie* community property. To defeat an action of ejectment for the premises in controversy, which might be brought by one having purchased under such a sale, it would have been necessary for Mrs. Tibbetts "affirmatively to establish, by clear and decisive proof," that the property was bought with her own money, as separate property.

Whenever one applying for an injunction can show, as she has done, such a state of facts to exist, then the right to have it granted, as a preventive against a cloud upon title, undoubtedly exists; for in an action of ejectment the burden of proof would rest upon her to show the premises in question to have been purchased with her separate property or money, as the record of

her title to the property bought in her name would not be conclusive that such was her separate property. *Moore v. Jones*, 63 Cal. 12. When a necessity exists, as she is shown by this record to be under, to make proof of her separate property *dehors* a deed of conveyance, an injunction to prevent a sale under execution of the kind here attempted will be appropriate, and should be granted; for the true test by which to determine the question whether a sheriff's deed under an execution sale would cast a cloud upon the plaintiff's title is this: "Would the owner of the property, in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence to defeat a recovery?" *Pixley v. Huggins*, 15 Cal. 129-134. And to obtain the injunction she sought, in order to prevent such a sale as was threatened, it was only necessary for the plaintiff to show, as she has, that a conveyance under the execution sale would have compelled her (in a suit of ejectment brought against her by one who might have become a purchaser at that sale, and holding the sheriff's deed) to have shown, *dehors* her muniments of title, that she had purchased the lot and built the house upon it with her separate money or property. *Pixley v. Huggins, supra*; *Hall v. Theisen*, 61 Cal. 525, 526.

If the sheriff had been permitted to make a sale of the house and lot under the writ he had levied upon them, and the purchaser holding his deed thereunder had brought suit in ejectment against Mrs. Tibbetts, she would have been compelled, in defending that action, to have shown, by evidence *dehors* the deed from her grantor, that she had bought and paid for the property with her separate estate. Hence we think the judgment appealed from should be reversed, and a judgment ordered to be rendered in the court below in favor of the plaintiff, perpetually enjoining the defendants from selling the property seized under the execution.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with direction to the court below to render judgment in favor of plaintiff, perpetually enjoining defendants from selling the property seized under the execution.

70 Cal. 339

LUCO v. COMMERCIAL BANK OF SAN DIEGO; (No. 11,038.)

(Supreme Court of California. July 30, 1886.)

1. EXECUTORS AND ADMINISTRATORS—JUDGMENTS—LIABILITY OF HEIRS.

If there is a vacancy in the office of executor of the estate of a deceased person at the time an action is brought, and judgment is rendered therein against the estate, the heirs are not bound by such judgment.

2. SAME—EXECUTOR'S RESIGNATION—PRESUMPTIONS IN FAVOR OF PROCEEDINGS OF COURT.

Where a probate court has jurisdiction of the subject-matter and the parties, all presumptions are in favor of the validity of its orders, and an order accepting the resignation of an executor cannot be collaterally attacked.

In bank. Appeal from superior court, county of San Diego.

Works & Titus, for appellant. *Levi P. Chase*, for respondent.

MYRICK, J. The question involved in this appeal is whether a judgment in favor of Lucio against one Castro Olvera, as executor of the last will of Augustin Olvera, is valid, so as to bind the heirs and devisees of the testator. Augustin Olvera, in his life-time, made a contract for the conveyance to Hartman of an interest in real estate. Augustin died testate, and Castro Olvera received letters testamentary, and entered upon the duties of his office. Lucio, assignee of the contract, brought an action against Castro, as executor, to compel the execution of a deed according to the terms of the

contract. Castro was served with summons. He failed to answer, and judgment was rendered in accordance with the prayer of the complaint. The suit was commenced October 15, 1880. Prior to the commencement of the suit, viz., February 11, 1878, an order was made by the probate court, in which were pending the proceedings for the settlement of the estate of Augustin Olvera, deceased, in which order it was stated that Castro had tendered his resignation, and had rendered a full and true account of his executorship, and his resignation was accepted, and his accounts, as rendered, approved, settled, and allowed; and the court "ordered, adjudged, and decreed that said letters of executorship be set aside, and on turning over all the effects and property in his hands to his successor, hereafter to be appointed by this court, and upon filing a receipt in full," etc., that he be discharged. No successor was appointed until after the decree in the suit of *Luco v. Olvera*. It thus appears that Castro Olvera was executor during the pendency of that suit, or there was a vacancy in the office. If there was a vacancy, the judgment against Castro did not bind the heirs and devisees of Augustin; and in the case at bar the property embraced within the decree against Castro should not, in this action, have been decreed to Luco upon the basis of that judgment.

Section 1427, Code Civil Proc., authorizes any executor or administrator to resign his appointment, having first settled his accounts, and delivered up all the estate to the person appointed to receive the same; and if there be delay in settling the accounts and delivering the estate, or, from other cause, the circumstances of the estate or the rights of those interested require it, the court may, before the settlement and delivery is completed, revoke the letters, and appoint an administrator, either general or special. The probate court had jurisdiction of the subject-matter then before it, viz., the resignation of the executor, and it had jurisdiction of the parties interested. Having such jurisdiction, all presumptions are in favor of the regularity of its proceedings, and the validity of its order, (Hittell, Gen. Laws, § 1229,) and the order accepting the resignation cannot be collaterally attacked, (*Haynes v. Meeks*, 20 Cal. 288; *Lucas v. Todd*, 28 Cal. 185; *Haynes v. Meeks*, 10 Cal. 110.)

Of the land set off by the decree to Luco, 6,083.2743 acres constituted the interest claimed by him under the decree against Castro Olvera, and is the interest involved in this appeal. The parties have stipulated that in other respects the partition may proceed. We are of opinion that Luco did not, by the suit spoken of, acquire the above-named interest.

The decree, so far as it relates to the interest of Luco in the 6,083.2743 acres, is reversed, as is also the order refusing a new trial, and the cause is remanded for a new trial as to such interest.

We concur: SHARPSTEIN, J.; MCKEE, J.; ROSS, J.; MCKINSTRY, J.

70 Cal. 343

SCHROEDER v. SUPERIOR COURT. (No. 11,152.)

(Supreme Court of California. July 30, 1886.)

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF SPECIAL ADMINISTRATORS.

A superior court has no power to appoint a special administrator, if the executor of the will of decedent has never been suspended or removed; and a simple order appointing a special administrator will not operate as a removal of the executor, if the latter has never been cited to appear, and has never appeared to show cause why the letters should not be revoked.

2. SAME—EFFECT OF MARRIAGE OF EXECUTRIX.

The fact that an executrix marries does not extinguish her authority, so as to deprive her, *eo instanti*, of all her powers, under section 1352 of the Code of Civil Procedure of California; but the construction of that statute, when read in connection with sections 1350, 1411, 1436, 1437, and other sections of the same Code, is that the words "her authority is extinguished," as employed therein, are the

equivalent of, "she ceases to be competent;" and thus, becoming incompetent, may be proceeded against for suspension and removal, under the rules provided therefor by such Code.

3. SAME--MARRIAGE OF EXECUTRIX.

The acts of an executrix who has secretly married, or married without the fact having reached the knowledge of the judge, and thereby rendered herself incompetent, are valid, until such executrix has had an opportunity to admit or deny the marriage, and is suspended, or by proper proceedings removed.

In bank. Appeal from superior court, city and county of San Francisco. *J. C. Bates*, for petitioner. *Fox & Ross*, for respondent.

BY THE COURT. This is an action to annul, by *certiorari*, an order of the superior court appointing a special administrator. The petitioner was duly appointed executrix of the will of deceased, and has never been suspended or removed. The superior court had therefore no power to appoint the special administrator. Code Civil Proc. § 1411. If it be said that the order appointing a special administrator operated a removal of the executrix, the conclusive answer is that she has never been cited to appear, nor did she appear, to show cause why her letters should not be revoked. Code Civil Proc. §§ 1436-1438.

It is urged, however, that, by virtue of section 1352 of the Code of Civil Procedure, when the executrix married, her authority was "extinguished," and that the fact of marriage deprived her *eo instanti* of all her powers. But, as we have seen, if this construction were given the section last cited, it would follow that no special administrator could be appointed. We think when section 1352 is read in connection with section 1350, 1411, 1436, 1437, and other sections, it sufficiently appears that the words, "her authority is extinguished," are employed as the equivalent of "she ceases to be competent." She becomes incompetent, and may be proceeded against for suspension and removal as provided in section 1436 and the sections immediately following.

Are all the acts of an executrix who has secretly married, or married without the fact having reached the knowledge of the judge, absolutely void? If so, they are void, and may be attacked or disregarded, after a final accounting and discharge. It would be difficult to distinguish between one never competent to serve as executrix and one whose capacity to serve as such has become extinguished. But if one originally appointed executrix was, in fact, under age, or a convict, she is clothed with all the powers of the office until she is suspended, or by proper proceedings removed. Does a different rule obtain where, by reason of an act done *in pais*, one originally competent has made herself incompetent? The intent of the statute is apparent from the language employed. If doubt remained as to the proper interpretation of the sections of the Code, we conceive it would be proper so to interpret them as to afford the executrix an opportunity to admit or deny the marriage, and as requiring an adjudication, which shall be record evidence of the marriage, (if the court shall find the marriage had taken place,) and which shall relieve subsequent proceedings of administration free from all liability to collateral attack. Order annulled.

THORNTON, J., concurs in the judgment. MYRICK and SHARPSTEIN, JJ., dissent.

70 Cal. 390

CURTIS v. SUPERIOR COURT. (No. 11,711.)

(Supreme Court of California. August 5, 1886.)

NEW TRIAL--EXTENSION OF TIME FOR PREPARING STATEMENT.

Under section 1054 of the Code of Civil Procedure of California, allowing courts, upon good cause shown, to extend the time for the preparation of statements, on motion for a new trial, for a period not to exceed 30 days, without the consent of the adverse party, it is not intended that the court shall not have power to extend

the time beyond 30 days after the 10 days allowed by the Code to the moving party in which to prepare and file his statement, but the proper construction of the statute is that the time may be extended, by stipulation of the parties, for such time as they see fit, and that the court shall have power to extend the time 30 days from the day to which the parties by stipulation extended the time.

Department 1. Application for writ of mandate.

G. P. Harding, for petitioner. *W. D. Grady*, for respondent.

ROSS, J. It appears in this case that on the day defendant in the action entitled *Wristen v. Curtis* gave notice of his intention to move for a new trial, counsel for plaintiff therein extended, by stipulation, the time for the preparation of the statement to a day beyond the twenty-second of March, 1886, and on the last-named day the court in which the action was pending, on good cause being shown, but against the plaintiff's objection, made an order extending the time 20 days from that date. Within the time thus extended, but more than 40 days after the notice of motion was given, defendant's counsel prepared and served the statement. The court afterwards became of opinion that the power to grant the last extension was wanting, and therefore refused to settle the statement. The present is an application for a writ of mandate to compel its settlement.

It is, among other things, provided by section 1054 of the Code of Civil Procedure that the time allowed by the Code for the preparation of statements, on motion for a new trial, may be extended, upon good cause shown by the court in which the action is pending, or a judge thereof, but that such extension shall not exceed 30 days, without the consent of the adverse party. The right to extend the time necessarily presupposes that the time allowed by the Code has not already expired, but since, under the Code, the parties may, by stipulation, extend the time for such purpose, it is not important whether its running is kept alive by consent of the parties, or by virtue of that provision of the Code giving to the moving party 10 days after the service of the notice of motion for a new trial within which to prepare the statement. The essential thing is that the application to the court or judge, if made at all, be made before the time has already expired. If so made, and good cause be shown, the court or judge is, we think, authorized to grant an extension; such extension, however, not to exceed 30 days, without the consent of the adverse party.

It results from these views that petitioner is entitled to the writ sought. Let it issue accordingly.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 564

SHEALOR v. SUPERIOR COURT OF AMADOR CO. (No. 11,557.)

(*Supreme Court of California.* August 31, 1886.)

JUSTICE OF THE PEACE—JURISDICTION—AMOUNT INVOLVED—SUPERIOR COURTS.

The jurisdiction of justices' courts in California being limited to actions in which the sum sought to be recovered is not over \$300, such a court cannot take jurisdiction of an action in which specific property is sought to be recovered, the value of which is fixed at \$319; the judgment prayed being for the possession thereof, or for the sum of \$299, in case possession cannot be had. And the superior court likewise has no jurisdiction of such an action, on appeal from the justice's court.

Department 2. Application for writ of review.

Eagon & Armstrong, for petitioner. *A. Heath* and *Rust & Caminetti*, for respondent.

BY THE COURT. In this case the plaintiff brought his action in a justice's court to recover various articles of personal property, the aggregate value of which, as averred in the complaint, amounted to \$319. The prayer of the

complaint was—"First, for the possession of said goods, or for two hundred and ninety-nine dollars, in case possession cannot be had; second, for one hundred and fifty dollars damages for the detention thereof, and the costs of the action." The cause came on to be tried, when the defendant moved that the cause be dismissed on the ground that the demands of the plaintiff exceeded the jurisdiction of the court. The justice's court dismissed the action. The plaintiff then took an appeal to the superior court above named, on questions of law and fact. The superior court, against the objection of defendant, proceeded to try the case. He did try it, and rendered a judgment for the plaintiff. The value of the property having been averred in the complaint to be \$319, for which possession was asked, neither the justice's court, nor the superior court on appeal, had jurisdiction of the action.

The judgment of the superior court must be annulled and quashed. So ordered.

70 Cal. 572

SIERRA UNION WATER & MIN. CO. v. BAKER. (No. 9,763.)

(Supreme Court of California. August 31, 1886.)

JUDGMENT AFFIRMED.

In bank. Appeal from superior court, county of Sierra.

The opinion in department 2 is reported in 8 Pac. Rep. 305.

S. B. Davidson, J. S. Belcher, and T. C. Van Ness, for appellant. *Van Cleaf & Wehe*, for respondent.

BY THE COURT. For the reasons given in the opinion heretofore filed (8 Pac. Rep. 305) the judgment and order are affirmed.

70 Cal. 585

MENK v. COMMERCIAL INS. CO. OF CALIFORNIA. (No. 9,625.)

(Supreme Court of California. September 1, 1886.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—INSURANCE.

In an action on an insurance policy, which policy plaintiff alleges was issued on an application made and signed by himself, evidence on the trial that plaintiff did not know what representations the application contained, because it was made by his agent, are not properly admissible, because contrary to the averment of the complaint; but if such evidence is admitted, on judgment for the plaintiff, the defendant will be entitled to a new trial, on the ground of newly-discovered evidence, where, as a basis of his motion, he produces an affidavit of such agent, which puts in issue the plaintiff's statement that he did not know what representations were made, and tends to show that he himself made them.

In bank. Appeal from superior court, city and county of San Francisco.

Robinson, Olney & Byrne, for appellant. *Walling & Gaylord*, for respondent.

BY THE COURT. In effect, the complaint alleged that the policy of fire insurance sued on was issued on an application made and signed by the plaintiff. The application contained certain material representations as to the manner in which the building was occupied. The plaintiff, against the objection and exception of the defendant, was permitted to testify at the trial, in effect, that the application was in fact made by an agent of the defendant of the name of Burckhalter, and that he (plaintiff) did not know what representations it contained. In the first place, that testimony was in contradiction of the averment of the complaint, and should have been ruled out. But it was not, and the plaintiff recovered in the action. The defendant moved for a new trial, among other grounds, upon the ground of newly-discovered evidence; and, in support of the last-mentioned ground, presented the affidavit of Burckhalter, in which the statements of the plaintiff at the trial were

put in issue, and tending to show that the representations contained in the application were in fact made by the plaintiff. As they were material, and were claimed by defendant to have been false, defendant was entitled to an opportunity to show that they were made by plaintiff, for the policy was issued in part upon them. Defendant did not have an opportunity of producing the proof at the trial, because it could not have been anticipated that plaintiff would be permitted to testify that he did not make the representations contained in his application, upon which it is alleged the policy was issued.

The judgment and order are reversed, and the cause remanded for a new trial.

70 Cal. 521

PEOPLE v. DANIELS. (No. 20,160.)

(*Supreme Court of California.* August 28, 1886.)

CRIMINAL LAW—TRIAL—EVIDENCE—ERROR CURED BY ADMISSIONS OF ACCUSED.

Where evidence is admitted, under the objection of an accused, tending to prejudice the jury against him as an immoral character, and he afterwards, as a voluntary witness in his own behalf, testifies substantially to the same effect, he cannot complain.

In bank.

The Attorney General, for the People. *Joseph Coffey*, for appellant.

FOOTE, C. The defendant was tried for the murder of a woman named Sarah Indig, and convicted of the crime of manslaughter. From a judgment in the premises, and an order denying him a new trial, he has appealed. The objection made by him to the introduction of evidence on the part of the people, which showed him to have at one time lived with the woman whom he was alleged to have slain in a house of ill-fame, was well taken, as tending to prejudice the jury against him as an immoral character; and its admission would have been good ground for a new trial but for the fact that the defendant, as a voluntary witness in his own behalf, testified substantially to the same effect, and hence cannot complain that the jury were informed that he had so lived; for it is not to be supposed that they would have been prejudiced in a greater degree by the statement of that same fact made by the witness on the part of the people than by that of the defendant voluntarily given.

The evidence in the cause was conflicting. The jury have rendered a verdict thereon, and it should not be disturbed merely because of such conflict.

There was evidence introduced to the effect that the defendant, before leaving Los Angeles to come to San Francisco, had made threats against the life of both Somerset and the deceased woman, and it is assigned for error that the court refused to give certain instructions asked for by the defendant upon the subject of such threats. As the instructions refused had application only to a state of facts which would have been material had the defendant killed Somerset, and been on trial therefor,—which he was not,—we are of opinion that the charge of the court upon the matter of threats covered all that the defendant asked for which was pertinent to the case before the jury.

It is further objected that the court charged the jury that, in order to acquit the defendant, they must believe from the evidence—that is, if he was the assailant in the combat, in the progress of which the woman lost her life, or if he was engaged in "mortal combat" with the witness Somerset—that the defendant must "in good faith have endeavored to retire from the struggle before the homicide was committed." Inasmuch as that part of the charge was a substantial repetition of the language of section 197, subd. 3, Pen. Code, as applicable to the case in hand, we perceive no error on the part of the court in giving it. The charge, taken as a whole, and giving to it a natural and unrestrained interpretation, covered all the material instructions

asked for by the defendant, and was eminently fair, and easily understood by the jury.

The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 236

KING v. GOETZ and Wife. (No. 9,431.)

(*Supreme Court of California.* July 28, 1886.)

1. HOMESTEADS—WHAT PROPERTY SUBJECT TO CLAIM—TRUSTS.

One residing with his family in a dwelling-house upon community property, on which he has filed a declaration of homestead subsequent to deeds of trust for the payment of debts, has such an interest in the property, notwithstanding the trust deeds, as will render his claim of homestead valid to the extent of any of such property or interest therein as may be left in him after the execution of the trust.¹

2. SAME—VALIDITY OF CLAIM.

A claim of homestead, as to the part of the premises which is clearly subject to such exemption, is not invalidated because part of the premises on which the claim was filed is not subject to such exemption.¹

3. SAME—DECLARATION—VALUE OF PREMISES.

A claim of premises as a homestead, where the actual value of the premises is less than \$5,000, is valid, notwithstanding the declaration estimates the value at a larger sum.

4. SAME—DEBTOR AND CREDITOR—FRAUD.

The head of a family having property subject to a homestead declaration, and who is indebted to third persons, may, notwithstanding such indebtedness, exercise his right of homestead, and the fact of his having done so is not, in itself, such evidence of fraud as will invalidate his homestead claim at the instance of his creditors.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

C. V. Grey, for appellant. *A. Campbell, Sr.*, and *Campbell & Sanderson*, for respondent.

SEARLS, C. This is an action of ejectment to recover a lot of land in the form of a parallelogram, 25 feet by 60 feet and 10 inches, near Golden Gate avenue and Laguna street, San Francisco. The cause was tried by the court, and findings in writing filed, upon which judgment in favor of plaintiff was entered for a strip of land across the north end of and parcel of the lot sued for, 8 feet 4 inches in width by 25 feet in length. The appeal is by plaintiff from the judgment, and from an order denying a new trial.

The demanded premises constitute the southerly or rear portion of a lot 25 by 137½ feet, on the south side of Tyler street, now known as Golden Gate avenue, San Francisco. Plaintiff's claim is based upon a sheriff's deed executed to him pursuant to a sale under execution on a judgment in his favor against the defendant Andreas Goetz. Defendants, Goetz and wife, claim the premises as a homestead under the statute of California, and if at the date of the inception of the lien upon which the property was sold under execution the premises were not impressed with the homestead character, plaintiff is entitled to a reversal of the judgment; otherwise it should be affirmed.

The whole lot, 25 feet by 137½ feet deep, southerly, was purchased by Goetz in 1873, and was community property. Goetz, with his family, consisting of

¹ See note at end of case.

a wife and two children, went to reside upon the lot in 1873, and ever since have resided in a house upon the rear portion of said lot; the front line of the house being about 100 feet southerly from the south line of Tyler street, and extending across the width of the lot. In 1876, Goetz built a two-story and basement house on the front portion of the lot, at an expense of upward of \$6,000. Said house covers the whole width of the lot, leaving an entry on the westerly side under the main story for access to the rear of the lot. The house, and fences connected with it, inclosed the northerly $76\frac{2}{3}$ feet of the lot, and has never been occupied by Goetz or his family, but, down to the time of the sale thereof to plaintiff, was rented to and occupied by tenants.

In December, 1879, Goetz executed, acknowledged, and delivered to James De Fremery and Alexander Campbell, Sr., a deed of trust, which was duly recorded December 24, 1879, and was executed to the grantees and trustees, to secure the payment of \$2,500 and interest, according to the tenor of a promissory note, for money borrowed from the San Francisco Savings Union, etc.; and providing that upon payment, etc., the property should be reconveyed to Goetz, etc. This trust deed conveyed the whole lot. On the thirteenth of September, 1880, Goetz made, acknowledged, and recorded in the proper office a declaration in the usual form, claiming the whole lot as a homestead, estimating the cash value at \$7,000, adding, "subject, however, to a mortgage of \$2,500 on said premises."

On the sixteenth day of February, 1881, Goetz and wife executed, acknowledged, and recorded an abandonment of the homestead, and on the same day Goetz executed a second trust deed, in like manner and form, to the same trustees, upon the same lot, to secure the payment of \$1,400 to the same creditor; and thereafter, and on the same day, executed a second declaration of homestead upon the same lot of land as the first, "subject to the two trust deeds." This homestead declaration was recorded after the second trust deed. The money not having been paid when due, the northerly 25 by 85 feet of the lot was sold by the trustees under the two trust deeds, and purchased by plaintiff. The trustees thereupon conveyed to Goetz the southerly 25 by $52\frac{1}{2}$ feet of the lot, with the right of way thereto, which portion constitutes the demanded premises, found to be of the value of \$3,000, and no more.

The position taken by appellant is that a homestead can only be selected from community property, or the separate property of the husband, or with the consent of the wife from her separate property. (Civil Code, § 1238;) that a community property is property *owned* which has been acquired after marriage, and that the property described in the complaint was not, at the date of filing the declaration of homestead, *owned* by the defendants, or either of them, for the reason that it had been conveyed to De Fremery and Campbell under the trust deeds, and therefore that no homestead right could attach thereto.

"The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." Civil Code, § 1237. Defendant Andreas was residing with his family in the dwelling-house upon the land described in his declaration at the date of making and filing such declaration, and to that extent his homestead is valid. *Dorn v. Howe*, 52 Cal. 630.

"If the claimant be married, the homestead may be selected from the community property," etc. Civil Code, § 1238. Defendant Andreas Goetz, who made the declaration, was married, and if he had any property in the premises it had been purchased subsequent to marriage, and was *community property*. The term "property," in its broad sense, signifies that to which one has an unrestricted and exclusive right, including all that is one's own, whether corporeal or incorporeal. Bouv. Law Dict. tit. "Property." "The term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract,—

those which are executory as well as those which are executed." Chief Justice MARSHALL in the two cases of *Soulard* and *Smith v. U. S.*, 4 Pet. 511. We see no reason for doubting the interpretation placed by Chief Justice MARSHALL upon the word "property," when applied to real estate. In this state, as elsewhere, the mere possession of real estate is constantly treated as property which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better title. "Occupancy for any period confers a title sufficient against all except the state, and those who have title by prescription, accession, transfer, will, or succession." Civil Code, § 1006.

The defendant Goetz, notwithstanding the execution of the trust deed, had an interest in the property which he could transfer or devise subject only to the trust. Civil Code, § 864. And the grantee under him would acquire a legal estate in the property, except as against the trustees and those lawfully claiming under them. Civil Code, § 865. It follows from these provisions (which modify section 863 of the same Code) that the trustor of an express trust, except as to his trustee and those holding under him, is treated as the holder of the legal title. The deeds of trust left an interest in Goetz which could have been sold under execution. *Kennedy v. Nunan*, 52 Cal. 326. It is the property of the judgment debtor in real estate which may be sold under execution, and we fail to see how the defendant Goetz had such a property in the demanded premises as gave to the purchaser under execution a title, and yet at the same time was not sufficient to support a claim of homestead.

Under these circumstances, we are of opinion that Goetz, who was residing with his family in the dwelling-house upon the premises, had, notwithstanding the trust deeds, such an interest in the property as entitled him to make a valid claim of homestead. He was in possession of and residing upon the land, and whatever title he had, whether legal or equitable, was subject to and sufficient to support a homestead; and when the trustees of the savings union afterwards, upon the execution of the trust, reconveyed to him the demanded premises, he became the holder of the entire title, legal and equitable. *Spencer v. Geissman*, 37 Cal. 96; *Brooks v. Hyde*, Id. 366.

2. The description of the premises in the declaration of homestead included the whole lot of 25x137½ feet, upon the portion of which now in dispute Goetz had his dwelling and resided. The front of the lot was covered by a building not occupied by him, but was rented and occupied by tenants. The claim of premises not the subject of a homestead did not invalidate his claim as to that clearly subject to such exemption. *Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 319; *Tiernan v. His Creditors*, 62 Cal. 286.

3. As to the value. The declaration estimates the value at \$7,000. The actual value of the demanded premises is admitted to be \$3,000. *Ham v. Santa Rosa Bank*, 62 Cal. 125, and *Tiernan v. His Creditors*, *supra*, are conclusive of this question.

4. The facts as set out in the record do not make out a case of fraud against the defendant. The head of a family having property subject to a homestead declaration, and who is indebted to third persons, may, notwithstanding such indebtedness, exercise his right of homestead, and the fact of his having done so is not in itself such evidence of fraud as will invalidate his homestead claim at the instance of his creditors. The law, for wise and beneficent purposes, secures to the family a right to have a homestead selected in the manner indicated by the statute, and this right may be exercised as well against existing as against future creditors, without the imputation of fraud for so doing.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

1. **TITLE NECESSARY TO SUSTAIN HOMESTEAD.** Some estate, however limited, in the land, is necessary to support a claim of homestead. There can be no right of homestead in the building apart from the land. *Myrick v. Bill*, (Dak.) 17 N. W. Rep. 263; *Tharp v. Allen*, (Mich.) 9 N. W. Rep. 443. It may be in leased ground. *Cullers v. James*, (Tex.) 1 S. W. Rep. 314.

Homestead may be acquired in lands held in common with others. *Sherrid v. Southwick*, (Mich.) 5 N. W. Rep. 1027; *Kaser v. Haas*, (Minn.) 7 N. W. Rep. 824; but see *Zimmer v. Pauley*, (Wis.) 8 N. W. Rep. 219; and not as against the rights of the cotenants, *Lynch v. Lynch*, (Neb.) 26 N. W. Rep. 263; *Farr v. Reilly*, (Iowa,) 10 N. W. Rep. 802; *Elder v. Reilly*, Id. 804.

One partner cannot, as against his copartners, nor against the partnership creditors, acquire a homestead in real property of the firm. *Hoyt v. Hoyt*, (Iowa,) 28 N. W. Rep. 500; *Drake v. Moore*, (Iowa,) 23 N. W. Rep. 263; *Trowbridge v. Cross*, (Ill.) 7 N. E. Rep. 347; *Short v. McGruder*, 22 Fed. Rep. 46.

2. **RESIDENCE AND OCCUPATION.** Actual residence on the premises is necessary in California at the time of the homestead declaration. *Pfister v. Dascey*, 10 Pac. Rep. 117; *Skinner v. Hall*, Id. 406; *Grange v. Gough*, 4 Pac. Rep. 1177. But it is not necessary that the entire premises shall be occupied for residence purposes. A portion may be rented out, or used for other purposes. *Skinner v. Hall*, 10 Pac. Rep. 406. But the provision as to residence does not apply to a homestead set aside under the insolvency laws. In *re Bowman*, 10 Pac. Rep. 412.

In Iowa the fact that a portion of the building is used by the owner for business purposes does not invalidate the homestead right. *Smith v. Quiggans*, 22 N. W. Rep. 907; *Wright v. Ditzler*, 7 N. W. Rep. 98. But otherwise as to portion of the building leased to other parties. *Johnson v. Moser*, 24 N. W. Rep. 32; *Mayfield v. Maasdom*, 13 N. W. Rep. 652.

In Kansas, as long as the whole tract is used for the purposes of the homestead, it is exempt, notwithstanding another building erected on it is let to tenants. *Morrissey v. Donohoe*, 5 Pac. Rep. 27.

In Michigan occupation of the premises as a residence is equivalent to a selection as a homestead, if they are within the statutory limits, *Riggs v. Sterling*, 27 N. W. Rep. 705; and purchase with the intention to use as a residence, followed by actual occupation as soon as practicable, will give the premises the character of a homestead from the time of purchase. *Reske v. Reske*, 16 N. W. Rep. 895.

In Minnesota no selection is necessary other than actual occupancy, *Ferguson v. Kumler*, 6 N. W. Rep. 618; but the dwelling-house must be or have been on the premises prior to the levy of an attachment or execution, *Liebetrau v. Goodsell*, 4 N. W. Rep. 813. It is not necessary that the entire building be occupied by the owner. *Pond v. Holcomb*, 3 N. W. Rep. 341.

In Nebraska it is not necessary that claimant mark and plat the homestead, *Aultman v. Howe*, 4 N. W. Rep. 357; but it must be in his occupation as his residence, *Karn v. Nielson*, 26 N. W. Rep. 666; and the leasing of a barn on the premises will not invalidate the homestead claim, *Guy v. Downs*, 12 N. W. Rep. 8.

In Vermont actual use and occupation as a homestead are necessary to give the premises that character. *Russ v. Estate of Henry*, 3 Atl. Rep. 491.

In Wisconsin selection will be presumed from occupancy, *Kent v. Lasley*, 4 N. W. Rep. 23; but the entire lot need not be occupied by the owner, *Hoffman v. Junk*, 8 N. W. Rep. 493; and the fact that the owner keeps a hotel on the premises does not prevent the exemption, *Harriman v. Queen Fire Ins. Co.*, 5 N. W. Rep. 12; but the premises cannot be so selected as to include premises leased to tenants other than servants. *Schoffen v. Landauer*, 19 N. W. Rep. 95.

70 Cal. 449

HELLMAN v. McWILLIAMS and others. (No. 11,554.)

(*Supreme Court of California*. August 26, 1886.)

1. TRUSTS—PERSONAL PROPERTY—TRANSFER NEED NOT BE IN WRITING.

Where the subject of a trust is personal property, it is not necessary that the transfer should be in writing.

2. SAME—EXPRESS TRUST—SUBJECT, PURPOSE, AND BENEFICIARY—ACCEPTANCE BY TRUSTEE.

The intention of a trustor to create a trust, where the subject is clearly defined and the purpose made manifest, and the acceptance of the trust by the trustee, with full knowledge of its subject, purpose, and beneficiaries, creates the trust.

3. SAME—REVOCATION—CONSENT OF CESTUIS QUE TRUST.

After a trust is once created and accepted, it is not in the power of the trustor to revoke it without the consent of the beneficiaries, unless power to do so was reserved in the declaration of trust.

4. TRIAL—EVIDENCE—STRIKING OUT—MOTION MUST BE DEFINITE.

When testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attacked that no uncertainty may remain as to testimony that is challenged.

Department 2.

A. M. Stephens and Glassell, Smith & Patton, for respondent. Gardiner & Stephenson, for appellant.

SEARLS, C. This is an action brought to determine whether the estate of Eli W. Hawkins, deceased, or his minor children, are entitled to certain money in the hands of plaintiff. The judgment awarded the property to the minor children, from which judgment, and from an order denying a motion for a new trial, the defendant W. D. Stephenson, administrator of the estate of Eli W. Hawkins, deceased, appeals.

In September, 1879, there was due to Eli W. Hawkins from the Odd Fellows' Savings Bank the sum of \$14,334.73, in evidence of which Hawkins held a pass-book of said bank, issued to him by the latter, showing said amount to be due. The bank was in process of liquidation. On the eighth day of September, 1879, said Hawkins requested plaintiff to allow him, the said Hawkins, to assign to plaintiff the whole amount due from the bank, to be held by plaintiff in trust for the use and benefit of the minor children of Hawkins, reserving to himself, however, the right to draw such sums of said money from the trustee as he might deem proper for his own use. Plaintiff agreed to accept the trust, and Hawkins verbally assigned to him all of said moneys, to be held by him in trust as aforesaid. Hawkins delivered his pass-book to plaintiff, who has since retained it.

In order to carry into effect the assignment, and to facilitate the collection of the money for Hellman, as such trustee, Hawkins proposed to make a written assignment directly to said Hellman; but to facilitate the collection of the money, and at the request of the latter, the assignment was made to the Bank of California, a corporation doing business in San Francisco, where the money was to be collected; and thereupon said Bank of California collected the money as agent and correspondent of Hellman, to whom it was transmitted at Los Angeles, the place of his residence. Subsequent to the assignment a power of attorney was also executed by Hawkins, at the request of Hellman, to the Bank of California, authorizing the latter to collect and receipt for the money. This seems to have been done to simplify the process of collection under the rule of the Odd Fellows' Bank, and is found by the court to have been done "in furtherance of said assignment and trust in the said Hellman." Eight thousand nine hundred and fifty-nine dollars and twenty cents was collected and paid over to plaintiff under this arrangement, of which sum Hawkins drew, at divers times prior to his death, \$6,271.44, leaving a balance in the hands of plaintiff of \$2,687.76; and there is still due, from the Odd Fellows' Bank, \$5,375.53,—all of which the court finds is trust funds, of which the minor children of Hawkins are the beneficiaries.

The foregoing is a synopsis of so much of the findings of the court below as serve to give point to the objections of the appellant.

The contention of appellant is that while an express trust may perhaps be created and proven by parol, still, conceding this point to create a trust by parol, the evidence must be *clear and unequivocal*, and that in the present instance the parol trust was not established by such clear and unequivocal testimony as to authorize the facts as found by the court, and that the facts shown by the evidence do not raise a trust.

Section 852 of the Civil Code declares the law as to the manner in which trusts in relation to real property may be created or declared, and provides that, except where created by operation of law, it shall be by an instrument in writing. "Subject to the provisions of section 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor indicating, with reasonable certainty, (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust." Civil Code, § 2221.

Having thus provided the manner in which a trust may be created, and the particularity requisite in its creation as to the trustor and beneficiary, the following section as to the trustee is important: "Subject to the provisions of section 852, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty—*First*, his acceptance of the trust, or his acknowledgment, made upon sufficient consideration of its existence; and, *second*, the subject, purpose, and beneficiary of the trust." The subject of the trust was personal property, and it was not necessary that the transfer should be in writing. "A transfer may be made without writing in every case in which a writing is not expressly required by statute." Civil Code, § 1052.

Referring to the testimony, we find there was evidence tending clearly to show the intention on the part of Hawkins to create a trust in favor of his minor children; that the subject of such trust was clearly defined, and its purpose made manifest. The evidence as to the acceptance of the trust by the plaintiff, with full knowledge of the subject, purpose, and beneficiaries, is explicit, and the whole testimony, taken together, establishes the facts as found by the court, with such *reasonable certainty* that we are not at liberty to disturb the findings. A trust may be created for any purpose for which a contract may be lawfully made. Civil Code, § 2220. It follows that Hawkins was, under the law, authorized to create a trust for himself and his minor children in the manner and form as found by the court. *Hearst v. Pujol*, 44 Cal. 234.

The fund was assigned to the plaintiff, the pass-book delivered to and retained by him, the money collected by the Bank of California for his account, and paid over to him. As to that portion of the fund paid over to Hawkins during his life-time, no question is made here, and it can cut no figure, beyond tending to illustrate the true intent of the parties. The trust once created and accepted, it was not in the power of the trustor to revoke it without the consent of the beneficiaries, unless power to do so was reserved in the declaration of the trust. Civil Code, § 2280.

The motion to strike out the testimony of plaintiff was properly overruled.

The motion to strike out all of witness Hellman's testimony, "so far as it states the effect of what took place between himself and Eli W. Hawkins, except the naked statement of what was said and done," was so general and indefinite that we do not see how the court below could have determined precisely what portion of the testimony was intended, and, had the motion been granted, we should be at a loss to know what was stricken out. Where testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attacked that no uncertainty may remain as to the testimony challenged. We think, therefore, the motion to strike out was properly denied.

Upon the whole case, as presented, we are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 430

YOLO CO. v. KNIGHT. (No. 11,190.)

(Supreme Court of California. August 25, 1886.)

1. WRIT AND PROCESS—SERVICE BY PUBLICATION—AFFIDAVIT—JURISDICTION—SECTION 412, CODE CIVIL PROC. CAL.

The statement in an affidavit for the publication of a summons, that the plaintiff has a good cause of action against the defendant, and that the defendant is a necessary and proper party, is not a sufficient statement of facts, under section 412, Code Civil Proc. Cal., to give the court jurisdiction. Such a statement is one of opinion or belief, and not of facts; and the findings of the court, reciting that due proof had been made that the summons was legally served upon the defendant, and his time for answering had expired, will not aid the plaintiff.

2. SAME—PUBLICATION OF SUMMONS—COUNTY CONDEMNING LAND FOR HIGHWAY—POL. CODE CAL. §§ 2698-2708.

In an action by a county to obtain a right of way over land for a highway, the affidavit for the publication of the summons, when the person upon whom service is to be made resides out of the state, must state that the proceedings directed by sections 2698-2708 of the Political Code have been had, or no cause of action is shown.

3. SAME—SERVICE BY NOTARY PUBLIC IN ENGLAND—SECTION 415, CODE CIVIL PROC. CAL.

Under section 415 of the Code of Civil Procedure, providing that, where the summons is served by any one other than the sheriff, proof of service must be made by the affidavit of the person serving it, a summons served by a notary public in England, and the proof attempted to be made by his certificate and seal, is insufficient.

Commissioners' decision. Department 2.

J. Craig and *J. C. Ball*, for respondent. *W. B. Treadwell*, for appellant.

BELCHER, C. C. This is an appeal from a judgment by default, condemning certain land owned by the defendant, for the purposes of a public highway.

Only one question need be considered, and that relates to the jurisdiction of the court to enter the judgment. When the complaint was filed, the defendant was in England. A summons was issued, and returned by the sheriff, with his certificate that he had been unable to find the defendant in Yolo county. Thereupon the attorney for plaintiff made an affidavit, and upon it asked and obtained an order for the publication of the summons. The affidavit stated that the complaint had been filed, and a summons issued thereon; that the action was brought for the purpose of acquiring the right of way for a public road and highway across and over the lands of the defendant; that the defendant was then residing at Sleaford, Lincolnshire, England; and then proceeded as follows: "That affiant is the attorney of record for said plaintiff, and is familiar with and knows the facts in this case; that the defendant, E. Knight, is the owner in fee of the lands sought to be taken in this action; that the plaintiff has a good cause of action in this suit against the said defendant; and that the said defendant, E. Knight, is a necessary and proper party defendant thereto." The order directed the publication of the summons for the requisite time, and it was published accordingly. It also directed that a copy of the summons and complaint be forthwith deposited in the post-office, post-paid, directed to the defendant at his said place of residence; and this was done.

Was this affidavit sufficient to authorize the court or judge to make the order? If not, then there was a want of jurisdiction, and the order and publication were void.

The Code provides that "where the person on whom the service is to be made resides out of the state, * * * and the fact appears by affidavit to the satisfaction to the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists

against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order," etc. Section 412, Code Civil Proc.

In *Ricketson v. Richardson*, 26 Cal. 153, the court, speaking of the corresponding sections of the old practice act, says: "An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably, the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party, but the acts constituting due diligence, or the fact showing that he is a necessary party, shall be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine, in his own way, the existence of jurisdictional facts,—a practice too dangerous to the rights of defendants to admit of judicial sanction. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge from the probatory facts stated in the affidavit before the order for publication can be legally entered."

And in *Forbes v. Hyde*, 31 Cal. 352, the court, speaking upon the same subject, says: "The statute provides that 'when the person on whom service is to be made resides out of the state, * * * and the facts shall appear by affidavit, * * * and it shall in like manner appear that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order,' etc. The existence of a cause of action, etc., then, is also a jurisdictional fact which must appear 'in like manner;' that is to say, by affidavit. The statute as clearly makes a cause of action as non-residence a jurisdictional fact, and we can no more disregard the one than the other. If this fact does not appear by the affidavit upon which the order for publication was founded, then there was a want of jurisdiction, and the order and publication are void."

In this case no facts are stated in the affidavit showing that the plaintiff had a cause of action against the defendant. It is true, it is stated that the action was brought for the purpose of acquiring the right of way for a road over land owned by the defendant; but, before such an action can be brought, certain proceedings must be had before the board of supervisors, as provided in sections 2698 to 2708 of the Political Code. These proceedings are conditions precedent to the right to maintain the action, and must be stated in the complaint and affidavit, or no cause of action is shown.

The statement in the affidavit that the plaintiff has a good cause of action against the defendant, and that the defendant is a necessary and proper party thereto, is a statement of opinion or belief, and not of facts. Unless a cause of action is stated, there can be no necessary or proper party thereto. There must be an existing cause of action against some one before any question of parties can arise. The rule is stated in *Ricketson v. Richardson*, *supra*, as follows: "It must appear from the affidavit * * * that the plaintiff has a cause of action against him, [the defendant,] or that he has a cause of action to the complete determination of which he is a necessary or proper party."

Under the section of the Code before quoted, it may be made to appear by the affidavit, or by the verified complaint on file, that a cause of action exists against the defendant. Here the complaint was not verified, and so the plaintiff is not aided by that.

The findings of the court recite that due proof had been made that the summons in the case had been legally served upon the defendant, and his time for answering had expired. But these recitals cannot aid the plaintiff. "In order to maintain a judgment when it is directly attacked, as in this case, by an appeal, it is requisite that the record should show that the court had jurisdiction of the person against whom the judgment was rendered, and that the judgment was warranted by the allegations of the pleadings of the party in whose favor it was rendered. We refer only to the judgments on the merits. In determining that question, recitals which may be found in the judgment cannot be regarded, for the question is whether the record sustains the judgment. Such recitals, therefore, will not be accepted as a substitute for the summons and the proof of service." *McKinlay v. Tuttle*, 42 Cal. 577.

The record contains a certificate made by one Crosfield, a notary public, "duly authorized, admitted, and sworn," and attested by his official seal, that, at a time after the order of publication was made, he personally served the defendant, at Sleaford, in the county of Lincoln, in England, with a copy of the summons and complaint in the action. To this certificate is attached a certificate by a vice-consul of the United States that "the signature subscribed and seal affixed to the notarial act hereunto annexed are the handwriting and official seal of Hy. C. Crosfield, a notary public of England, * * * and that to the said act full faith and credit are due."

The Code provides, (section 415, Code Civil Proc.): "Proof of the service of summons and complaint must be as follows: (1) If served by the sheriff, his certificate thereof; (2) if by any other person, his affidavit thereof."

As the attempted service in England is not shown by affidavit, it must be disregarded. It follows that the judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion judgment reversed and cause remanded.

(70 Cal. 519)

DAVIDSON v. DEVINE. (No. 9,675.)

(*Supreme Court of California*. August 28, 1886.)

TRESPASS—JUDGMENT—NOMINAL DAMAGES—UNCERTAINTY—APPEAL.

A verdict of "damages nominal," and judgment thereon for one cent and costs, will not be set aside for uncertainty.

Commissioners' decision. In bank.

The opinion states the facts.

S. B. Davidson, for respondent. *John Gale*, for appellant.

SEARLS, C. This was an action to recover damages for an alleged trespass upon a mining claim, and for an injunction. Plaintiff had judgment for one cent damages, costs of suit, and a perpetual injunction against defendant. A motion for new trial was made and denied. Defendant appeals from the final judgment only, and not from the order overruling the motion for new trial. There is no bill of exceptions or statement on appeal, and we can only look to the judgment roll in determining the propriety of the action of the court below.

The perpetual injunction was warranted by the complaint, and, in the absence of any statement, we must presume the evidence was sufficient to jus-

tify its issuance. The awarding of costs to the plaintiff was within the discretion of the court upon decreeing a perpetual injunction. This leaves nothing to be considered but the validity of the judgment for one cent damages rendered upon a special finding of a jury, which is attacked for want of preciseness.

The answer does not deny cutting timber upon the premises which are found by the jury to belong to the plaintiff, and, if it did, we must presume, in the absence of a statement, that there was ample testimony to support the findings.

The finding to which exception is taken is in answer to the following questions: "Has the defendant cut upon and taken from the premises described in the complaint, without permission of the owners, any wood, since 1870, and prior to the commencement of this suit? If so, what damage was done to plaintiff?" The answer is as follows: "Yes. Damages nominal."

Under the pleadings admitting the cutting of the wood by defendant, it must follow that, when the ownership of the premises was established in plaintiff, he was entitled, as a conclusion of law, to nominal damages. Every trespass upon real property imports an injury for which the law gives nominal damages. *Attwood v. Fricot*, 17 Cal. 38. By nominal damages is meant some trifling sum, as a penny, one cent, six cents, etc. Bouv. Law Dict. tit. "Nominal Damages."

The proposition presented, then, is this: Under the pleadings and facts as found, plaintiff was entitled to nominal damages, and, had the jury found otherwise upon this last question, it would have been the duty of the court, in view of the other facts found, to set the finding aside.

We are asked to set the verdict and judgment aside because the term "damages nominal" is not definite and certain. The answer is, judgments are reversed by this court, not for error alone, but for such errors as work an injury to the appellants. Defendant was not injured by a judgment in other respects proper, and which awarded one cent damages against him, in a case where plaintiff was entitled to nominal damages.

Again, the law disregards trifles, (Civil Code, § 3533;) and, as only *one cent* is involved in the determination of the question at issue, the doctrine of *de minimis non curat lex* should be invoked, and the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 527

MATTHEWS v. SUPERIOR COURT. (No. 11,311.)

(*Supreme Court of California.* August 30, 1886.)

APPEAL—FROM JUSTICE TO SUPERIOR COURT—NOTICE OF APPEAL—WAIVER OF DEFECTS—CODE CIVIL PROC. CAL. §§ 974, 1015.

The voluntary appearance of the attorney of record in an action before a justice of the peace appealed to the superior court, and his participation in the proceedings in that court, without objection to the service of notice of appeal, operates as a waiver of any defects in such notice. See *Matthews v. Superior Court of Marin Co.*, 10 Pac. Rep. 128.

Department 2. Appeal from superior court, Marin county.

The opinion states the facts.

J. F. Smith, for petitioner.

McKEE, J. In the case of *Coughran v. Matthews*, on appeal to the superior court of Marin county, a writ of *certiorari* was issued on the twentieth of October, 1885, to determine whether the superior court had pursued its ju-

jurisdiction in refusing to settle a statement presented in the case upon a motion for a new trial, and in ordering the dismissal of the motion. Pending that proceeding in error, Matthews, the petitioner in error, on the thirty-first of October, 1885, applied for another writ of *certiorari* to determine whether the superior court had acquired jurisdiction at all to proceed in the case.

Upon the hearing had upon the first writ the order of dismissal was reversed, upon the ground that the lower court exceeded its jurisdiction in making the order without first settling the statement upon which the motion for a new trial was to be made. After the announcement of that decision a return was made in the proceeding in error instituted by the present writ. The return shows that there had been an appeal taken in the case, "on questions of both law and fact," by a notice of appeal addressed to the justice of the peace and "James F. Smith," attorney for respondent. This notice was given under section 974, Code Civil Proc., which provides *how* an appeal shall be taken to a superior court. The provision is: "The appeal is taken by filing a notice of appeal with the justice, and serving a copy on the adverse party." Service on the attorney of record of the adverse party is sufficient. Section 1015, Code Civil Proc.

But the return shows that the proof of service of the notice consisted of an affidavit, in form, of service upon "Frank J. Smith, attorney of respondent;" and the alleged affidavit was not sworn to or subscribed before any officer. "Frank J. Smith" was not the attorney of record of respondent; and, as the proposed affidavit of service was not verified, the proof of service of the notice of appeal was inadequate.

The exercise of jurisdiction by an appellate court, in a case where there has been no service of notice of appeal, is ineffectual and void, (*Coker v. Superior Court*, 58 Cal. 177; *Trobock v. Caro*, 60 Cal. 301;) but the party upon whom the law requires notice to be served may voluntarily appear, and submit himself to the jurisdiction of the court. If he appears, his appearance is a waiver or cure of the want of notice.

The return shows that the attorney of record to whom the notice of appeal was addressed, appeared on the trial of the appeal in the superior court; and that without objecting to any defect in the proof of service, or moving to dismiss for want of service of notice of the appeal, he participated in the proceedings, and in the preparation of the statement on motion for a new trial which was presented to the court for settlement. Such being the case, the party will not be heard to say that the court had no jurisdiction. Writ dismissed.

We concur: SHARPSTEIN, J.; THORNTON, J.

70 Cal. 614

PALMER v. UNCAS MIN. Co. and others. (No. 11,352.)

HOLM v. SAME. (No. 11,352.)

(*Supreme Court of California*. September 9, 1886.)

1. LIEN—MINER'S LIEN—MINING SUPERINTENDENT—MANUAL LABOR.

Although the lienor may be a "mining superintendent," if the service for which the lien was filed was manual labor rendered in behalf of the mine, the lien will be allowed under the law of miners' liens.

2. SAME—ASSIGNMENT OF CLAIM—REASSIGNMENT BEFORE FILING LIEN.

One entitled to a lien on a mine is not estopped to enforce such lien by the fact that he has given orders on the owners of such mine for what is due him for labor, provided the owners have not accepted such orders, and they have been reassigned to him before the filing of the lien.

Department 1.

The opinion states the facts.

Henry Miller, for appellant. S. B. Davidson, for respondent Palmer. Farley & Smith, for respondent Holm.

Ross, J. Palmer and Holm commenced separate actions against the Uncas Mining Company and others for the foreclosure of miners' liens, which actions were subsequently consolidated and tried together.

So far as Holm's suit is concerned, it is objected (1) that his complaint is fatally defective, in that it does not contain a sufficient allegation of non-payment; (2) that the labor performed by Holm was not such as would entitle him to a lien; and (3) that, "before filing his lien, Holm transferred nearly all his claim to Beaver and Junot, but afterwards had it reconveyed, and filed a lien" for the amount claimed to be due him.

In respect to the complaint, the allegation is that the defendant, the Uncas Mining Company, for which company it is averred the plaintiff rendered the services, "has paid to plaintiff no part of said one hundred and seventy-one dollars, and the same is now due and owing to the plaintiff from said defendant." No demurrer was interposed, in the absence of which it cannot be held the allegation is insufficient. The case shows that the labor for which the lien in question is claimed was rendered in and upon the mining claim.

The fact that Holm gave to Beaver and Junot orders on the mining company for portions of the amount due him did not divest his right to the lien claimed. The orders were not received by Beaver or Junot in payment of their respective claims against Holm, nor were they paid or accepted by the mining company, but were returned to Holm before the filing of his claim of lien.

In respect to the suit of Palmer, it is said that his assignor, Schmidt, was not entitled to a lien because he was a "mining superintendent." Whether a mining superintendent is, under the statute, entitled to a lien or not, the case shows that, although Schmidt was called superintendent, the service for which his claim of lien was filed was manual labor done by him in and upon the property upon which the lien is sought to be established. The stipulation of counsel under which the depositions of Schmidt and Palmer were taken, estop appellant from claiming that they were not taken under a commission issued from the court.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 515

PEOPLE v. SAM LUNG. (No. 20,197.)

(Supreme Court of California. August 28, 1886.)

1. GAMING—INFORMATION—GAMING AT "TAN"—OWNER OF GAME—PEN. CODE CAL. § 330.
An information for "carrying on and conducting a certain game of *tan*, then and there played for money," is good, under Pen. Code Cal. § 330. It is not necessary to state that the person accused was the employe or owner of the game; nor is proof as to that fact an essential prerequisite to conviction.
2. SAME—EVIDENCE—WITNESS IDENTIFYING GAME OF CARDS.
It is not error, in the trial of a person accused of playing a certain game, *e. g.*, "tan," for money, for one witness to illustrate what game the accused was playing, and for another to testify that the game thus shown is "tan."
3. SAME—JUDGMENT—WHEN SUFFICIENT.
A judgment that "the defendant, by the verdict of a jury, was found guilty of the offense of gaming at tan, as charged in the information," is good on a verdict given under an information for playing such game for money.
4. CRIMINAL LAW—TRIAL—EXCLUSION OF WITNESSES FROM ROOM.
The exclusion of witnesses for the prosecution from the court-room while other witnesses are testifying, is a matter within the discretion of the court.

Commissioners' decision. In bank.

Appeal from an order overruling motion for new trial. The opinion states the facts.

The Attorney General, for the People. *S. I. Geil* and *H. V. Morehouse*, for appellant.

FOOTE, C. The defendant, Sam Lung, was accused, by information, of having carried on and conducted the game of *tan*, for money, etc. He was convicted as charged, by a jury, and from the judgment against him, and an order refusing a new trial, he appealed. As we understand section 330 of the Penal Code, it means that every person whatsoever who deals, plays, or carries on, or opens or causes to be opened, or who conducts, certain games therein mentioned, "for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid,—such imprisonment not to exceed one year;" and that "every person who plays or bets at or against any of said prohibited game or games is guilty of a misdemeanor." That being so, it was not material that the information (which charged that the defendant "did willfully and unlawfully carry on and conduct a certain game of *tan*, then and there played for money," etc.) should have stated that he did so as *employe* or *owner* of such game.

The offense defined in the first clause of the section, *supra*, is not limited to those who, as *owners* or *employes*, *conduct* or *carry on* any of the prohibited games for money. It embraces all persons who carry on or conduct such games, whether as owners, employes, or in any other capacity, but it does not include any one who plays or bets at or against such games; they being included in the second clause of the said section. The legislature did not intend to declare, by the first clause, that no one except *owners* or *employes* connected with such games should be punishable thereunder. It meant to include all persons who might thereafter commit the acts there prohibited. And the demurrer to the information was properly overruled.

It was unnecessary, in order to convict the defendant of the offense charged, that it should have appeared in evidence that he was either an *owner* or *employe* of a *tan* game, conducting or carrying on the same for money or its equivalent; nor was it necessary that the depositions taken on the preliminary examination should have evidenced the character which the defendant then and there assumed. If it was proved before the committing magistrate, and afterwards, before the trial court, that he was a person carrying on or

conducting such a game for money or its equivalent, it was sufficient to warrant his being tried by the superior court, and convicted by the jury; and therefore the court did not err in refusing to set aside the information on any ground covered by the motion therefor.

It was within the discretion of the court to exclude or not witnesses from the court-room. *People v. Garnett*, 29 Cal. 625; Greenl. Ev. § 462.

The introduction in evidence of the articles used in carrying on and conducting the game of tan, called the "lay-out," was admissible to aid in illustrating the kind of game alleged to have been carried on, etc., and was a part of the *res gestæ*.

The testimony of the witnesses Carrow and Nesbitt was not expert testimony in the proper sense of such term. One of them was called who testified, in effect, that he saw the defendant conducting a certain game for money or its equivalent, and described it before the jury. The other witness was called, who had illustrated to him the game which was shown before the jury. He said, "That is the game of tan." This did not take away from the jury the determination of the material thing at issue; that is, whether or not the defendant had carried on or conducted such a game for money as that illustrated by one witness, and identified as being a certain kind of a game by another witness. A given individual may have witnessed the playing of some ordinary game of cards for money but twice or thrice in his life, and heard the players denominate it by its proper name, and yet he may be able readily (when he has such a game as he formerly observed illustrated before him) to declare that such game is the game he formerly saw played; and in such recollection or identification no special skill or science is a necessary ingredient. And such evidence is entirely proper, and may sometimes be all that can be had in a given case upon a special point. The evidence given was competent and pertinent to the issue. Of its force the jury alone were the judges.

We do not think that the court, in its charge, assumed and declared to the jury that the game conducted or carried on by the defendant *was* the game of tan, or took away from the jury the determination of the question as to whether or not it was the said game; and in all other respects we are of opinion that such charge was correct, fair, and easily comprehended by those to whom it was addressed. And the instructions asked for by the defendant were properly refused.

The recital in the entry of the judgment was that "the defendant, by the verdict of a jury, was on January 21, 1886, found guilty of the offense of gaming at tan as charged in the information." This meant that the defendant was, by the verdict of that jury, found guilty of gaming at tan, by carrying on and conducting the same, for money or its equivalent, and therefore the judgment sentenced the defendant for the offense of which he was tried and convicted, and was in no way erroneous, or prejudicial to his rights.

From a careful examination of the record, we are of opinion that the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 523

PEOPLE v. OTTO. (No. 20,141.)

(Supreme Court of California. August 28, 1886.)

OFFICE AND OFFICER—FAILURE TO PAY OVER FUNDS—INDICTMENT—SINGLE OFFENSE—
PEN. CODE CAL. § 424, SUBD. 10; ID. §§ 950-952.

An indictment charging that the defendant, a tax collector, "had," on such a day, collected public money, and "on that day, and for five days thereafter," etc.; "refused and omitted" to pay it over, charges but a single offense, and is not bad under Pen. Code Cal. §§ 950-952.

Commissioners' decision. In bank.

Demurrer to indictment. Demurrer sustained, and appeal by the state.

The Attorney General, for the People. R. G. Knox, for respondent.

FOOTE, C. The defendant was indicted under section 424 of the Penal Code, which reads as follows: "Every officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who either * * * [subd. 10] willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same, is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state." The indictment was demurred to, the demurrer sustained, and from the judgment made in the premises the people have appealed.

The grounds alleged in the demurrer why it should be sustained were—*First*, that the indictment did not substantially comply with the requirements of sections 950, 951, and 952 of the Penal Code; *second*, that more than one offense is charged in the indictment; *third*, that the facts do not constitute a public offense.

The indictment set out that the defendant, "during all the times between the first Monday of January, A. D. 1883, at 12 o'clock M., and the first Monday, viz., the fifth day, of January, A. D. 1885, at 12 o'clock M., was the duly elected and qualified sheriff and *ex officio* tax collector of the county of Del Norte and state of California;" that, as such, it was his duty to receive, safely keep, disburse, transfer, etc., the state and county taxes for the fiscal year ending June 30, 1885; that as such tax collector, on the fifth day of January, 1885, he "had" received and collected a certain amount of money, state and county taxes,—the sums belonging to the state and county being stated in the aggregate first, then separately; that on the first Monday, viz., the fifth day, of January, 1885, and for five days thereafter, at the county and state aforesaid, "the said W. H. Otto, as said tax collector, wholly and willfully omitted and refused to pay over to the county treasurer of said county of Del Norte, the officer authorized by law to receive the same," the sum of money, etc.; and that on the fifth day of January, 1885, etc., "he wholly and willfully omitted and refused, and still does omit and refuse, to pay over" said money, etc.

As, in the first part of the indictment, it was distinctly charged that defendant was the tax collector of Del Norte county from the first Monday in January, 1883, at 12 o'clock M., to the like day and time on the fifth day of January, 1885, the charge that, "as said tax collector," he "had" on the fifth day of January, 1885, collected the public money, and upon that day, and for five days thereafter, and ever since then, refused and omitted to pay it over, was but charging the defendant with a single offense. For the word "had," being in the pluperfect tense, denotes that the collection of the money was prior to the fifth day of January, 1885, and, taken in connection with the other language preceding it, the statement of fact was that said collection was made during the term of office of the defendant as tax collector; and the statement that he refused and omitted to pay the money over on the fifth day

of January, 1885, and for five days thereafter, and that he wholly omitted and refused, and still refuses, to pay it over, is a charge of but one offense; for he is thereby no more accused of the commission of an offense for each of the five days after the fifth of January, 1885, than for every day since then that he had omitted and refused to pay over. Taking them together, the words last considered convey the meaning that the defendant neither paid the money over on the fifth of January, 1885, when he was tax collector, nor for five days thereafter, nor at any time. And as a refusal to do a thing includes an omission to do so, there is no charge of two offenses in saying that the defendant "omitted and refused," etc.; the greater including the less. The refusal and omission to pay over the sum of money collected was the charge, and the fact that is stated, that part of it was state and part county money, is not a charging of two offenses.

We are of opinion that the indictment does substantially comply with sections 950, 951, and 952 of the Penal Code, and that the facts set out therein were sufficient to charge a public offense under section 424, subd. 10, of the Code, *supra*.

The judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with direction to the court below to overrule the demurrer.

70 Cal. 529

PEOPLE v. REED. (No. 20,200.)

(Supreme Court of California. August 30, 1886.)

1. FALSE PRETENSES—INDICTMENT—PROMISSORY NOTE—JOINT NOTE—VARIANCE—PEN. CODE CAL. § 532.

An indictment for obtaining property under false pretenses alleged that the property obtained was a note of Samuel Purrington, and the proof showed that the property obtained was a joint note of Samuel Purrington and Lincoln Purrington. *Held*, that there was a material variance between the *allegata* and *probata*.

2. SAME—PROMISSORY NOTE, SUBJECT OF—PEN. CODE CAL. § 7.

Under the law of California, (Pen. Code, § 7,) a promissory note may be the subject of the crime of obtaining property under false pretenses.

Commissioners' decision.

In bank. Appeal from Sacramento county.

The opinion states the facts.

The Attorney General, for the People. Henry Edgerton and R. M. Swain, for appellant.

SEARLS, C. The defendant was indicted in the county of Sacramento, upon a charge of obtaining property by false pretenses, under section 532 of the Penal Code, and was tried and convicted. This appeal is from the judgment of conviction, and from an order denying a motion, on the part of defendant, for a new trial.

The indictment charges that the defendant, at the county of Sacramento, in September, 1885, falsely and fraudulently, and with the intent to defraud one Samuel Purrington of his property, represented to said Purrington that he, the said defendant, was then and there the owner and patentee of a certain patented mechanical invention known and called a "Mechanical Motor;" that one Frances Purrington, the mother of said Samuel Purrington, who was in San Francisco, had authorized and directed defendant to tell her son Samuel that she, the mother, had, within a few days theretofore, purchased from defendant, for her said son Samuel, the patent-right of and for said in-

vention for the county of Sacramento, and that she desired the said Samuel to agree to said purchase, and to pay defendant therefor \$1,000, by executing and delivering to defendant his promissory note therefor, payable to defendant, and to do all things necessary to said purchase; and Samuel Purrington believing said statements, and being deceived thereby, was induced to deliver to, and did then and there execute and deliver to, said defendant "his [said Samuel Purrington's] promissory note for the sum of \$1,000, * * * payable to said defendant, said note being then and there of the personal property of said Samuel Purrington, * * * and of the value of \$1,000;" and thereupon defendant pretended to consummate the purchase by executing and delivering to Purrington a bill of sale of the patent-right for the county of Sacramento. The indictment then proceeds to aver the falsity of defendant's representations, etc.—allegations not important to any question raised.

At the trial the testimony showed, without conflict or contradiction, that the bill of sale of the patent-right was executed and delivered to Samuel Purrington and Lincoln Purrington, and that the promissory note was dated March 30, 1885; was for \$1,000, payable in six months from date; and was the joint note of Samuel Purrington and Lincoln Purrington, both of whom executed it; and that no other note for \$1,000 was ever made to defendant by them, or either of them.

Upon this state of the proofs the defendant requested the court to instruct the jury as follows: "*Second.* In a criminal action the proofs must correspond with the material averments of the indictment; and, in case of a substantial variance between the proofs adduced and such material averments, the defendant is entitled to an acquittal. The indictment in this action charges the defendant with obtaining, by certain false and fraudulent pretenses and representations, the promissory note of *Samuel Purrington* for the sum of one thousand dollars, (\$1,000,) and the property of said Samuel Purrington. If you find from the evidence that the defendant obtained the joint note of Samuel Purrington and Lincoln Purrington, and did not obtain the individual note of Samuel Purrington, then there is a substantial variance between a material averment in the indictment and the proofs adduced in this action, and you should render a verdict of acquittal." The instruction was refused, and such refusal is assigned as error.

Section 532 of the Penal Code, under which the indictment was found, provides that "every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, * * * and thereby fraudulently gets into possession of money or property, * * * is punishable," etc. The indictment or information must be direct and certain as it regards (1) the party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

All these things are set out in the indictment. Stripped of all verbiage and legal phraseology, it in effect says that, with intent to defraud Samuel Purrington, the defendant informed him that his mother desired him to purchase from defendant the patent-right for a certain pump for \$1,000, and to give defendant his note therefor. The whole story was false, but Samuel Purrington believed it to be true, purchased the patent, and gave his note. A plea of not guilty was interposed to this indictment, the effect of which was to deny these material facts. The evidence was that defendant represented that their mother wished the brothers, Samuel and Lincoln Purrington, to purchase the patent; that they believed the statement, and did purchase; that the right was assigned to them; and that they jointly made and delivered to defendant their note for the \$1,000.

In a prosecution under section 532, the indictment or information should set out with reasonable certainty the pretenses and fraudulent representations by which the party injured was defrauded of his property, and such

specific description of the property obtained as will identify it, and give to the defendant notice of what he is required to meet. And between the allegations thus made and the proofs there should be such a correspondence that, when the latter are adduced, it can be said that the former are substantially established. In the present case there was a wide departure from the necessary correspondence between the *allegata* and *probata*. The proofs established another offense, separate and distinct from that charged. The property obtained by the fraudulent practices of defendant was different from that described in the indictment. This difference was so significant that in a civil action it would have been fatal to a recovery.

This discrepancy is not remedied by section 956 of the Penal Code. That section provides that where a public offense "involves the commission of, or attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material."

Samuel Purrington and Lincoln Purrington were the parties injured. Under this last section the mistake of charging that Samuel Purrington only was injured, was of no consequence; and, if the mistake stopped there, it would avail the defendant nothing. But the offense actually committed by the defendant was not described "with sufficient certainty in other respects to identify the act." A conviction of the offense *charged* would not be a bar to another indictment for the offense as *proven*.

It is further contended by defendant that the promissory note, as proven, was not such property as would support the indictment. At common law, the only description of property which could be the subject of larceny was personal *goods*; that is, mere movables having an intrinsic value. The crime could not be committed of things which savor of the realty, or of written instruments of any description. 4 Bl. Comm. 229, 233, 234; 2 Russ. Cr. 62-70. The paper only on which the instrument was written, and not the instrument, was the subject of larceny. This phase of the common law is modified by our Penal Code, section 7 of which provides that the term "personal property" includes "money, goods, chattels, things in action, and evidences of debt." The promissory note of Purrington was evidence of a debt, and, as such, was such property as might be the subject of the offense defined by section 532 of the Penal Code.

We are of opinion that the instruction asked by defendant should have been given, and that the refusal was error for which the judgment and order appealed from should be reversed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

70 Cal. 616

TABLE MOUNTAIN & SAN ANDREAS WATER CO. v. CHAVANNE.

(*Supreme Court of California*. September 9, 1886.)

WATERS AND WATER-COURSES—MILL-OWNER AND WATER COMPANY—SUPPLY OF WATER—SALE OF MILL.

An agreement, by a water-power company, to supply the owner of mills with water for 10 years, at a certain annual rate, will not subject such owner to a personal liability for such supply after he has sold the mills.

Department 1.

The opinion states the facts.

Reddick & Solinsky, (J. H. Budd, of counsel,) for appellant. Robinson, Olney & Byrne, for respondent.

Ross, J. On the thirteenth day of October, 1879, the plaintiff, being engaged in the business of selling water for mining and other useful purposes, and the defendant, being the owner of a certain mine and quartz mill, entered into an agreement in writing by which the plaintiff agreed and bound itself to furnish the defendant certain water, which the defendant agreed and bound himself to take and use in running the mill. Among other provisions, the agreement contained the following:

"It is further understood that the said party of the second part [defendant] may make any alteration in the driving power of his mill, and may put up amalgamators, concentrators, or arastras and machinery, at and near his mill, without any further or extra charge for the water, but shall not put up another mill, and use the same water again for a separate driving power. And the said A. Chavanne, the party hereto of the second part, agrees to pay to said party of the first part the sum of \$100 per month for the use of said water, payable quarterly. It is further understood that should said party of the second part erect another mill, and use the same water to run said other mill, he shall pay to said party of the first part fifty dollars (\$50) per month additional, but no extra charge for water shall be made for putting up more stamps in the present mill. This agreement is to continue and be in force between the parties, and their successors, administrators, representatives, and assigns, for the term of ten years from this date, for which term the same shall be binding upon the parties to this agreement, and their successors in interest as aforesaid. It is further understood that, if the party of the second part should sell his mines, his successors in interest in the mines shall be bound by this agreement."

A subsequent addition was made to the agreement, which does not affect the question to be decided.

The parties to the contract at once entered upon its performance, and each duly complied with its requirements, until the defendant, on the fourteenth of May, 1880, sold and conveyed his mill and mining property mentioned in the agreement to a corporation called the "Amelia Gold Mining Company," from and after which time, and until the first day of October, 1881, the plaintiff furnished the water mentioned in the agreement for the use of, and which was used by, the Amelia Gold Mining Company, in the operation of the mill and mine aforesaid. The findings show that, from the time of the defendant's sale to the date last mentioned, defendant was the agent of the Amelia Gold Mining Company, and that, "by and in accordance with his instructions, the plaintiff made out the bills for water furnished, as aforesaid, against the said Amelia Gold Mining Company, and receipts were given therefor in the name of the plaintiff to the Amelia Gold Mining Company,—defendant, Chavanne, paying the same by his check drawn upon the Swiss Bank in San Francisco; that on the first day of October, 1881, the said defendant, Chavanne, ceased to have any interest or connection with the Amelia Gold Mining Company, or with the mines, mill, and premises in said agreement mentioned; and on said date notified J. F. Treat, the president of the plaintiff corporation, that he had sold all of his interest in said property to the Amelia Gold Mining Company."

The plaintiff subsequently continued to furnish the water for use of the mill, and seeks, by this action, to charge the defendant, Chavanne, with the amount per month stipulated in the agreement of October 13, 1879. The whole question, therefore, turns on the true construction of that contract; the plaintiff insisting that defendant thereby made himself personally responsible, at the price fixed, for the water plaintiff agreed to furnish during the whole period of 10 years. We do not think that the true meaning of the agreement. The price to be paid was for the use of the water; and as the latter was to be used in running the mill, and as the right of the defendant to sell the mill, as well as the mine, was expressly recognized in the agree-

ment, it would seem to follow necessarily that it was not contemplated that defendant should pay the price after he should sell the mill. That conclusion is greatly strengthened by the provision of the agreement attempting to bind the successors in interest of defendant to take and use the water in running the mill, and to pay for its use at the price mentioned in the agreement during the term therein specified. It is further strengthened by the construction the parties themselves put upon the agreement by the furnishing by plaintiff of the water to the Amelia Gold Mining Company, and the receipt, from the latter, of pay for its use, in accordance with the terms of the agreement. Whether or not the agreement is binding upon the Amelia Company is a question that does not arise in this case. Judgment affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 612

DAVISSON v. BOARD OF SUP'RS OF SOLANO Co. (No. 11,241.)

(*Supreme Court of California*. September 9, 1886.)

WAYS—MANDATE TO COMPEL COUNTY SUPERVISORS TO APPOINT ROAD OVERSEER.

A writ of mandate will not lie to compel county supervisors to appoint a certain person road overseer, on a petition of a majority of the tax-payers of a road-district. Pol. Code Cal. § 2642; St. 1883, p. 8; St. 1885, p. 94.

Department 1. Appeal from superior court, Solano county.

The opinion states the facts.

Joseph McKenna, for respondent. *O. P. Dobbins*, (*Joseph Robinson* and *J. M. Gregory*, of counsel,) for appellant.

Ross, J. Section 2642 of the Political Code, as amended in 1883, (St. 1883, p. 8,) provided: "The board of supervisors of each county shall, upon the presentation of a petition signed by a majority of the tax-payers of said road-district, appoint one road-overseer or road-master for each or any road-district in their respective counties; such overseer to be an elector of the district for which he is appointed, who shall hold office for and during the pleasure of the board, not to exceed two years, and who shall, under the direction of the road commissioners of his district, perform the duties hereinafter in this chapter specified; and, if a vacancy at any time occurs in any district, the supervisors may appoint without any petition for the unexpired term. If the board does not appoint road overseers, the road commissioners within their respective districts shall perform the duties imposed on road overseers by the provisions of this chapter: provided, that all road overseers, road-masters, or road commissioners now in office by election, must hold office, and exercise the duties thereof, for the terms for which they were elected."

Under that provision of law the petitioner in the present case presented to the board of supervisors of Solano county a petition signed by a majority of the tax-payers of Suisun road district, of that county, asking the appointment of the petitioner road overseer of the district. The board having refused to make the appointment, the superior court, upon the application of petitioner, awarded a writ of mandate to compel the appointment. Manifestly, the judgment is erroneous. Under no possible view of the statute was the board of supervisors obliged to appoint the *person* petitioned for road overseer; nor, under a true reading of the statute, was the board obliged to appoint any one, although requested to do so by a majority of the tax-payers of the district.

That the statute, which has since been changed, (St. 1885, p. 94,) was directory, is shown by the provision: "If the board does not appoint road overseers, the road commissioners within their respective districts shall perform the duties imposed on road overseers by the provisions of this chapter." Judgment reversed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 116

PEOPLE v. DONALDSON. (No. 20,174.)

(Supreme Court of California. June 30, 1886.)

1. FALSE PRETENSES—PASSING BANK-CHECK—EVIDENCE.

On the trial of an information for obtaining property under false pretenses, an instruction that, to convict, it must be found that defendant *said* he had money in bank to pay a check given in payment for the property, would be error. A bank-check is a false token, if the drawer knows when he gives it, payable to a person other than himself, that he has neither funds to meet it, nor credit at the bank on which it is drawn.

2. CRIMINAL LAW—APPEAL—ADMISSION OF EVIDENCE—BY WHOM ERROR ASSIGNED.

Evidence admitted in a party's favor cannot be assigned as error by him.

In bank.

The Attorney General, for the People. *J. M. Lucas*, for appellant.

FOOTE, C. The defendant was found guilty by a jury of having obtained certain property from one Spence under false pretenses, with intent to cheat and defraud him. From the judgment of conviction and an order refusing a new trial appeals are taken. His first contention is that the information filed against him was insufficient, and that the court erred in overruling the demurrer filed thereto. Upon examination, we are satisfied that the court was right in its ruling in that matter. The information charged the offense in proper language, sufficient to meet the requirements of sections 532, 950-952, Pen. Code. The charge of the learned judge, giving to it an unstrained interpretation, was, we think, in all respects, in accordance with law, and was especially full and fair towards the defendant.

The refusal to give certain instructions asked by the defendant is assigned as error also. They were as follows: "Before you can convict, you must find, as a fact in this case, that, before the sale and delivery of the hogs in question, the defendant represented to Mr. Spence that he had at that time in the Commercial & Savings Bank of San Jose the sum of \$196.70, and that Mr. Spence relied solely on such representation in parting with said hogs. In other words, that he would not have parted with said hogs, or delivered them, to the defendant, unless the defendant had *told* him that he had such money in bank, and that that representation induced Mr. Spence to part with said hogs. If you do not so find, you must acquit the defendant. A bank-check is not a false token, within the statute."

It is very clear that, if the court had given the first of these instructions, the jury would have been compelled to exclude from consideration all that was said or done in the transaction tending to prove the defendant's guilt, and would have been obliged to acquit him unless it had appeared that the defendant had said to Mr. Spence, when he handed him the check: "I have the money that check calls for in the Commercial & Savings Bank of San Jose." Such a misleading instruction, utterly discarding all the evidence pertinent to the issue, was very properly refused.

A bank-check may be a false token, and would be such, under the statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it, nor credit at the bank upon which he drew it. Section 532, Pen. Code; *Com. v. Drew*, 19 Pick. 186; *Rex v. Jackson*, 3 Camp. 370; *Ros. Crim. Ev.* (2d Ed.) 419. There was evidence given on the trial of the cause which tended to show that the defendant did not have the money to meet the alleged fraudulent check, or credit at the bank upon which he drew it, which would warrant any belief on his part that it would be paid. The court could not rightfully have taken such evidence from the jury, and therefore did not give the second instruction above referred to. The bank-check for \$196.70, in writing, together with the other evidence in the cause, was sufficient, under section 1110, Pen. Code, which requires that, "upon a trial for having, with an intent to cheat and defraud

another, designedly, by any false pretense, * * * obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language, unaccompanied by a false token in writing," etc.

The defendant further complains that, according to the evidence in the case, he was not shown to have been guilty of any offense known to the law; for he claims that the things which he was charged to have obtained from one Spence by false pretenses were actually purchased by him from Spence, and title thereto vested in him, and a delivery had, before the giving of his check. This was a question for the jury. They have determined it against the defendant, and we cannot say their verdict was wrong, the evidence being somewhat conflicting.

It is also objected to that the court allowed a certain check for the sum of \$150 to be introduced in evidence. Of that the defendant cannot be heard to complain, for the reason that its only effect, if any it had, was favorable to him, for the jury might have been led by that means to believe in his good faith in the original transaction, as at the time of the giving of the last check he was shown to have paid some cash to Mr. Spence on the first check, (the giving of which was alleged to have been fraudulent,) and to have given that for \$150 in lieu of the balance due upon the first.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 242

COUNTY OF SAN LUIS OBISPO *v.* HENDRICKS. (No. 11,380.)

(*Supreme Court of California.* June 30, 1886.)

1. TAXATION—ACTION BY COUNTY FOR LICENSE TAX—SUBDS. 1, 2, § 340, CODE CIVIL PROC. CAL.

A civil action by a county, for the recovery of a license tax, is not barred by subds. 1, 2, § 340, Code Civil Proc. which relate exclusively to actions for a penalty.

2. SAME—AUTHORITY TO BRING ACTION PRESUMED—ACTION BY COUNTY DIRECTED BY TAX COLLECTOR—PLEADING.

When an ordinance provides that "the tax collector may direct suit," it is not necessary to set up that he did direct the suit to be brought. An attorney is presumed to be authorized to institute the actions which he begins.

3. MUNICIPAL CORPORATIONS—ORDINANCE OF COUNTY—PUBLICATION OF ORDINANCE—SECTION 26 OF THE CALIFORNIA COUNTY GOVERNMENT ACT.

It is not necessary, under section 26 of the county government act, that an order for the publication of an ordinance shall be made.

4. SAME—ORDINANCE PASSED BY BOARD OF SUPERVISORS—ACT AUTHORIZING MEETING REPEALED.

An ordinance passed at a meeting of a county board of supervisors, held pursuant to an act of the legislature which had been previously repealed, is void.

Department 2.

J. R. Putton and *V. A. Gregg*, for respondent. *J. M. Wilcoxon*, *R. B. Preat*, *Wm. & E. Graves*, and *J. N. Turner*, for appellant.

SEARLS, C. This is an action to recover from the defendant the sum of \$150, the amount of a license for carrying on for 18 months from November 1, 1883, the business and occupation of selling spirituous, malt, and fermented liquors and wines in less quantities than one quart, within the said county of San Luis Obispo, state of California, together with \$15 damages, and costs of suit. Plaintiff had judgment, from which defendant appeals.

On the first day of October, 1883, the board of supervisors of the county of San Luis Obispo passed an ordinance taxing certain occupations, and, among others, the business of retailing spirituous and malt liquors, wines, etc., at \$25 per quarter, and requiring a license to be taken out therefor. The ordinance was ordered to be published in the Republic, a newspaper printed and published in said county, and by an order of the board of October 9, 1883, it is recited that the ordinance was duly published. At the time of the passage of the ordinance there was published in said county a daily newspaper called the Daily Republic, which published a daily issue, and the same publishers, at the same place, printed and published a weekly newspaper called the Thursday Republic, being a separate and distinct paper from the Daily Republic. The ordinance was published in the weekly paper.

On the fifth of February, 1885, the board of supervisors passed another ordinance, amending section 5 of article 1 of the former ordinance, so as to provide that any person who should fail, neglect, or refuse to take out a license, or who should carry on business without a license, "the tax collector may direct suit, in the name of the county as plaintiff, to be brought for the recovery of the license tax; * * * and, in case of recovery by plaintiff, \$15 must be added to the judgment and costs to be collected from the defendant." Of this sum, \$5 went to the tax collector, and \$10 to the attorney prosecuting the suit.

At the date of the ordinance of October 1, 1883, the board of supervisors had not yet passed an ordinance providing for the holding of regular meetings of the board, as required by section 25 of the act known as the "County Government Act," approved March 14, 1883, but assumed to act under the authority of section 4045 of the Political Code, as amended March 13, 1883, the third subdivision of which section required the board of supervisors of each county, on the first Monday of October of each year, to fix the rates of county licenses. Nor was such ordinance passed at a regular session of the board, or at a special session thereof, unless section 4045, *supra*, authorized a session thereof for the purposes in such section indicated.

Defendant conducted the business of selling spirituous liquors, etc., in quantities less than a quart, from October 1, 1883, to May 1, 1885, without having procured a license so to do. This action was commenced June 20, 1885; hence that portion of the cause of action which claims license tax from November 1, 1883, to June 20, 1884, accrued more than one year before suit was brought.

The answer avers that the cause of action is barred by the provisions of subdivisions 1 and 2 of section 340 of the Code of Civil Procedure of this state. For convenience sake, we will first dispose of the question arising upon the plea of the statute of limitations.

Subdivisions 1 and 2 of section 340 of the Code of Civil Procedure relate exclusively to actions for a penalty arising either under a statute or upon an undertaking in a criminal action for a forfeiture or penalty to the people of the state. The license tax sought to be recovered in this action is not a penalty, but in the nature of a *debt* due from the defendant to the county; or, what is the same thing for present purposes, a duty devolved upon the defendant personally, which can be enforced precisely as though he had contracted with the county to pay such sum of money. *People v. Seymour*, 16 Cal. 332; *Perry v. Washburn*, 20 Cal. 351; *Guy v. Washburn*, 23 Cal. 116; *City of Oakland v. Whipple*, 39 Cal. 115. A penalty is in the nature of a punishment for the non-performance of an act, or for the performance of an unlawful act, and in the former case stands in lieu of the act to be performed. Here the action is to enforce the precise duty. The statute of limitations of one year does not therefore apply.

It is urged by appellant that as the ordinance upon which the action is based, provides that "the tax collector may direct suit," etc., the complaint

should have averred that the tax collector had directed the suit to be brought, and, not having done so, that the demurrer should have been sustained. There can be no doubt but that, where a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must state in his complaint the facts upon which the right is founded. *Dye v. Dye*, 11 Cal. 163; *Himmelman v. Danos*, 35 Cal. 448. The objection goes, not to the absence of any fact constituting the cause of action, but rather to the authority to bring the suit for want of an authorization from the tax collector. The action is instituted by the district attorney of the county,—an attorney at law, and an officer of the court. It was not necessary to state in the complaint that he was directed to bring the action. An attorney at law is presumed to be authorized by the proper party to institute the actions he brings, until the contrary is made to appear. We see no ambiguity or uncertainty in the complaint, and are of opinion the demurrer was properly overruled.

Section 26 of the county government act, under which the ordinance was enacted, provides that "no ordinance passed by the board shall take effect within less than 15 days after its passage, and before the expiration of the said 15 days the same shall be published, with the names of the members voting for and against the same, for at least one week in some newspaper published in the county, if there be one. * * * An order entered in the minutes of the board that such ordinance has been duly published * * * shall be *prima facie* proof of such publication." The essential thing to be done was to publish the ordinance in some newspaper published in the county, if there was one, for at least one week, with the names of the members voting for and against the same. The evident object of this provision is that notice may be imparted to the public of the nature and requirements of the ordinances which may affect their rights and interests. The statute does not, in terms, require any order from the board of supervisors for the publication; and the fact that they made an order for the publication in a paper called the Republic, and that it was published in the Thursday Republic, did not in anywise weaken the force of the publication as made, or impair its usefulness as a means of information to the public. Where, as is sometimes the case, a notice is to be given by publication in a newspaper to be designated by the party who is required to give the notice, the designation of the paper may be supposed to be submitted to his judgment, and to become an essential part of the proceedings; but no such considerations arise here.

It is next urged that "the ordinance [Exhibit A] was not passed at a time when the board were holding a legal session, and was invalid, and could not be amended so as to impart any validity to it."

Section 22 of the county government act provides that the board of supervisors must, by ordinance, provide for the holding of regular meetings of the board at their respective county seats." The next section of the same act provides for special meetings. Section 4045 of the Political Code, as before stated, was approved March 13, 1883, and the county government act on the fourteenth of March, 1883.

In *Ex parte Benjamin*, 65 Cal. 310, S. C. 4 Pac. Rep. 23, this court held that the county government act repealed the act of March 13, 1883, relating to license taxes, but that an ordinance of a board of supervisors passed at a regular session of the board after March 14th, but before the board had provided for regular sessions under the latter act, was valid. The theory of that case is that the county government act provides for an ordinance fixing the times at which regular sessions are to be held, and that, until such ordinance was passed, the board could continue to transact business at the regular sessions previously provided.

Ex parte Benninger, 64 Cal. 291, is to the same effect, substantially, though the question of repeal of the act of March 13th was not therein considered.

In *Santa Clara Co. v. Southern Pac. R. Co.*, 6 Pac. Rep. 744, it was ex-

pressly held that section 4045 of the Political Code was repealed by the county government act.

Ordinance "A" was not passed at a regular session of the board, and cannot, therefore, be upheld under the theory advanced in *Ex parte Benjamin, supra*. If upheld at all, it must be on the assumption that section 4045 of the Political Code, which required the board to fix the rates of county licenses on the first Monday of October in each year, was still in force. It was evidently upon this assumption that the board met and acted in passing the ordinance. The section having been repealed, there was no authority for their meeting and action, and ordinance "A" was null and void.

The judgment should be reversed, and judgment entered in the court below in favor of defendant.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, with direction to the court below to enter judgment for defendant.

70 Cal. 150

LOBREE v. MULLAN. (No. 11,496.)

(*Supreme Court of California.* July 14, 1886.)

1. PUBLIC LANDS—STATE LANDS—JURISDICTION OF SUPERIOR COURT—SURVEYOR GENERAL OR REGISTER—SECTIONS 3414-3416, POL. CODE CAL.

The jurisdiction of the superior courts to determine contests concerning the approval of a survey or location of state lands before the surveyor general, or concerning a certificate of purchase or other evidence before the register, is derived from sections 3414, 3415, and 3416 of the Political Code, requiring the surveyor general or register to make an order referring such contests to the district court of the county where the lands are situated, and to enter such order of record in his office.

2. SAME—JUDGMENT OF COURTS DETERMINING CONTESTS—SECTION 3416, POL. CODE CAL.

The judgment of the superior court, or that of the appellate court, determining contests concerning state lands, where such contest has been referred by the surveyor general or register to the district court of the county where the land is situated, is made conclusive upon the officer referring the contest, and also upon the state and the contestants.

Department 1.

Charles B. Lamberson, for respondent. *C. A. Webb* and *F. S. Stratton*, for appellant.

MCKINSTRY, J. Sections 3414, 3415, and 3416 of the Political Code read:

"Sec. 3414. When a contest arises concerning the approval of a survey or location before the surveyor general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record-book in his office.

"Sec. 3415. After such order is made, either party may bring an action in the superior court of the county in which the land in question is situated, to determine the conflict, and the production of a certified copy of the entry made by either the surveyor general or the register gives the court full and complete jurisdiction to hear and determine the action.

"Sec. 3416. Upon filing with the surveyor general or register, as the case may be, a copy of the final judgment of the court, that officer must approve

the survey or location, or issue the certificate of purchase, or other evidence of title, in accordance with such judgment."

The statutes might have provided that the register should determine questions of law as well as questions of fact between those seeking to purchase the same tract of state lands, and made his determination final, so as to entitle the party in whose favor it might be to the certificate of purchase. In such case, all intended purchasers would have had notice of the fact that their right to the certificate would thus be determined by the register. The jurisdiction of the superior court to determine these contests is derived from section 3415 of the Code. *Pro hac* the court acts in the place of the officer; its judgment, or that of the appellate court, being made conclusive on the officer by the statute. The order of the register referring the matter is based upon a contest already existing in the land-office,—a contest of which both parties have notice, and both must be assumed to have notice of the order. The order, and all proceedings prior and subsequent to the order of reference, assume the title to the land to be in the state. When a person applies to purchase lands of the state, he knows that, in case a contest arises between himself and another applicant, the dispute may, under certain circumstances, be decided by the register, or that it may be referred to the superior court, and that in the last case, if the action (which is a mode of bringing the contest before the court) is commenced by the other contestant, he may be notified of it by publication of the summons, in case he is not a resident of the state. He consents to this mode of service in advance. The state has consented, by the statute, that the judgment shall determine which of the two contestants shall receive the certificate of purchase, and the judgment, to the full extent of its scope and purpose, is binding on all the world. Whether the proceeding is *ad rem* strictly or not, the applicant has subjected himself in advance to the mode of deciding his right to purchase provided by the statutes. The court, like the register, is an agent of the state, to whom is committed the power of determining whether the applicant has complied with the terms on which alone he is permitted to purchase the land. The case does not come within the rule laid down in *Pennoyer v. Neff*, 95 U. S. 714. Judgment affirmed.

We concur: MORRISON, C. J.; MYRICK, J.

70 Cal. 169

PFISTER v. CENTRAL PAC. R. CO. (No. 9,326.)

(Supreme Court of California. July 19, 1886.)

1. CARRIERS—OF PASSENGERS—LUGGAGE.

The term "luggage," as in England, obtains in legal expression in the state of California, rather than the term "baggage."

2. SAME—"LUGGAGE"—MONEY.

Section 2181 of the Civil Code and adjudicated cases decide that money intended for trade, business, or investment, or for transportation, and not intended for the passenger while traveling, is not "luggage."

3. SAME—RIGHTS OF PASSENGER UNDER HIS TICKET OR CONTRACT.

A railroad ticket, entitling a person to transportation between points therein specified, in a first-class passenger coach, and to have his luggage, not exceeding 100 pounds, transported free of charge, gives such person no right to travel in a baggage, express, or freight car, but only in such passenger coach; and no right to transport, either at his own charge or that of the company, any merchandise or property not included in the term "luggage."

4. SAME—MESSENGER—ST. 1863-64, PAGE 344—COUNTY TREASURER.

A county treasurer is not a "messenger," within the meaning of St. 1863-64, p. 344, imposing upon railroads the duty of transporting messengers and others upon certain occasions.

5. SAME—EXPRESS FACILITIES—DUTY OF RAILROAD COMPANY.

Railroad companies are not required to furnish express facilities to all alike who demand them.

6. SAME—DUTIES OF, AS TO PROPERTY TO BE CARRIED.

The duty of a carrier is confined, as is provided in the Code of California, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."

Department 2.

W. H. L. Barnes, for respondent. J. J. Burt, for appellant.

SEARLS, C. This is an action to recover from the defendant, a corporation engaged in the business of a common carrier of passengers and freight for hire, by cars drawn over a railroad by steam-engines, damages in the sum of \$50,000, for refusing to carry certain treasure for plaintiff. Defendant interposed a demurrer to the complaint, which was sustained by the court, and judgment, upon refusal by plaintiff to amend, was entered in favor of defendant, from which judgment this appeal is taken.

It appears from the complaint that the plaintiff was the county treasurer of the county of Santa Clara, and as such it was his duty to pay over and deliver to the state treasurer, at Sacramento, California, certain funds due the state from him as such county treasurer. On the nineteenth day of January, 1883, plaintiff purchased from the defendant at San Jose, in the county of Santa Clara, for \$16, four first-class passenger tickets, entitling four persons to first-class passage from said San Jose to Sacramento. Furnished with these tickets, plaintiff and three employes, having with them \$91,952 in gold coin of the United States, contained in small leather satchels, which they carried in their hands, boarded a passenger train of defendant with such treasure, and were permitted by the conductor, who had knowledge of the contents of the satchels, to retain possession of and carry the same as far as Niles, a way-station on the railroad leading to Sacramento, where it became necessary to change cars, and take another train for the latter place. The conductor of the train from Niles refused to permit plaintiff and his employes to enter the passenger car with their treasure, and required plaintiff, if he desired to carry said money to Sacramento, to deliver the same to Wells, Fargo & Co., an express company, engaged as common carriers for hire in the business of carrying treasure, and that class of goods known as "express matter," over the railroad of defendant, from San Jose to Sacramento, and to which company defendant had given the exclusive privilege of carrying money upon its trains from San Jose to Sacramento, so far as such money exceeded such sums as might be carried by a passenger traveling on its trains.

Defendant had provided accommodations for Wells, Fargo & Co. in a baggage car; had not provided any special cars for persons generally having money to carry to Sacramento; and all such persons, under the rules and regulations of defendant, were obliged to give up to Wells, Fargo & Co., for transportation, all money outside of that which they could carry as passengers. Plaintiff at first refused to surrender his money to Wells, Fargo & Co., and insisted that he and his employes had a right to go into some car of the train without any extra charge for carrying the money beyond their regular passenger fare; but at the same time told the conductor that rather than be left at Niles, or give up the custody of his treasure to Wells, Fargo & Co., he would go into the baggage or any other car of defendant which might be designated, and would pay to defendant any charges which might be exacted for the transportation of the money,—all of which was refused; and plaintiff thereupon, to avoid being left at Niles, delivered the money to the express company for transportation to Sacramento, paying for such transportation the sum of \$68.95.

The money which plaintiff was carrying was funds which he, as county treasurer, had received and was conveying to Sacramento to pay over to the state treasurer,—being due from him, in his official capacity, to the state of California; and his employes were taken along as guards of said money, and to aid in carrying the same,—all of which was known to defendant. It had

been the custom of the defendant for 10 years prior to January 19, 1883, to permit the county treasurer to carry like money in like satchels, upon its passenger trains, free of charge, and no notice was given to plaintiff of any change in such custom. At the date when said money was carried to Sacramento the defendant did not receive and transport money as freight; did not permit persons to travel on its freight trains, and carry money as freight; would not check and carry the same as baggage on its passenger trains; and would not have received said money for transportation as freight, baggage, or otherwise; and the only way by which the plaintiff could have transported his money to Sacramento by said railroad was by carrying it himself, or by delivering it to Wells, Fargo & Co. for transportation, as required by defendant.

The complaint further proceeds to show, in apt language, that the defendant is subject to, bound by, and, by express agreement duly filed, has accepted and is bound to execute on its part, the duties, and discharge the obligations, imposed by an act of the legislature of the state of California approved April 4, 1864, entitled "An act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this state for military and other purposes, and other matters relating thereto;" and showing that the railroad from San Jose to Sacramento is a portion of the railroad to which said act of the legislature is applicable.

The defendant was a common carrier of passengers and freight between San Jose and Sacramento, and, upon receiving the reasonable and customary payment therefor, it was its duty to receive and carry upon its passenger trains all persons desiring to travel thereby, with a reasonable amount of luggage for each passenger, without charge, except for an excess of weight over 100 pounds. Civil Code, § 2180. "Luggage may consist of any articles intended for the use of a passenger while traveling, or for his personal equipment." Civil Code, § 2181. "The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property." Civil Code, § 2182. A common carrier by railroad must check and carry, in a regular baggage car, the luggage of passengers over his road, and must deliver such luggage immediately upon the arrival of the passenger at his destination; and whenever passengers neglect or refuse to have their luggage so checked and transported, it is carried at their own risk. Civil Code, § 2183.

The question of whether money can or cannot be treated as luggage has been frequently determined by the courts, and, usually, to the effect that, except as to such limited amount as may be necessary for personal use to defray expenses of the passenger, it is not luggage. *Orange Co. Bank v. Brown*, 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 459; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Smith v. Boston & M. R. R.*, 44 N. H. 325; *Cincinnati & C. A. L. R. Co. v. Marcus*, 38 Ill. 219; *Michigan Southern & N. I. R. Co. v. Oehm*, 56 Ill. 293; *Jordan v. Fall River R. Co.*, 5 Cush. 69; *Hawkins v. Hoffman*, 6 Hill, 586; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Hutchings v. Railroad Co.*, 25 Ga. 61.

Some of the cases cited *supra*, hold that neither money nor merchandise are included in the term "baggage." We do not find it necessary, however, to decide that precise point in this case. The terms "baggage" and "luggage" signify one and the same thing. The former is the term in general use in the United States, while in England the latter prevails. Our Code has adopted the English expression.

We think it clear, alike from section 2181 of the Civil Code and from adjudicated cases, that money intended for trade, or business, or investment, or, as in this case, for transportation, and not intended for the use of the passenger while traveling, is not luggage. It follows that plaintiff and his employes had no right to transport, as luggage, the money in question upon the passenger and express train of defendant.

The right of plaintiff as a passenger must be determined by the contract he made with defendant. He purchased four first-class passenger tickets from San Jose to Sacramento, which entitled him and his three employes to transportation in the first-class passenger coaches of defendant between the points indicated, and gave to them a right to have their luggage, not exceeding 100 pounds to each person, transported at the same time free of charge. It gave to them no right to travel in a baggage, express, or freight car, but in the regular passenger car or cars of the defendant; and the contract gave to them no right to transport, either in their own charge or that of the defendant, any merchandise or property not included in the term "luggage." The law takes no note of what property a passenger carries upon his person, but beyond this he may not, by virtue of his contract for passage, carry, either free of charge or by paying an extra charge, property not included within the import of the term "luggage." Were it otherwise, it would be within the power of the passenger to convert the passenger coaches of a railroad company into vans for the transportation of merchandise, or to compel the carrier to do much the same thing by furnishing baggage cars for the conduct of ordinary freight. The orderly and expeditious transit of passengers and their baggage renders it necessary and proper for the carriers engaged in their transportation to run separate trains for their accommodation, or, at least, to furnish and transport them in cars separate from those devoted to the carriage of freight; and this result can only be accomplished by requiring the carrier, on the one hand, and the passenger upon the other, to refrain from making passenger cars the receptacle for merchandise.

Plaintiff must be presumed to know the legal effect of the contract he had made, and to be subject to its terms, conditions, and limitations equally with the defendant. The fact that for 10 years the defendant had permitted the county treasurers of Santa Clara county to carry with them, upon its passenger trains, the money which they were by law required to pay over to the state treasurer, neither enlarged nor abridged the contract between it and plaintiff. If defendant was not legally bound to extend this favor, its liberality to others, or to plaintiff himself, could not be urged as a binding rule for the continuance of such practice.

The theory of plaintiff that, by having accepted him as a passenger with knowledge of the money he had with him, the defendant became a common carrier of him and his money, though he retained possession of the latter, is not sustained by the authorities cited. *Minter v. Pacific R. R.*, 41 Mo. 504; *Butler v. Hudson R. R. Co.*, 3 E. D. Smith, 571; *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; and *Hannibal R. R. v. Swift*, 12 Wall. 262,—were all cases in which the property was delivered to the carrier; and, although not baggage, it was held that, having received it with knowledge that it was not the ordinary traveling baggage of the passenger, the liability of a common carrier attached.

We are clearly of opinion that the defendant was under no obligation, by virtue of its contract of passage with plaintiff as an individual, to permit him to carry with him in its passenger car the sum of money indicated, in the manner indicated, and weighing, as it must have done, between 300 and 400 pounds. Whether, independent of contract, the defendant was or was not, as a common carrier, in duty bound to receive and transport the money of the plaintiff, depends upon other considerations affecting such duty, and will be considered hereafter.

But appellant contends, *second*, that if, as a private citizen, the treatment of plaintiff would have been right, still, as the treasurer of the county of Santa Clara, with money belonging to the state, to be paid into the state treasury, he occupied a different position, and was, as such treasurer, entitled to take the money to Sacramento, the capital of the state, and official residence of the state treasurer. As county treasurer, it was his duty to

safely keep the public funds in his custody, and, at stated intervals, to settle with the comptroller, and to pay over in cash to the state treasurer the sum found due to the state. This duty presupposes the necessity of a visit in person at Sacramento, and the delivery there of the amount due the state, and the county treasurer is responsible personally, and upon his official bond, until the money is so paid.

The defendant, if within the purview of the act of April 4, 1864,—and under the allegations of the complaint, which are to be taken as true, we shall so regard it,—was bound, in consideration of certain obligations assumed by the state of California, and of certain privileges extended to it, to “transport and convey over their said railroad all public messengers, convicts going to the state prison, lunatics going to the state insane asylum, materials for the construction of the state capitol building, articles intended for public exhibition at the fairs of the state agricultural society, and in case of war, invasion, or insurrection, as well as at all other times, also transport and convey over their said railroad all troops and munitions of war belonging to the state of California, free of charge, and without any other compensation than as herein provided.” St. 1863-64, p. 344. If plaintiff was entitled to a free passage, or to carry the money in question, under this law, it must have been because he was a *public messenger*.

A “messenger” is defined by Webster to be “one who bears a message or an errand; the bearer of a verbal or written communication, notice, or invitation from one person to another, or to a public body; an office servant.” The term, by its fair import and significance, does not apply to a public officer, acting in an original capacity, in the discharge of duties imposed upon him by law; but presupposes a superior in authority, whose servant the messenger is, and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior. If a county treasurer is to be treated as a public messenger, we see no good reason why legislators and state officers, having enjoined upon them duties requiring their presence at the state capital, may not, with equal propriety, be entitled to free conduct as “public messengers.”

Under the nineteenth section of the twelfth article of our state constitution, “no railroad or other transportation company shall grant free passes, or passes or tickets at a discount, to any person holding an office of honor, trust, or profit in this state; and the acceptance of any such pass or ticket by a member of the legislature, or any public officer other than railroad commissioner, shall work a forfeiture of his office.” We do not think the term “public messenger,” as used in the act in question, applied to or conferred any rights upon the plaintiff as county treasurer of the county of Santa Clara.

It only remains to inquire whether or not defendant, as a common carrier, was derelict in duty in refusing to permit plaintiff, upon offer of compensation therefor, to carry his money in the baggage car as freight,—he retaining the custody thereof; such car being used by Wells, Fargo & Co. as a receptacle for its express matter by consent of the defendant. Defendant was, at the date of the alleged refusal, according to the averments of the complaint, “engaged in and carrying on the business of a common carrier of passengers and freight for hire, by cars,” etc., “over its railroad.” “A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.” Civil Code, § 2169. “A common carrier must not give preference, in time, price, or otherwise, to one person over another,” etc. Civil Code, § 2170.

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered. That class of carriers known as “transfer companies,” engaged in receiving and transferring the baggage of

passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property "*of a kind that he undertakes or is accustomed to carry.*"

The defendant did not undertake—that is to say, did not promise or agree—to carry defendant's money. Indeed, it was not asked to do so, except to permit the plaintiff to retain charge of and carry it in the car; and there is nothing in the complaint showing, or tending to show, that defendant was *accustomed to carry, or ever did carry, or offer to carry, money as freight or baggage*. On the contrary, the express averments of the complaint are to the effect "that the defendant has always refused to receive money as freight for transportation" over this route, or to allow any person to travel and carry money on its freight cars, or to check and carry money as baggage on its passenger cars.

The problem is therefore practically narrowed to a consideration of this question: Defendant had accorded to Wells, Fargo & Co. the privilege of carrying in its baggage car property of the same kind with that possessed by the plaintiff, and of retaining possession thereof while in transit. Under the circumstances presented by the complaint, was it the duty of defendant to extend like facilities to the plaintiff?

The express business, as understood and carried on in the United States, is said to have been inaugurated by Alvin Adams in the year 1839. It at first involved the carriage of small packages of value between important cities; and, proving convenient to the public and remunerative to those engaged in the business, it gradually expanded in volume and importance, until upon all the great thoroughfares of the country, whether by land or water, one or more companies was to be found engaged in the receipt, carriage, and delivery of property, varied in character, and including that of great value in small compass, articles requiring special care to protect them from injury or theft, perishable goods requiring speedy transit and immediate delivery, and a variety of others, all known as "express matter." The business has continued to increase until it has become a prime factor in satisfying the wants of advancing civilization, and has demanded and received from transportation companies the facilities essential to its importance and successful execution. Among these are the allotment of express cars, and space in baggage cars attached to passenger trains, for the speedy transportation of this class of freight by railroad companies, and the transportation of messengers, the employes of the express companies, in whose custody and possession the property is retained during transit. The duties of railroad carriers are confined to the receipt, carriage, and delivery of such freights as are appropriate to such a mode of transportation; and, in the absence of some special provision in their charter, or in the law under which they are organized, railroad companies are not bound, as carriers of property, to receive and carry money, gold or silver bullion, bonds, bank-notes, jewelry, valuable papers, or other property not appropriate to the mode of transportation in vogue by such companies. *Southern Exp. Co. v. Nashville, etc., Ry. Co.*, 20 Amer. Law Reg. 596; S. C. 2 Fed. Rep. 465.

Doubtless the growth and expansion of the express business is largely due to the fact that its successful conduct calls for the exercise of powers, and furnishing of facilities, not possessed in any ample degree by railroad carriers. Be this as it may, the express business, as was said in *Southern Exp. Co. v. Nashville, etc., Ry. Co.*, 20 Amer. Law Reg. 598, S. C. 2 Fed. Rep. 465, "is only second in importance to railroad transportation; and that the express business has so interwoven itself into the present methods that it

cannot be dispensed with without producing an abrupt and disastrous revolution in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity. * * * It has attained its present enlarged usefulness under the fostering care of the railroads themselves. * * * The right of the public to have quick, reliable, and safe carriage of goods, through expressmen, has been recognized for forty years. This general recognition by the public, and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage."

The carriage of such freights for express companies is demanded by the wants of the public, and is in the strict line of railroad duty.

An application of the principle which involves the duty of railroad companies to avail themselves of the discoveries of modern science and skill for the safe and speedy transportation of passengers and freight may well require them to so adjust their facilities for accommodating the public that its advancing wants may be supplied, and the mutual interests of all parties may be subserved.

The defendant has recognized and discharged this duty so far as to accord to Wells, Fargo & Co. all necessary facilities for conducting an express business over its railroad. Having thus provided for the accommodation of the public with express facilities, the contention of defendant is that the full measure of its duty is discharged, and that to require it to extend to each individual who may apply, and be willing to pay therefor, like facilities, would, owing to the peculiar requirements demanded, be subversive of legitimate trade, impose upon defendant burdens not easily borne, and in nowise benefit individuals demanding such privileges.

It does not appear from the complaint that the sum charged by Wells, Fargo & Co. for the transportation of his money was in excess of the value of the service rendered, or in excess of the sum which might reasonably have been exacted from him by defendant had it permitted him to retain possession of his money, and to travel with it in the baggage car devoted in part to express matter. If, therefore, plaintiff has been injured and damnified, it must be upon the principle that he, in common with all other persons, had a right to possession of his property while in transit, and to all the privileges and facilities extended to the express company for the transportation of like property.

This question was involved in three cases recently presented to the supreme court of the United States, and decided by that tribunal, known as the "*Express Cases*," and severally entitled, *St. Louis, I. M. & S. Ry. Co. v. Southern Exp. Co.*, *Memphis & L. R. R. Co. v. Same*, and *Missouri, K. & T. Ry. Co. v. Dinsmore*, 25 Amer. Law Reg. 274; S. C. 6 Sup. Ct. Rep. 542, 628, 1190. These causes were each brought by an express company against a railway company to compel the latter to afford it the same express facilities it had formerly enjoyed under a contract then abrogated. The several circuit courts from which the cases were appealed had each entered a decree in favor of the express companies, in which it was held, among other things:

"(1) That the express business * * * is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steam-boats and railroads.

"(2) That it has become the law and usage, and is one of the necessities, of the express business that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messenger or agent of such express company.

"(3) That to refuse permission to such messenger or agent to accompany such property on the steam-boats or railroads on which it is to be carried, and to deny to him the right to the custody of the property while so carried,

would be destructive of the express business, and of the rights which the public have to the use of such steam-boats and railroads for the transportation of such property so under the control of such messengers or agents."

"(7) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same terms, that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains."

The supreme court, in the opinion delivered by Chief Justice WAITE, reviews the growth and importance of the express business; recognizes the fact that it could not be destroyed without interfering materially with business and the conveniences of social life; refers to the fact that railway companies recognize the right of the public to demand transportation facilities, by the railways which the public has permitted to be created, of that class of freight known as "express matter;" and then proceeds to show the inconveniences that would follow were the railroad companies obliged to furnish express facilities to all applying for them, its interference with passenger traffic, and concludes that "the railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodation. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." And holds that in the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish express facilities to all alike who demand them.

The inconveniences which would follow from requiring railroad companies to extend equal express facilities to all persons, companies, and corporations regularly engaged in the express business, would be multiplied beyond measure were they, either with or without previous notice, required to furnish like accommodations to each individual who might at any time, and for a single trip, see fit to demand them.

Railroad companies owe important duties to the public, the discharge of which, in their letter and spirit, should be rigorously enforced by every department of the government to which authority in the premises is delegated; but to uphold the claim of plaintiff would establish a principle onerous to railroad companies, and at the same time detrimental to the speedy and orderly conduct of a branch of the carrying trade in which the public is most concerned.

We are of opinion the demurrer to plaintiff's complaint was properly sustained, and that the judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 430

NATIONAL BANK OF D. O. MILLS v. PORTER and others. (No. 11,036.)

(Supreme Court of California. July 20, 1886.)

PRINCIPAL AND AGENT—CONSIGNEE—LIEN AGAINST NOMINAL CONSIGNOR.

A party having consigned goods of another in his own name, and *bona fide*, in order to accommodate such other party, does not so give a character of his own ownership to the goods as to render them subject to a lien for past advances in favor of the carrier.

Department 1.

Freeman & Bates, for respondent. Hart & White, for appellants

Ross, J. In respect to the *bona fides* of the sale by Brewer & Co. to Cooke & Co., who were plaintiff's assignors, the jury were fully instructed by the court below, and their verdict includes a finding to the effect that the sale was a valid one. As the evidence is sufficient to sustain the verdict in that regard, we must take it that Cooke & Co. acquired the title to the grapes, the net proceeds of which form the subject of the present action.

It is urged, however, by the defendants, who are the appellants here, that the title acquired by Cooke & Co. was subject to a lien in defendant's favor upon the grapes, to pay a general balance due them from Brewer & Co., the amount of which was greater than the net proceeds realized upon the sale of the property. It is not claimed that defendants, who were factors, and whose principal place of business was in the city of Chicago, made to Brewer & Co. any advances upon the particular car-load of grapes in controversy, but one of the defendants testified at the trial that the firm of Porter Bros. had, for a number of years prior to the transaction in question, been in the habit of doing business for Brewer & Co. in Chicago under an arrangement by which Brewer & Co. were to ship them grapes to be sold on commission for the account of B. & Co., and Porter Bros. were to make to Brewer & Co. such advances from time to time as they (Porter Bros.) should think the product would bear. There was no understanding as to the amount of grapes that were to be so shipped, but Brewer & Co. "were to ship, as a rule, all that the market would take, and all that they could get."

As applicable to this testimony counsel for defendants requested the court to give the jury this instruction: "The jury are instructed that, if there was a general understanding between the defendants and M. T. Brewer & Co. that the defendants would make advances to said M. T. Brewer & Co., and that M. T. Brewer & Co. would make shipments of grapes to them, which they would sell, and apply the proceeds to the payment of such advances, then the defendants would have a lien upon the grapes shipped to them by said M. T. Brewer & Co. for the payment of such advances, which lien would attach at the moment said grapes were delivered to the railroad company to be shipped to said defendants, and it is not necessary that advances be made upon the particular car load which is the subject of this litigation, to create such a lien."

The court refused to give this instruction, but, to the contrary, instructed the jury to the effect that defendants would have no lien for former advances until they had gotten possession of the property, and that "for the purpose of that lien the goods would not be considered in their possession from the mere fact that they were delivered on the car under a bill of lading in which Porter Bros. were named as consignees."

The action of the court in each particular was excepted to by defendants' counsel, and constitutes the chief ground of the appeal.

The case shows that the grapes were shipped to defendants in the name of Brewer & Co., to whom a bill of lading was issued by the railroad company; but it also shows that they were so shipped at the request of Cooke & Co., for the reason that Brewer & Co. had a yearly guaranty with the railroad company which exempted them from a rule requiring payment of freight in advance on shipments of fruit. The case further shows that Brewer & Co. wrote to defendants by the same train that carried the grapes that, although shipped in their name, they were the property of Cooke & Co., for whose account they were to be sold; and Cooke & Co. also advised defendants of the same fact, inclosing them at the same time the bill of lading, which was properly assigned to them by Brewer & Co. as soon as issued by the railroad company.

Upon this state of facts we think it clear that defendants did not acquire a lien upon the property for the balance due them by Brewer & Co., and that the court below was right in refusing to give the instruction requested by

defendants. They did not acquire a lien, for the reason, among other reasons, that Brewer & Co. did not own the property when it was delivered to the carrier, nor at any time afterwards. Defendants advanced nothing upon the faith of any apparent ownership by Brewer & Co., growing out of the fact that the property was shipped in their name and the bill of lading issued to them. The reason for making the shipment in the way it was made has been stated, and defendants were promptly advised of the true owner. It is very clear that Brewer & Co. did not deliver the grapes to the carrier as their property, nor under the agreement they had with defendants. It is plain, therefore, that the latter did not acquire any lien for the advances previously made by them to Brewer & Co.

We see no prejudicial error in the record. Judgment and order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 206

LONG BEACH LAND & WATER CO. v. RICHARDSON and others. (No. 11,510.)

(*Supreme Court of California.* July 26, 1886.)

WATER AND WATER-COURSES—SEA SHORE—PRESUMPTION.

When the *locus in quo* is sea-shore abutting plaintiff's land, and the grant to the land is not put in evidence, in the absence of proof to the contrary the courts must presume that the said land of plaintiff extends only to high-water mark, (*U. S. v. Pacheco*, 2 Wall. 587,) and that the soil intervening between that and low-water mark is state property.

Department 2.

R. M. Widney and C. W. Pendleton, for appellant.

MCKEE, J. This was an action of forcible entry and detainer against the parties defendants, who were charged with having forcibly entered upon about 20 feet square of the sea-shore, of which, it was alleged, the plaintiff was in the exclusive possession at the time of the entry. The entry was made on the twenty-seventh day of July, 1885.

At the trial of the issues made by the pleadings in the case, the court granted a nonsuit upon the ground that the evidence was insufficient to prove actual and peaceable possession by the plaintiff of the *locus in quo* at the time of the defendants' entry thereon. Whether the court erred in nonsuiting the plaintiff on that ground is therefore the only question presented on the appeal.

From the case, as presented by the plaintiff, it appears that the land upon which the defendants entered is part of the sea-shore in front of a ranch, in Los Angeles county, known as the "Cerritos Ranch," which extends, from the San Gabriel river on the west, along the beach of the Pacific ocean for about two miles, to the boundary line of the Alamitos ranch. The plaintiff was in possession of that portion of the ranch lying immediately in front of the ocean, using the land as a sea-side resort, which, in the exercise of corporate powers derived from its articles of incorporation, it had established there two or three years before the entry complained of, and was known by the name of "Long Beach." In establishing this sea-side resort the company had the portion of the ranch which fronted the ocean surveyed and laid off in streets and blocks for residence purposes and public parks, and a map of the survey made, on which the streets were marked and named, and the blocks for residence purposes, subdivided into lots, were delineated and numbered. As designated on the map, the streets laid off in the direction of the ocean were not projected to the beach; they ended in a street which was laid off, parallel with the beach, on the upland, above the line of high tide, named on the map "Ocean Park Avenue." South of the avenue the beach extends irregularly. In the narrowest place it is about 300 feet to the line of

low-water mark; but it gradually widens out until it is about 800 feet,—more than a hundred feet of which from low-tide to high-tide lines is covered by the ordinary tides.

On the upland, a considerable distance inland from the beach, the company had built, and, at the time of the defendants' entry, occupied, a "fine hotel," and, on the beach below the upland, a bath-house of 16 rooms, near which were benches for the accommodation and use of patrons and visitors to the hotel; and in connection with this occupation it claimed, and in its corporate capacity exercised, the right to use and control the entire sea-shore frontage of the ranch for two miles—the tide-covered portion of it—as a public bathing place, and the portion uncovered by the tides as a driveway for carriages, which could be driven onto the beach from Ocean Park avenue through two or three places in the bluff, which had been cut down to admit of their passage to and from the beach. It had also passed a resolution declaring "that all lands lying south of the south line of Ocean Park avenue, at Long Beach, to extreme low water of the Pacific ocean, were reserved from sale and kept for the use of the company." In like manner it ordered its agent to prevent "campers" and other persons from taking possession of any part of the beach land by the erection of tents or bath-houses thereon, and to remove from it any such structures as might be put there by any person or persons for any purpose; and, from time to time, that had been done by the employees of the company.

This was the sum of the evidence given by the plaintiff as to its actual and peaceable possession of the beach at the time of the entry by the defendants.

The evidence was undoubtedly sufficient to prove such an exclusive possession of the ranch by the plaintiff as vested it with the right to maintain ejectment or forcible entry against persons who may have invaded the possession. But there was no evidence tending to show that the ranch included the sea-shore in front. The plaintiff did not put in evidence the grant to the ranch; and, in the absence of evidence to the contrary, the court below was bound, as this court is bound, to presume that the ranch went no further seaward than ordinary high-water mark. (*U. S. v. Pacheco*, 2 Wall. 587,) and that all the sea-shore fronting the ranch, lying between high and low water mark, was the property of the state, (section 670, Civil Code,) from which, so far as appears by the evidence, the plaintiff did not claim to have derived any right of possession.

Such being the case, the plaintiff did not, merely by its exclusive possession of the Cerritos ranch, acquire possession of any lands outside of the ranch lines; and the evidence shows that it had no actual possession of the beach in front of the ranch, except that part of it which was occupied by its bath-house and improvements; but these were 500 or 600 feet away from that part of the beach upon which the defendants entered and put up their bath-house. Where the defendants entered, the plaintiff had no actual possession. Their entry, although resisted by the servants of the plaintiff, was therefore not an invasion of the plaintiff's possession; and the plaintiff was not entitled to maintain the process of forcible entry or detainer against them. It follows that the plaintiff was properly nonsuited. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(70 Cal. 440)

AMER v. HIGHTOWER and others. (No. 11,252.)

(Supreme Court of California. August 25, 1886.)

1. SALE—FRAUD—OWNERSHIP NOT CHANGED—RATIFICATION OF SALE.

When a sale of personal property is procured by fraud, the ownership of the property is not changed, unless the seller in some way afterwards ratifies the sale.¹

2. SAME—SALE PROCURED BY FRAUD—REMEDIES OF PARTY SELLING.

The remedy of a party who has been induced to make a sale of personal property through fraud, is either trover or replevin in the *detinet*, or trespass or replevin in the *cepi*, at his election.

Commissioners' decision. Department 2.

Hatton & Fulkerth and *W. E. Turner*, for appellant, John Amer. *Wright & Hazen*, *L. W. Elliott*, and *Reddick & Solinsky*, for respondents, R. F. Hightower and others.

BELCHER, C. C. This is an action to recover the possession of certain personal property, or its value in case a delivery cannot be had, and damages for its detention. The answers deny all the allegations in the complaint.

At the trial the plaintiff was called as a witness, and testified in his own behalf. He was then asked, on cross-examination, if he had ever made a bill of sale of the property described in the complaint, and answered that he had. The bill of sale was shown to him, and he said "he signed it, but it was got out of him by lying." The bill of sale was then offered by the defendants and received in evidence; the material parts of it reading as follows:

"In consideration of the sum of \$2,055, to me in hand paid by R. F. Hightower, I do hereby sell and deliver to him," etc., (describing property.)

"In witness whereof, I have hereunto set my hand this eighteenth day of September, 1884. JOHN AMER."

On redirect examination, the witness was asked to state all the circumstances under which he gave the bill of sale. Counsel for defendants objected to the question, upon the ground that it was incompetent, irrelevant, and immaterial under the pleadings; that no fraud having been alleged in the complaint, and this being an action at law, the plaintiff was bound by the wording and language of the bill of sale, and could not vary, alter, or modify it by parol testimony. Counsel for plaintiff then offered to prove, by this witness and others, that the bill of sale was obtained from plaintiff by fraud, falsehood, and deceit on the part of Hightower and others; that no consideration had been paid for it; that he had never delivered the property, or any part of it, to Hightower, or any one else; that after discovering the fraud practiced upon him he immediately demanded that the bill of sale be returned to him, and refused to deliver the property; that Hightower promised to return the bill of sale, but failed to do so, and that he took the property from plaintiff's possession without his knowledge or consent; and that the other defendants were, at all times, fully aware and cognizant of all the facts of fraud and deceit under which the bill of sale and possession of the property were obtained by Hightower. The court sustained the objection, and refused to allow any such testimony in the case, and the plaintiff duly excepted. Thereupon both parties rested, and the court instructed the jury to return a verdict for the defendants. The plaintiff appeals from the judgment, and from an order denying him a new trial.

Several points are made by the appellant, but the only material one relates to the rulings of the court upon the offered testimony. Those rulings were based upon that part of section 1962 of the Code of Civil Procedure which reads as follows: "The following presumptions, and no others, are deemed

¹See note at end of case.

conclusive: * * * (2) The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration."

It is claimed for the respondents that, under this section, the recital in the bill of sale, that the plaintiff does "hereby sell and deliver" to the defendant the property, is conclusive upon him, and not subject to be disputed except by a suit in equity to set aside the bill of sale. In our opinion, the claim is not supported by reason or authority. The rule is well settled that, when a sale of personal property is procured by fraud, the ownership of the property is not changed unless the seller in some way afterwards ratified the sale.

In *Ash v. Putnam*, 1 Hill, 303, Judge COWEN states the rule as follows:

"When a sale is procured by fraud, no title passes to the vendee. The vendor still retains his right in the goods, unless, after discovering the fraud, he assented to and ratified the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent;" and he cites *Root v. French*, 13 Wend. 570.

The same doctrine is reasserted in *Cary v. Hotailing* and in *Olmsted v. Hotailing*, 1 Hill, 311, 317.

In *Masson v. Bovet*, 1 Denio, 73, Judge BEARDSLEY says: "Fraud destroys the contract *ab initio*, and the fraudulent purchaser has no title;" citing *Chit. Cont.* (Amer. Ed. 1842) 406, 678-681. See, also, *Hodgeden v. Hubbard*, 18 Vt. 504.

In *Thurston v. Blanchard*, 22 Pick. 18, SHAW, C. J., held that, "if a purchase of goods is effected by means of fraudulent representations on the part of the vendee, the vendor may maintain trover for the goods against the vendee, without a previous demand."

In *Benj. Sales*, (2d Ed.) 342, speaking of a sale which the vendor has been fraudulently induced to make, it is said: "This contract is *voidable* at the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in *assumpsit* for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it."

In *Butler v. Collins*, 12 Cal. 457, which was an action to recover damages of the defendant as for a trespass and conversion of goods, this court reviewed the authorities, and announced the law to be that "the ownership of goods is not changed when the claim to such ownership is based upon a fraudulent contract." It was held that when the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods under the representation that it was only to serve as a temporary security for the compliance by the plaintiff with an engagement to furnish certain securities on previous indebtedness, and at *this time* intended to refuse to receive such security, or give plaintiff the advantage of such new contract, the possession of the goods thus obtained was fraudulent and the bill of sale void. "It is as much a trespass," the court said, "to take possession under such circumstances as without color of contract." And it was further said: "This being so, the civil remedies of the party defrauded are clear, viz., trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, at his election."

The testimony offered and rejected was to the effect that the bill of sale and the possession of the property were obtained from the plaintiff by fraud and misrepresentations, and that as soon as he discovered the fraud he repudiated and rescinded the sale. This was competent testimony, and should have been received. The rule above stated has not been changed by the Code. Fraud vitiates a sale now, as it did before the Codes were passed, nor have the remedies been changed.

It follows that the section of the Code of Civil Procedure, upon the supposed authority of which the rulings were made, has no application to the case, and

the judgment and order should therefore be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

NOTE.

SALE PROCURED THROUGH FRAUD—TITLE TO PROPERTY. Where a sale has been procured through fraud, notwithstanding the actual or constructive delivery of the property to the purchaser, he acquires no title to it, *Lee v. Simmons*, (Wis.) 27 N. W. Rep. 174; *Carl v. McGonigal*, (Mich.) 25 N. W. Rep. 516; *Oswego Starch Factory v. Lendrum*, (Iowa,) 10 N. W. Rep. 900; *Rodliff v. Dallinger*, (Mass.) 4 N. E. Rep. 805; *Doane v. Lockwood*, (Ill.) 4 N. E. Rep. 500, and note; *Alexander v. Swackhamer*, (Ind.) 4 N. E. Rep. 433; or, at most, a title defeasible at the election of the seller on discovering the fraud, *Kraus v. Thompson*, (Minn.) 14 N. W. Rep. 266; *Goodwin v. Wertheimer*, (N. Y.) 1 N. E. Rep. 404.

The original owner of goods so obtained may replevy them from the party in whose possession they may be, even from an officer who has taken them by virtue of an attachment, *Oswego Starch Factory v. Lendrum*, (Iowa,) 10 N. W. Rep. 900; or of an execution, *Doane v. Lockwood*, (Ill.) 4 N. E. Rep. 500; from an assignee for the benefit of creditors, *Lee v. Simmons*, (Wis.) 27 N. W. Rep. 174; *Goodwin v. Wertheimer*, (N. Y.) 1 N. E. Rep. 404; and from a purchaser in good faith, *Alexander v. Swackhamer*, (Ind.) 4 N. E. Rep. 433. But see, to the contrary, *Perkins v. Anderson*, (Iowa,) 21 N. W. Rep. 696.

As to the right of stoppage *in transitu*, see *Symms v. Schotten*, (Kan.) 10 Pac. Rep. 828, and note, 832; *Hall v. Dimond*, (N. H.) 3 Atl. Rep. 423, and note; *The E. H. Pray*, 27 Fed. Rep. 474, and note, 476.

70 Cal. 211

TEMPLE and others v. SUPERIOR COURT OF LOS ANGELES Co. (No. 11,583.)

(Supreme Court of California. July 26, 1886.)

MANDAMUS—To COMPEL COURT TO HEAR CHARGE OF CONTEMPT.

Mandamus will lie, within section 1210, Code Civil Proc., to compel a superior court to entertain a charge of contempt of court after such court has declared its own want of jurisdiction.

Department 2.

Glassell, Smith & Patton, for petitioners, Temple and others. *James M. Dawson*, for respondent, Superior Court of Los Angeles Co.

THORNTON, J. This is an application for a writ of mandate to compel the superior court of Los Angeles county, Judge W. A. CHENEY presiding, to hear a charge of contempt of court made against one B. Newman, which that court had refused to hear, and has dismissed on the ground of want of jurisdiction. We have examined the record, and are of opinion that the matter is within the jurisdiction of the court. The facts stated bring the case clearly within section 1210, Code Civil Proc., and, under such circumstances, the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it.

The prayer of the petition should be granted; and it is so ordered.

We concur: MCKEE, J.; SHARPSTEIN, J.

70 Cal. 226

ANDERSON and others v. BLACK and others. (No. 11,819.)*(Supreme Court of California. July 27, 1886.)***1. TRIAL—FINDINGS—EQUITABLE POINT—ISSUE.**

A defendant cannot complain that the court made no finding upon an equitable point involved in the cause, when, by his own neglect to meet such point in his answer, no issue thereon has been raised.

2. WITNESS—CROSS-EXAMINATION—QUESTION NOT RESPONSIVE.

A question put in cross-examination as to a "side-line monument," not mentioned in the examination in chief, to a witness examined upon a certain map in evidence, is not responsive to such examination in chief.

3. EJECTMENT—INSTRUCTIONS TO JURY—BAD INSTRUCTION.

In an action to recover possession of a mine, an instruction informing the jury, as a matter of law, that the mere fact that the locators did not place a monument at a certain corner of the claim they intended to locate would be fatal to the plaintiffs' right of recovery, when, according to all facts in evidence, the location was distinctly marked, so that its boundaries could be distinctly traced, would be in contravention of the statute, and would invade the province of the jury.

Commissioners' decision. Department 1

H. C. Kolfe, for respondents, *Anderson and others. Byron Waters and W. A. Harris*, for appellants, *Black and others.*

FOOTE, C. This action was instituted for the purpose of recovering the possession of specific real property, a mining claim, with damages for the withholding thereof, and for a temporary injunction pending the action. The verdict of the jury was in favor of the plaintiffs, for the recovery of the possession of the property sued for, without damages. It does not appear from the record whether or not any injunction had been granted. From the judgment rendered in the cause, and an order refusing a new trial, the defendants appeal.

The first point made by them is that the cause was one which involved equitable matters, as well as those of law, and that the court entered its judgment upon the general verdict of the jury, without any findings. The only matters of fact which were set up in the complaint as equitable in their nature, and entitling the plaintiffs to a temporary restraining order pending the action, were set up in the fifth paragraph of the complaint. Those allegations were the only basis upon which a temporary injunction was claimed against the defendants, and were to the effect that the latter were continuing, and threatening to continue, to mine and extract ores and valuable metals from the plaintiffs' alleged premises; yet they were not denied in the answer. The only effort made in that direction was a denial that the defendants had extracted ores or valuable metals from the premises sued for, to the plaintiffs' damage. Thus no equitable issue was raised by the pleadings upon which it became the duty of the court to make a finding.

But that tribunal, it is urged, erred in sustaining the plaintiffs' objection to a question, upon cross-examination, put to the witness Silver by the defendants' attorney. The question was this: "Please point out, with reference to that excavation, [on plaintiffs' map,] where that side-line monument is." The objection was that it was not responsive to the examination in chief. It appears that the witness had testified in chief to nothing indicating the existence of any side-line monument. The action of the court in the premises, therefore, was proper.

The defendants afterwards called this witness as their own, and proved the location of side-line monuments, so that they suffered no detriment. Nor in his examination in chief had this witness said anything about monument No. 1, and the objection made to the cross-question put to him, "Was there a notice in No. 1?" was properly sustained.

Another question which, it is claimed, should have been allowed to be answered by the witness Anderson was: "I would like to know if you did not, in the month of December last, go upon this ground, where they were in possession working peaceably, with shotguns in the night-time, and take forcible possession?" The reason of its being regarded as a proper question by the defendants is that the witness had been inquired of if he entertained any bias or ill will towards the defendants, and that he had replied, "No, sir; I do not, except one;" and that, therefore, as tending to show the state of mind of the witness as biased against the defendants, it was proper to show an act of violence done towards them by the witness. Upon the other hand, the plaintiffs contend that to have allowed the question would have been to permit the credibility of the witness to be assailed by proof of a particular wrongful act on his part, and would have been in violation of section 2051, Code Civil Proc.

If it had clearly appeared that by putting that question an attempt was being made to attack the credibility of the witness by showing him to have committed such a wrongful act as is meant by the section of the Code of Civil Procedure, *supra*, the action of the court would have been correct; but it seems evident from the record that the cross-examination, of which the question was a part, was for the purpose, not of exhibiting the witness to the jury as one unworthy of belief because of the commission of a crime or unlawful act, but as one who, if he had taken part in a violent demonstration against the defendants, of the kind designated in the language of the query put to him, might perhaps have been thought by the jury to be biased, or to entertain ill will against the defendants. And in this point of view it is not deemed by us to have been an improper question, "as it is perfectly well settled that on cross-examination a witness may be interrogated as to any circumstances which tend to impeach his credibility by showing that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party." *People v. Benson*, 52 Cal. 381. But as the witness had, by his answer to a previous question, already admitted bias or ill will to exist on his part as to one of the defendants, and was confessedly a party to the suit whose interest was adverse to that of the defendant, we do not see how any injury resulted to them from the question not having been answered. If the witness had admitted the facts to exist as intimated by the question, he could not have appeared to the jury by such act to have been more unworthy of belief, because of bias or ill will, than he had already confessed himself to be; for he was just as likely to be influenced, in giving his testimony in the cause, from ill will towards one as all of the defendants, and his interest in the suit as against them all was an undisputed fact in evidence.

It is contended by the defendants, also, that the court erroneously refused to give an instruction asked by them, as follows: "If the jury find from the evidence that McBride and Silver, intending to locate the mining ground claimed by plaintiffs, erected monuments upon the south-west, north-west, and north-east corners thereof on the fifth day of April, 1881, but that they did not erect any monuments at that time to designate the south-east corner of the claim, and that, prior to the erection of such monument marking the south-east corner of said claim, Covington and Davis located the Nellie Gray claim, and erected monuments thereon whereby the boundaries thereof could be readily traced, then you will find for the defendants." This instruction, if given, would have informed the jury, as a matter of law, that the mere fact that the locators did not place a monument at a certain corner of the claim they intended to locate, would be fatal to the plaintiffs' right to recover, even although it should appear from all the evidence in the cause that the location was so distinctly marked on the ground as that its boundaries could be readily traced. Therefore the instruction was properly refused, as being in contra-

vention of the statute, and invading the province of the jury, by instructing them upon the weight of evidence. Section 2324, Rev. St. U. S.; *Taylor v. Middleton*, 8 Pac. Rep. 594.

Another point made is that the evidence was insufficient to justify the verdict. As the jury arrived at their conclusion in the case upon conflicting testimony, we do not think their verdict should be disturbed.

It is further insisted upon, as a reason for the reversal of the judgment and order, that the proof showed the claim to have exceeded 1,500 feet in length. This point was not raised on the trial, either in a motion for a nonsuit, upon instructions to the jury, or in any other way brought to the attention of the court or counsel; and it cannot be successfully urged for the first time here. *McDonald v. Bear River & A. W. & M. Co.*, 13 Cal. 238; *King v. Meyer*, 35 Cal. 646; *Stoddard v. Treadwell*, 29 Cal. 281.

For these reasons we are of opinion that the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed

70 Cal. 429

SANDERS v. LANSING. (No. 11,318.)

(*Supreme Court of California.* August 25, 1886.)

VENDOR AND PURCHASER—VENDOR HAVING NO TITLE—RECOVERY OF PURCHASE MONEY.

Where a party who has agreed to sell certain lands at a stipulated price, possession to be given on full payment, can give neither title nor possession, the purchaser is entitled to recover the amount paid as part of purchase money.¹

Department 1.

Freeman, Johnson & Bates, for respondent, Sanders. *T. J. Clunie and McKune & George*, for appellant, Lansing.

MYRICK, J. The defendant agreed with plaintiff to sell to him a tract of land at a stipulated price per acre, possession to be given on full payment. Plaintiff paid \$5,200, part of the purchase price. Defendant having failed to convey, this action was brought to recover the money paid. At the time of making the contract defendant was not in condition to give title,—the title being in other parties; nor has she since acquired the title. The defendant can give neither title nor possession. Under such circumstances the plaintiff is entitled to recover the money paid.

Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

¹ NOTE.

As to the purchaser's right of prepayment if the vendor cannot give title or possession, see *Stockholm v. Cheney*, (Mich.) 28 N. W. Rep. 692; *Goetz v. Walters*, (Minn.) 25 N. W. Rep. 404.

Where a contract for sale of land is rescinded by mutual consent, or by the vendor, the latter must restore whatever he has received, and the law implies his promise to do so. *Laboyteaux v. Swigart*, (Ind.) 3 N. E. Rep. 373; *Davis v. Strobridge*, (Mich.) 6 N. W. Rep. 205; *Benton v. Marshall*, (Ark.) 1 S. W. Rep. 201.

70 Cal. 212

PEOPLE *ex rel.*, etc., v. BUNKER. (No. 9,447.)

(Supreme Court of California. July 27, 1886.)

1. IMMIGRATION—CALIFORNIA COMMISSIONER—ACTION FOR MONEYS COLLECTED—DEFENSE—ESTOPPEL.

The commissioner of immigration of the state of California, having assumed to act under a statute, and collected moneys according to the letter of it, cannot, in an action against him to recover such moneys received by him, be heard to say that the statute is invalid.

2. SAME—DELIVERY TO TREASURER—INSTITUTION OF ACTION.

The fact that the party from whom the money was collected has instituted suit to recover it back, does not excuse the commissioner from handing it over to the treasurer as required by law.

3. SAME—FEES OF DEPUTIES—SECTION 2969, POL. CODE.

Section 2969, Pol. Code Cal., has an application even in cases where the money was collected before its passage.

Department 1.

The Attorney General and Langhorne & Miller, for the People. W. W. Morrow and H. G. Platt, for appellant.

MYRICK, J. Action to recover from the defendant moneys received by him, as commissioner of immigration, under section 2955, Pol. Code. The court below allowed the defendant for his salary and office expenses actually paid, and rendered judgment against him for the surplus, with damages and interest as specified in section 437, Pol. Code.

1. The defendant, having assumed to act under a statute of this state, and having collected moneys according to the letter of that statute, cannot be heard to say that the statute was in conflict with the constitution of the United States; that he was unauthorized to collect them; and that he was not bound to pay them over to the proper officer. Neither was he authorized to retain the moneys collected in excess of his salary and office expenses, if the proper authorities failed to provide a suitable lazaretto or lepers' quarter. In collecting the money he assumed to act as a state officer, and, as between him and the state, he is bound by that assumption. *Placer Co. v. Astin*, 8 Cal. 303; *McKee v. Monterey Co.*, 51 Cal. 275. So one who holds himself out as a public officer, or acts as an officer *de facto*, is estopped to deny that he is an officer *de jure*, even on a criminal prosecution for malfeasance in office. *State v. Stone*, 40 Iowa, 547; *Randall v. Dusenbury*, 63 N. Y. 645.

2. The court did not err in refusing to allow, as items of office expenses, sums not paid to deputies. It is true, section 2969 was added to the Political Code as a new section, after defendant received the moneys, but under that section there is full provision for compensation to the deputies if they are or shall be entitled thereto.

3. Under the statute, the defendant cannot retain the money because a person of whom money was collected has instituted an action against him to recover it. Having collected it, he should have let it take the regular course, viz., payment to the state treasury.

Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

(70 Cal. 286)

EDGAR and others v. STEVENSON. (No. 11,250.)

(Supreme Court of California. July 28, 1886.)

1. APPEAL—ERROR WITHOUT INJURY.

Error without injury affords no grounds for reversal.

2. TRIAL—BY THE COURT—REQUEST AS TO FINDINGS.

A party may not present certain findings to the court, and demand that they be found as facts in the case.

3. WATER AND WATER-COURSES—DIVERSION—INJUNCTION.

A party claiming a right to water privileges is not in a position to ask for an injunction to restrain another from diverting it, if such diversion affects only a surplus or overflow.

In bank.

Satterwhite & Curtis and *Byron Waters*, for respondents, Edgar and others.
H. M. Willis and *Rowell & Rowell*, for appellant, Stevenson.

THORNTON, J. This is an action for an injunction to restrain the diversion of water.

We cannot perceive that the defendant was injured by the refusal of the court below to allow him to file an amended answer. The matters averred in the amended answer might all have been proved under the answer originally filed. Error without injury affords no ground for reversal.

The defendant presented to the court certain findings, and asked the court "to find the same as facts in the case," which the court refused, and defendant excepted. That this is not error we consider clearly settled in this court by the cases of *Hidden v. Jordan*, 28 Cal. 304, and *Miller v. Steen*, 30 Cal. 402. See *Porter v. Woodward*, 57 Cal. 537, 538. It was held in *Miller v. Steen* that a party requiring a finding upon a particular point should specify the point, without dictating the terms of the finding. The right of the party is only to specify or suggest the point on which a finding is required. See cases above cited. For the above reasons we hold that the court below did not err in refusing to find as facts in the case the findings presented.

The evidence as to the issue whether there was a continuous water-course through the lands of plaintiffs was conflicting; and, in accordance with the well-settled rule of this court, there can be no reversal on the ground of insufficiency of the evidence to justify the finding on that point.

The court made the following findings:

"(1) That the plaintiffs are the owners and in possession of, and their grantors, ancestors, and predecessors have been all the time since March, 1859, the owners of and in the possession of, the land and premises described in the complaint herein.

"(2) That for more than twenty years immediately preceding the commencement of this action the plaintiffs, and their grantors, ancestors, and predecessors in interest, have cultivated the aforesaid land in orchard, vineyard, and usual annual crops, and are still so doing.

"(3) That there is, and has been from time immemorial, a natural stream of water, sometimes known as 'Little San Geronio Creek,' and sometimes called 'Edgar Creek,' which is the same that is designated in the complaint as 'Edgar Creek,' which has its source in the mountains northerly from said land of plaintiffs, and flows, in its natural course, to, upon, and across the aforesaid land of plaintiffs. Said stream, before it reaches said land of plaintiffs, sinks in the sand at several places, and rises again, and flows above the ground; but it is one continuous, well-defined stream and water-course until after it crosses and passes upon and over and across said land of plaintiffs.

"(4) That for many years last past, and prior to the diversion of the waters of the said stream by the defendant, as alleged in the complaint, and until

such diversion, the plaintiffs, their grantors, ancestors, and predecessors, have continuously appropriated and used all the water of said stream upon their said land and premises for domestic and household purposes, and irrigating their said land, except during times, very seldom occurring, of extraordinary high water or freshets, and the use of the whole thereof in its ordinary flow, and, with the exceptions aforesaid, has always been since so appropriated and used by plaintiffs, their grantors, ancestors, and predecessors, and now is necessary for the proper irrigation and cultivation of said land of plaintiffs, and for domestic and household use thereon.

"(5) That at the time the defendant diverted the waters of said stream, as alleged in the complaint, and ever since, until now, there has been and is flowing therein an unusually large quantity of water, by reason of the unusually heavy rains during the last winter and spring, and more than a sufficient quantity for the proper irrigation and cultivation of said land of plaintiffs, and for domestic and household or any beneficial use thereon, and sufficient for all such purposes over and above the amount of water diverted by the defendant.

"(6) That the water diverted by the defendant, as mentioned in the complaint, and also in the answer of defendant, is water of the stream described in the complaint, and designated therein as 'Edgar Creek,' and in the answer as 'Little San Antonio Creek,' and would, in its natural course, if not so diverted by defendant, flow down to and upon and across the said land of plaintiffs; and during the ordinary flow of the stream, to-wit, except during extraordinary high water, or freshets, the amount of water diverted by the defendant would naturally diminish the quantity flowing to and upon and across the land of plaintiffs, and thereby cause great injury to and destruction of the orchard trees, vines, and crops growing thereon, and great and irreparable damage to plaintiffs."

It will be observed that the court finds that for many years last past, and prior to the diversion of the waters of the stream in controversy by defendant, the plaintiffs, and those under whom they claim, have continuously appropriated and used all the water of said stream upon their lands and premises for domestic and household purposes, and for irrigating their land, except during times of extraordinary high water or freshets, and that the use of the whole *in its ordinary flow*, and with the exceptions aforesaid, has always been so appropriated and used by plaintiffs and those under whom they claim, and is necessary for the proper irrigation and cultivation of the land of plaintiffs, and for domestic and household use thereon.

By examination of finding 5, it will be observed that the defendant has not diverted any of the ordinary flow of the stream, but only during freshets, when the stream was swollen by reason of unusually heavy rains; and though such diversion was made by defendant, still sufficient was left for all the needs of plaintiffs, and all that was appropriated by them. It thus appears that the defendant has only diverted the surplus which was not used and not appropriated by plaintiffs. That the plaintiffs are not entitled to an injunction restraining defendant from using such surplus is sustained by the ruling in the following cases: *Brown v. Smith*, 10 Cal. 510; *Ortman v. Dixon*, 13 Cal. 39; *McKinney v. Smith*, 21 Cal. 374; *Nevada Co. & S. C. Co. v. Kidd*, 37 Cal. 313; and *Smith v. O'Hara*, 43 Cal. 375, 376.

The following observations, taken from the opinion of the court, speaking by SAWYER, C. J., in the case above cited from 37 Cal., are applicable here: "That the mere diversion or use of water by another is no injury to a party claiming, till he is in a position to use it himself, and even after he has acquired a right, during any cessation of his ability to use it, is settled by many cases. Nor is such diversion or use, or the diversion or use of any surplus beyond the amount which the claimant has ability to use, actionable. Thus, in *Brown v. Smith*, 10 Cal. 510,—an action for the diversion of water from

Brown's ditch, which had the prior right,—it was held that if 'Brown's old ditch, so called, was so filled with tailings during the winter season of 1857 that it was incapable of diverting any of the waters of Rabbit creek, then plaintiff cannot recover for loss of water from that ditch.' And, again, in *Ortman v. Dixon*, 13 Cal. 39: 'He was entitled to all whenever all was necessary for the mill; but, whenever the mill did not need or could not use it for its operations, the defendant could use it for his purposes.' *McKinney v. Smith*, 21 Cal. 381, recognizes the same principle."

The court below, in our judgment, found that defendant did not divert and never diverted any of the waters appropriated, used, or needed by the plaintiffs, and rendered a judgment enjoining defendant from using the surplus not appropriated, which he had a right to use. In this judgment it went beyond what was authorized by the findings. A judgment restraining defendant from using any of the waters of the stream at its ordinary flow would be proper under the findings.

The judgment should therefore be reversed, and the cause remanded, with directions so to modify the judgment as to restrain the defendant from diverting any of the waters of the stream referred to in said judgment at its ordinary flow. Ordered accordingly.

We concur: MORRISON, C. J.; MYRICK, J.; MCKEE, J.; SHARPSTEIN, J.

70 Cal. 254

FLANAGAN v. BROWN. (No. 11,164.)

(Supreme Court of California. July 23, 1886.)

PROMISSORY NOTE—INDORSEMENT TO AGENT TO COLLECT—COLLECTOR'S RIGHTS AFTER RELEASE.

The mere temporary custody which a collector has of a promissory note indorsed in blank does not place such collector in a position to dispute, as against his employer, the question of ownership, nor to deny the efficacy of a release from liability given by the owner to the obligor.

Commissioners' decision. Department 2.

P. Z. Blakeman, for appellant, Flanagan. *James A. Waymire*, for respondent, Brown.

SEARLS, C. This is an appeal from a judgment in favor of defendant, and from an order denying a new trial. We are of opinion the judgment and order should be affirmed, for the reasons given by the learned judge who decided the case in the court below, on the rendition of judgment, and which are as follows:

"SULLIVAN, J. This is an action on a promissory note for \$27,000 executed by defendant, September 4, 1876, payable four months after date, and bearing interest at 10 per cent. per annum from maturity. The original holder of the note was the National Bank of the State of Missouri. At a sale of the assets of said bank, J. F. Conroy became the purchaser of the note in suit, paying therefor the sum of \$32. Subsequently Conroy and the present plaintiff entered into an agreement, reciting that whereas Flanagan was the owner of thirty bonds of the St. Louis County Railroad, and Theodore W. Gaty (whose name was used for Conroy's) was the owner of the note in suit for \$27,000, it was agreed that Gaty should place his note in the hands of Flanagan so as to enable him to manage, transfer, or dispose of said bonds and said note. The agreement concludes in these words: 'All proceeds, money, or property realized from the transaction after payment of expenses shall be equally divided between the parties; but in no event shall said note be sold or disposed of for a sum of money or other property whereby a net sum shall be realized by said Gaty of less than \$250.'"

"The action was commenced by Flanagan alone. Pending the action the

defendant, after some negotiation, obtained from Conroy a release, which by supplemental answer is set up as a bar to this action.

"The question to be determined is, does this release from Conroy bar plaintiff's right of recovery. Defendant claims that Flanagan was a mere agent, whose authority was revocable at the pleasure of Conroy, his principal, and that Flanagan had no such right in the matter as would defeat Conroy's control of the property, and his release of any claim thereon. Plaintiff claims that he is the owner of the legal title, and also of a one-half interest in the proceeds of the note.

"If plaintiff is the legal owner of the note, the ownership is not evidenced by the agreement hereinbefore referred to. No language of transfer or assignment is found therein. It does not appear therefrom that Conroy was parting with the ownership, or vesting the title in Flanagan. On the contrary, it appears that the note is referred to as Conroy's note, which is placed in Flanagan's hands to enable him to manage, transfer, or dispose of the same. This is language creating an agency. That it intended to create, and does create, an agency, is not negated by the fact that the subject of the agency is a promissory note, rather than some other species of personal property. It seems to me that the mere temporary custody which a collector has of a promissory note indorsed in blank does not place him in a position to dispute, as against his employer, the question of ownership. Nor is he in a position to say to the party liable on the note that a release obtained from the real and sole owner is not valid to defeat a recovery by the mere agent who happens to be the custodian of the paper.

"The mere manual holding of the paper would give no right of action to a thief who might sue upon it. The entire destruction or loss of the paper would not bar a recovery by the real owner. The physical custody of the paper is a false element in the controversy to determine ownership as between a principal and his agent. It may be that it cuts a controlling figure as between the agent and the maker of the note when no question is made of the agent's right to represent and act for the owner. When the agent holds a note indorsed in blank, and sues upon it in behalf of his principal, it is no defense for the maker to say that the plaintiff in the suit is not the owner; and this, as I understand it, is all that is really decided in the case of *Curtis v. Sprague*, 51 Cal. 241. There the defendant applied for a nonsuit, and the supreme court held that it was not error to deny the motion; and held further that it was error to join as plaintiff one who had assigned the note with the understanding that he should have half of the amount recovered. The agreement under which the note in suit was delivered to Curtis, the plaintiff, was that he should bring the suit, and divide the proceeds with his assignor. That case involved only a question of proper parties and pleadings; it did not deal with any question of release by the real owner of the claim in suit.

"In my judgment, that case is not to any extent determinative of the rights of the parties here. The agreement here says nothing of the right of Flanagan to bring any suit upon the note, nor of his right to control such suit when brought. Far less does the agreement divest the principal of the absolute ownership of the obligation represented by the paper. Flanagan's custody of that paper determines nothing as against Conroy's ownership of it, or the efficacy of Conroy's release of any obligation represented by it.

"If Flanagan has any standing, it must result from something else than his mere custody of the paper. He is not the owner of it; he is a mere agent intrusted with its custody. Was he such an agent that his principal had not the right to revoke his authority?

"His authority was defined and limited by the agreement signed by the parties. Article 6 of chapter 1 of title 9 of the Civil Code treats of the termination of agency. Section 2356 of that article is as follows: 'Unless the power of an agent is *coupled with an interest* in the subject of the agency, it

is terminated, as to every person having notice thereof, by (1) its revocation by the principal.' This language is not as broad as that found in some of the text-books which define the extent of the principal's right of revocation of the agent's authority. It does not include, as do many of the books, an agency given for a valuable consideration, as one whose power is irrevocable. It makes use of language frequently found and construed in the text-books, and omits a portion of the limitations set on revocability. It seems to limit the principal's power of revocation to cease when his agent is vested by his principal with an interest in the property itself which is the subject of the agency. The term 'power coupled with an interest' is well understood, and is discussed and defined in the very cases cited by the code commissioners under the section above referred to. These cases lay down the rule that a power coupled with an interest is where the grantee has an interest in the estate, as well as in the exercise of the power. It is determined to exist or not accordingly as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result from the execution of his power, the agent has not a power coupled with an interest.

"The case of *Brown v. Pforr*, 38 Cal. 550, recognizes the rule as to power coupled with an interest. There, the agents had an interest, to the extent of \$750, in the execution of the power conferred within the time named in their contract of agency, but they had no interest in the real estate which was the subject of the agency. Accordingly the principal, even within the time limited in the contract, was held to be at liberty to revoke. But, in stating the rule as to revocability, the language of SANDERSON, J., is broader than the language of the Code section above cited. He says: 'It is a general rule that any agency, whether to sell land or to do any other act, unless coupled with an interest, or given for a valuable consideration, is revocable at any time.' The words, 'or given for a valuable consideration,' as thus used in stating the rule by the supreme court in 1869, are not found in the Code section as adopted in 1872. But the other words, 'power coupled with an interest,' are used, and presumably with the construction put upon them in that case.

"The case of *Hartley's Appeal*, 53 Pa. St. 212, is instructive in this connection. There was an ordinary agency, established by letter of attorney, to collect moneys that might be due the principal from the estate of her father. For their services the attorneys were to have one-half of the net proceeds of what they might recover for her. The court there says: 'The plaintiffs in error claimed that this clause [giving one-half of the amount recovered] rendered the power irrevocable by the principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney, in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. * * * In the case in hand the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would *ipso facto* extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended.' The power was therefore held revocable.

"Flanagan, in the sense of the rule here laid down, and of the rule laid down by section 2356 of the Code, was not the holder of a power coupled with an interest. If not, by the terms of that section his power was revocable, and his principal's release is a good bar to this action.

"But even if the rule was broader than its terms as laid down in that section, and contemplated an agency given for a valuable consideration as irrevocable, I think there is much force in the suggestion of defendant's counsel,

that in equity Conroy was the owner of the bonds, as well as of the note for which they were originally held as collateral. If that be so, the agreement as to the agency shows no valuable consideration passing from Flanagan to Conroy, and the agency would not, under any rule laid down on the subject, be irrevocable.

"It results from these views that the release set up is a good bar to the action. If plaintiff has sustained any loss or damage through the action of his principal, he may look to him for damages.

"Judgment will be for defendant."

The other points made in the case cannot affect the result, and require no notice.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT: For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 247

GOULD v. LANTERMAN. (No. 11,384.)

(Supreme Court of California. July 28, 1886.)

PUBLIC LAND—STATE LANDS—JURISDICTION—ACT OF SURVEYOR GENERAL.

The decision of the surveyor general of California in an *ex parte* proceeding does not oust the courts of jurisdiction, in a subsequent proceeding by an interested party, under his statutory right to be heard in court.

Commissioners' decision. Department 2.

W. D. Gould, J. S. Waltman, and W. W. Taylor, for respondent, Gould. Chapman & Hendrick, for appellant, Lanterman.

FOOTE, C. This was a contest as to which of two individuals was entitled to purchase land of the state of California. The complaint was demurred to, and the demurrer overruled. A trial was then had before the court without a jury, and judgment was rendered for the plaintiff, from which, and an order denying a new trial, the defendant appeals.

He contends that the court had no jurisdiction to try the cause, because the certificate of the surveyor general of the state, by virtue of which only, as he alleges, could such jurisdiction be obtained, was insufficient. A similar certificate in all respects was held by this court, in *Eads v. Clarke*, 9 Pac. Rep. 666, to fully meet all the requirements of the statute, and the reasons for such decision, as there given, it is not necessary here to repeat.

It is further contended that as the complaint stated the surveyor general had approved the defendant's application before the plaintiff made his, that such fact, showing judicial action by that officer in favor of the defendant, barred any right of the plaintiff to have his contest determined by any other court, and hence his complaint did not state facts sufficient to constitute a cause of action. Inasmuch, however, as the complaint also, and in the proper connection, charged such action of the surveyor general was brought about by the fraudulent representations made to him by the defendant, and that the latter had never been an actual settler upon the land in controversy, or entitled to purchase it, and that the surveyor general, when a second application was made for the land, referred the matter, as between the parties making the first and second applications for a contest, by proper certificate, to the proper court, we are of opinion that such contention is not well founded.

And we cannot well perceive how the action of the surveyor general, in granting an application upon a statement of facts made by the defendant alone, could bar the plaintiff, who afterwards made an application to pur-

chase the land, of a *statutory* right to have the contest between him and the defendant settled by the proper court. The jurisdictional act of the land-office in such a case could not, by granting such an application, bind one who was not a party to a proceeding so entirely *ex parte*. To hold such a doctrine as that for which the defendant contends, would be to nullify the statute, and to enable the surveyor general, as *ex officio* register of the land-office, to oust the superior courts of the state of their jurisdiction over such contests as the one in hand, when there is no law which gives them such power, or repeals the statute allowing such a contest.

We are of opinion that the evidence justifies the findings of the court, and that findings were made upon all the material issues raised by the pleadings.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 261

SANBORN v. MADERA FLUME & TRADING CO. (No. 8,982.)

(Supreme Court of California. July 28, 1886.)

1. MASTER AND SERVANT—SAFE MACHINERY—DUTY OF MASTER.

An employer, being in duty bound to provide safe machinery for use by his employes, cannot divest himself of liability by intrusting the performance of such duty to a servant.¹

2. SAME—HOW AFFECTED BY SERVANT'S KNOWLEDGE OF DEFECTS.

A master's liability for injuries to a servant caused by defective machinery does not apply to a case where the servant, knowing, or having the means of knowing, of the defects, and knowing of the perils to which they exposed him, pursued his employment in spite of them.¹

Commissioners' decision. Department 2.

D. M. Delmas, for respondent, Sanborn. McKisick & Rankin, (Hall McAllister, of counsel,) for appellant, Madera Flume & Trading Co.

BELCHER, C. C. This is an appeal from a judgment in favor of plaintiff, and an order denying the defendant a new trial. The action was brought to recover damages for injuries sustained by plaintiff while working as an employe about defendant's saw-mill, situate in the county of Fresno. It is alleged in the complaint that the injuries were caused by defective machinery used in the mill, and that the defects were known to the defendant, and unknown to the plaintiff. The answer denies that the alleged defects were known to the defendant, and alleges that they were known to the plaintiff, and that the injuries sustained by him were the direct result of his own negligence, and the negligence of his fellow-servants.

It appears that, when the accident happened, the mill had been recently erected, and had been in operation only about 10 days. It was put up by one Woodsum, acting as superintendent, and one White, acting as mill-wright. When it was nearly completed, White discovered that there was no "sword," and he so informed Woodsum. Woodsum directed him to make a temporary sword, and he did so out of a piece of old iron which he found in a neighboring mill. This temporary sword was put in the mill, and used till after the injury to the plaintiff. The mill had two circular saws, and the sword was placed behind and in line with them, and about two or three inches distant from them; its function being to enter the cut made by the saws as the log moves onward, and to keep it from closing up and pinching the saws as they pass through it. A good sword, if it failed to enter the cut, would stop the

¹See note at end of case.

onmoving log, and no injury would result. This temporary sword was not a good one, and was not safe. It was not stiff enough and not strong enough, and was too rough and not true.

The injury to plaintiff was caused in this wise: There was upon the carriage a log eighteen inches square and fourteen feet long, which had been sawed into three pieces, each six inches thick, and technically called "cants." These cants were lying one on top of the other, and were to be sawed through again. When the carriage started, they were carried forward and cut by the lower saw till they reached the line of the sword. The sword, instead of entering the cut, as it should have done, struck the end of the cants, and bent to one side. This caused the cants to deflect slightly from a right line, and this deflection cramped the lower saw. The teeth of this saw threw the cramping cants upward, and, as they came up, the teeth of the upper saw caught the topmost cant, and hurled it back with great force. The projected cant struck the foot of the plaintiff, who was standing at the logway about forty feet distant, attending to his duties.

About the time the mill was started the plaintiff was employed by Woodsum to act as foreman in the yard. His duties were to work on the logway, look after the Chinese, change the men from place to place, and keep the mill running. He had nothing to do with the machinery. That was in charge of White, the mill-wright.

At the trial it was claimed for the plaintiff that the accident was the result of the defectiveness of the sword, and we think the jury were justified in so finding.

It was also claimed that the defectiveness of the sword was chargeable to the negligence of the defendant, and we think the evidence fully sustained that position. When the sword was made, it was known by the mechanics who fashioned it to be a bad one and unsafe. But it was the duty of the defendant to furnish suitable and safe machinery, and it could not divest itself of liability by intrusting the performance of that duty to its servants. The rule upon this subject is correctly stated in *Fuller v. Jewett*, 80 N. Y. 52, where the court says "that acts which the master, as such, is bound to perform for the safety and protection of his employes, cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do, by selecting competent servants or otherwise, to secure the safety of his employes." See, also, *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20.

The principal question presented for our consideration relates to the alleged negligence of the plaintiff. It is insisted for the appellant that if the plaintiff knew, or had means of knowledge, of the defects in the sword, and still voluntarily continued to work about the mill, he was guilty of such negligence as would prevent his recovering damages in the action. The court very clearly and pointedly instructed the jury that if the plaintiff knew, or had the means of knowledge, of the defects in the sword, and of the dangers and risks likely to result from its use, then he could not recover; but it refused to give an instruction asked by the defendant as follows: "The general rule is that an employer who provides machinery must see that it is suitable and fit for the use for which it is intended; but this rule does not require the owner of a

saw-mill to adopt the latest improvements in its construction, nor does the relationship of employer and employe involve a guaranty by the employer of the employe's safety. When a party works with, or in the vicinity of, a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge, or means of knowledge, of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery."

We think the rule, as stated by the court, correct, and that the instruction asked was rightly refused, because it failed to include, as one of the conditions upon which the plaintiff could not maintain his action, that he knew, or might have known, that his employment involved danger to himself.

Shearman and Redfield, in their work on Negligence, after stating, in section 94, the general rule that, when the servant's action is founded on the assumption that the master ought to have known of the defect which caused the injury, it is clearly a sufficient defense to show that the servant had equal means of knowledge, say, in section 95: "This rule has, however, been very properly held to be applicable only to such defects as the servant ought reasonably to have foreseen might endanger his safety. If a person of ordinary prudence would not have believed that the servant could, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing his right to complain, if, while pursuing his ordinary course, he suffers from such defect."

This rule was recognized in *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15, and has been declared to be the true rule in many other cases.

In *Russell v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 233, S. C. 20 N. W. Rep. 147, the court said: "We shall not here enter into any general discussion of the question when and under what circumstances a servant takes upon himself risks incident to the use of unsafe machinery, by continuing to use it without objection after knowledge of its defective character. We simply say that it is not enough that the servant knew, or ought to have known, the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, or, by the exercise of ordinary observation, ought to have understood, the risks to which he is exposed by their use."

And in a later case, *Cook v. St. Paul, M. & M. Ry. Co.*, reported in 32 Alb. Law J. 319, and 24 N. W. Rep. 312, the same court said: "It is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting, or which may follow, from such defects. The mere fact that the servant knows the defects, may not charge him with contributory negligence, or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed."

In *Mayes v. Chicago, R. I. & P. Ry. Co.*, 14 N. W. Rep. 340, the supreme court of Iowa said: "He must have known, or possessed the means of knowing, that the absence of the blocks was a defect causing danger to him and to others. It is very plain that, to bring the case within the rule above stated, the intestate must have known, or in the exercise of reasonable diligence could have known, the dangers and perils resulting from the absence of the blocks. Now, if it should appear that the intestate, by reason of his lack of experience, did not know, or in the exercise of ordinary diligence could not know, of these perils and dangers, the law will not hold that he waived the negligence of defendant." See, also, *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Lawless v. Connecticut River R. Co.*, 136 Mass. 5; *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 598; *Lasure v. Graniteville Manuf'g Co.*, 18 S. C. 280; Whart. Neg. § 217.

Certain other instructions were given at the request of the plaintiff, and are claimed to have been erroneous; but we fail to see that they misstated the law of the case, or in any way prejudiced the defendant. In one of them the jury were told that if the sword was obviously insufficient and unsafe for the purposes for which it was intended and used, and that by reason of such insufficiency and unsafeness the accident happened without any fault or negligence on plaintiff's part, he was entitled to a verdict; and in the other that if the plaintiff was an employe of the defendant at its mill, and it was no part of his duty either to put up or keep in order the machinery of the mill, then, even if they should find that he knew that the sword which was alleged to have caused the accident was defective, that fact alone did not, as a matter of law, charge him with negligence in undertaking or continuing his work at the mill; that such knowledge, if it existed, was merely a fact to be weighed by the jury in determining the ultimate question of his negligence. It is urged that if the sword was "obviously insufficient and unsafe," then the plaintiff could not have been "without any fault or negligence." But why not? Notwithstanding the sword was obviously insufficient, and therefore known to the plaintiff to be unsafe, still he might not have known, or had reason to suspect, that it threatened danger to him; and in that case, as we have seen, he was not chargeable with negligence.

Whether the plaintiff was negligent, and so barred from recovering damages for his injury, or not, was a question of fact, and not of law, and the court properly instructed the jury that the plaintiff's knowledge of the defectiveness of the sword was only one of the probative facts from which they must determine upon the ultimate fact of his negligence.

It is also claimed that the court erred in permitting the witness W. F. Parkinson, when called in rebuttal, to answer certain questions asked by counsel for plaintiff. We are unable to see that the court erred in its rulings. The witness had shown himself qualified to speak as an expert of saw-mill machinery, and the manner of operating it, and, under the circumstances, the question seems to us to have been pertinent and proper.

In our opinion, the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

See, as to the duties of the master in regard to defective or dangerous machinery, *Tribay v. Brooklyn L. M. Co.*, (Utah,) 11 Pac. Rep. 612, and note; *Kelley v. Chicago, St. P., M. & O. Ry. Co.*, (Minn.) 29 N. W. Rep. 173.

70 Cal. 270

BETTNER v. HOLT. (No. 11,511.)

(*Supreme Court of California.* July 28, 1886.)

1. LIBEL AND SLANDER—LANGUAGE TO SUSTAIN CHARGE—MEANING—CIRCUMSTANCES CONSIDERED.

In determining whether certain language which is charged as being libelous is sufficient to sustain an action, the court must consider, not the actual words alone, but also the sense and meaning, under the circumstances of the publication, which such language may fairly be presumed to have conveyed to those who read it.

2. SAME—"OBLOQUY"—WORD DEFINED.

To expose one to "obloquy" is to expose him to censure and reproach.

3. SAME—COMPLAINT—SUFFICIENCY.

Language and circumstances set out in the complaint considered, and held sufficient, as stating a cause of action.

Commissioners' decision. Department 2.

The opinion states the facts.

Paris & Godcell, for appellant, Bettner. *Curtis & Otis*, for respondent, Holt.

FOOTE, C. Bettner brought an action against Holt for a libelous and unprivileged publication. The complaint was demurred to as not stating facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff not having filed an amended complaint within the time allowed by the court, judgment for costs, etc., was given in favor of the defendant, from which the plaintiff has appealed. The pleading, which was on demurrer held insufficient, is as follows:

"The plaintiff, for cause of action against the defendant, alleges that the plaintiff and others, being at the time residents of Riverside and vicinity, in this county, and largely interested in the raising of oranges and other fruits in that locality, sent a collection of such fruits to the World's Fair, held at New Orleans in 1884-85, to be at such fair entered and exhibited for premiums; and this plaintiff and H. J. Rudisill attended such fair in charge of said fruit, as the agents and representatives of all such contributors, to see that said fruit was properly entered and exhibited at said World's Fair; that the plaintiff performed his duty as such agent and representative, and thereafter, on or about the ——— day of April, 1885, returned to his place of residence at said Riverside; that thereafter, on April 25, 1885, the defendant, being at the time the editor and publisher of a weekly newspaper published at said Riverside, and called the Press and Horticulturist, published in said newspaper, in a regular issue thereof of that date, an article entitled, 'Intelligent Report from New Orleans,' [referring to said World's Fair,] in which article the defendant used and published the following language: 'After a lapse of several weeks we are enabled to publish a report from the *citrus* fruit contest at New Orleans, in which Riverside, and our readers generally throughout California, are so universally interested. Although we had two representatives at New Orleans, [meaning this plaintiff and H. J. Rudisill,] and one of them [meaning this plaintiff] returned home with this information in his pocket two weeks ago, yet we had to wait till the Florida papers bring us this information, so that it could be given to our people, who furnished the fruit with which to make an exhibit, [meaning the fruit in charge of this plaintiff and H. J. Rudisill aforesaid.]' Here followed, in said article, the report referred to.

"That in said issue or said newspaper, and side by side with said article, and commenting thereon, the defendant published another article, etc., entitled 'A Little World's Fair History,' in which the defendant used and published the following language: 'Eighty of our fruit-growers contributed 164 boxes of fruit, an average of more than two boxes each, and the exhibit was sent to New Orleans; Messrs. James Bettner and H. J. Rudisill going to take charge of the same, [meaning the fruit sent by this plaintiff and others in charge of this plaintiff and H. J. Rudisill, as before in this complaint alleged.] We have done our very best, by telegraphing and making personal applications, to get news for our readers, and up to the present time have got no report of what our representatives did at New Orleans, and hence have to depend entirely on Florida reports, and Kimball Bros., of National City, for news. We find that out of eighty contributors only thirteen had any fruit entered for premiums, and out of *thirty-two* entries James Bettner had *eleven* entered in his name. When it came to lemons, Mr. E. W. Holmes [meaning one of said contributors, who had sent fruit in charge of this plaintiff and H. J. Rudisill] picked the very best he had to send to New Orleans, and yet with what he had left he took the premium at Riverside, but his lemons were not entered at all at New Orleans. R. P. Waite and scores of others whom we might mention [meaning others of said contributors] were also left out in the cold. Messrs. Kimball Bros. took an entire *citrus* fair

to New Orleans, and were at liberty to enter any of the fruit therein contained in their own name for premiums; hence in making their selections they had an entire *citrus* fair to select from. In the Riverside exhibit, with few exceptions, Mr. Bettner was confined to his own exhibit of *eight* boxes from which to select fruit to make eleven entries and secure five premiums. We will say, in this connection, that the officers of the fruit company here in Riverside tried to conduct the exhibit in an honorable, upright manner, but the management got beyond their control. Those who shipped the fruit had a right to a report when Mr. Bettner returned, but not a word has he made public, and we don't blame him for not wanting to make one.'

"That by the use and publication of said words and language, used and published by the defendant as aforesaid, he intended to charge and assert, and to be understood as charging and asserting, and by the readers of said newspaper was in fact understood as charging and asserting, that this plaintiff, in violation of his trust as said agent and representative, had corruptly and dishonestly failed to make a proper entry or exhibit at said World's Fair of fruit sent by said contributors in his charge, but had himself appropriated fruit belonging to others of said contributors, and had entered and exhibited in his own name, and for his own benefit, fruit that he should have entered and exhibited in the name of, and for the benefit of, some other or others of said contributors; that the exhibit of fruit so sent from Riverside was not conducted in an honorable or upright manner, because of the corrupt and dishonorable action of this plaintiff as said agent and representative; and that plaintiff had refused to furnish information to said newspaper, or to make any report of his action as such agent and representative, and did not want to make such report, because such information or report, if given or made, would disclose corrupt and dishonest conduct on the part of the plaintiff such as was charged by the defendant in said articles.

"That said charge, so made and published by the defendant, and so understood, and by him intended to be understood, by the readers of said newspaper, was and is false, scandalous, and unprivileged, and did and does expose the plaintiff to hatred, contempt, and obloquy, by imputing to him dishonesty and corruption in violation of his trust as said agent and representative; that said articles were so published by the defendant as editorials, with the apparent and express sanction and authority of the defendant as the editor and publisher of said newspaper; and said issue of said newspaper containing said articles was, by the defendant, widely circulated among the people of said Riverside and vicinity, and throughout this county and state, and elsewhere; and said articles were generally read by the subscribers of said newspaper and others; and were by them generally understood to have the sense and meaning aforesaid, and to charge the plaintiff with corrupt and dishonorable conduct as hereinbefore stated; that the plaintiff has thereby been damaged in the sum of ten thousand dollars. Wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, and costs."

In the interpretation to be placed upon language charging the publication of a libel, a court of justice is to put such construction upon the words which it contains as may be derived "as well from the expressions used as from the whole scope and apparent object of the writer." *Spencer v. Southwick*, 11 Johns. 592; *Cooper v. Greeley*, 1 Denio, 358. And not only is the language employed to be regarded with reference to the actual words used, but according to the sense and meaning, under all the circumstances attending the publication, which such language may fairly be presumed to have conveyed to those to whom it was published; so that in such cases the language is uniformly to be regarded with what has been its effect, actual or presumed, and its sense, is to be arrived at with the help of the cause and occasion of its publication. And in passing upon the sufficiency of such language as stating

a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of a complaint for libelous publication according to its natural and popular construction. Townsh. Sland. § 133.

Applying the rules thus laid down to the construction of the publication complained of, as set out in the pleading, and taking in connection with it the other matters set out in the complaint, it seems evident that the plaintiff was charged with having been guilty of conduct which was calculated and did expose him to obloquy, as one untrue to a trust reposed in him by his fellow-citizens at Riverside and elsewhere; and, if the charge was false, it was libelous. To expose one to obloquy, is to expose him to censure and reproach, as the latter terms are synonymous with the word "obloquy."

If, under all the facts and circumstances as set out in the publication, taken together with those stated in connection with it in the complaint, plaintiff was not exposed to the censure and reproach of those at Riverside and elsewhere who read or heard read the publication concerning him, by some of whom it was alleged he had been trusted in an important matter, then we are mistaken both in the temper and disposition of men in like circumstances, and in the fair and unstrained interpretation of the language of that publication. The complaint was sufficient under section 45 of the Civil Code.

The judgment should be reversed, and cause remanded, with permission to the defendant to answer the complaint, if so advised.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with permission to defendant to answer the complaint, if so advised.

70 Cal. 276

GREEN v. HAYES and others. (No. 11,438.)

(Supreme Court of California. July 28, 1886.)

1. PUBLIC LANDS—DECISION OF INTERIOR DEPARTMENT, FINAL.

Under the Booth act, (19 St. U. S. 267,) confirming to the state of California the title to the school sections of land selected in lieu of those supposed to be in Mexican grants, subject to the rights of previous *bona fide* settlers thereon, the question of the good faith of such previous settlers is one of fact, or of law and fact, and the decision of the interior department, in any case involving the same, is final.

2. FRAUD—PLEADING.

Allegations of fraud in a complaint cannot be regarded unless accompanied by particulars showing what the fraud was, and how it was perpetrated.

3. PUBLIC LANDS—STATE LANDS—DEFECTS IN APPLICATION CURED BY PATENT.

Defects and irregularities in an application to purchase land from the state are cured by the issuance of the patent.

Commissioners' decision. Department 2.

The opinion states the facts.

F. H. Howard, W. D. Gould, and James H. Blanchard, for appellant, Green. *H. T. Hazard, C. E. Thorn, and Wells, Van Dyke & Lee*, for respondents, Hayes and others.

BELCHER, C. C. The only question presented in this case is as to the sufficiency of the complaint when tested by a general demurrer. The action was brought to quiet the plaintiff's title to 80 acres of land in Los Angeles county, and the material facts alleged in the complaint are as follows:

In March, 1868, one Andrew Jaughin made application to purchase the land in question from the state of California, under the provisions of an act of the legislature passed April 27, 1863, and entitled "An act to provide for

the sale of certain lands belonging to the state." His application was not made in conformity to the provisions of that act, and was fraudulent, and known to be so when it was presented to the state locating agent for acceptance and approval. The land was within the exterior limits of a Mexican grant which had been regularly presented to and confirmed by the board of land commissioners and the United States courts, and it remained so, and was claimed by the Mexican grantees until the thirty-first day of October, 1871. The land was sought to be taken in lieu of a part of a sixteenth section, which, at the time of the application, was also within the limits of a Mexican grant, and had not, by final survey of the grant or otherwise, been ascertained or determined to be lost to the state. Knowing all these facts, the state locating agent, conspiring with Jaughin to unlawfully divest the United States of the title to the land, fraudulently accepted the application, and on the twenty-second of April, 1868, selected and located the land in question in the name of the state of California, and for the benefit of Jaughin as indemnity school land.

In May, 1870, the land was unimproved, uncultivated, and vacant public land, and on the sixth day of that month the plaintiff, being then a qualified pre-emptor, settled thereon as a pre-emption settler, with the intention of availing himself of the pre-emption laws of the United States, and erected a dwelling-house and made other valuable improvements thereon. After his settlement, and while the state selection and location was pending before the land department, he, by his attorneys, notified, in writing, the commissioner of the general land-office and the secretary of the interior of his claim, and particularly called attention to the defects and illegalities of the state selection and location; but notwithstanding such notification the commissioner and secretary approved the location, and listed the land to the state as indemnity school land, before the land in lieu of which it was taken, was known to be lost to the state. Jaughin obtained a certificate of purchase for the land from the proper officers of the state, and assigned the same to R. Y. Hayes. Hayes obtained a patent for the land from the state and died. The defendants are his successors in interest.

The plat of the township in which the land is situated, was first regularly and legally filed in the local land-office on the twenty-first day of November, 1871, and on the next day the plaintiff filed with the register and receiver his declaratory statement, and paid them the fees required therefor. Afterwards, having fully complied with the pre-emption laws, he offered to make proof before them of his settlement and improvements and residence upon the land, and his qualifications as a pre-emptor, and tendered the government price for the land, with all necessary fees; but the register and receiver rejected his tender of proofs and payments, and refused to allow him to enter the land, because of the indemnity school selection, and for no other reason. Plaintiff appealed from the decision of the register and receiver to the commissioner of the general land-office, and afterwards, on the tenth day of March, 1876, the secretary of the interior made a decision to the effect that the list to the state was invalid and void, and no bar to the claim of the plaintiff. The plaintiff then, on the fourth day of April following, again appeared in the local land-office, and proved up his claim, paid for and entered the land, and received his duplicate receipt. Afterwards the secretary of the interior ordered a rehearing of the case to be had, in order that the state of California might appear, and contest the plaintiff's right to the land.

A rehearing was had on the twenty-third day of July, 1877, and the state, by its attorney, appeared and contested the plaintiff's rights. Full proofs were taken, and as a result the department of the interior found all the facts to be as claimed by plaintiff, but decided that the plaintiff was not entitled to the land, because, at the time he made his settlement upon it as a pre-emptor, he had knowledge of the fraudulent and void claim of Jaughin

thereto. It is then alleged that the decision of the secretary was erroneous, and that it was upon a question of law and not of fact, and that the claim of Jaughin was in fact no bar to plaintiff's pre-emption claim. The court below sustained a demurrer to the complaint; and we think it did so properly.

On March 1, 1877, an act was passed by congress entitled "An act relating to indemnity school selections in the state of California," and commonly known as the "Booth Act." 19 St. U.S. 267.

By the first section of the act "the title to the lands certified to the state of California known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said state," was confirmed to the state.

By the second section of the act it is provided "that when indemnity school selections have been made and certified to said state, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or one otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-sixth sections, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: provided, that if there be no such sixteenth or thirty-sixth section, and if the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: provided, that if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof, and make payment for such land, it shall be subject to the general land laws of the United States." By this section congress confirmed to the state such indemnity school selections as had been made and certified to it, and which would fail by reason of the land in lieu of which they were taken not being included within the final survey of a Mexican grant, "*or are otherwise defective or invalid.*" *Martin v. Durand*, 63 Cal. 39.

It was then further provided in the act that the confirmation should not apply to mineral lands, etc., nor extend to the lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or pre-emption laws: provided, that such settlement was made in *good faith* upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of the lands to the state by the department of the interior: and provided, further, that the claim of such settler should be presented to the register and receiver of the district land-office, together with the proper proof of his settlement and residence within a given time.

It is clear that the land in question was confirmed to the state by this act, if the plaintiff's settlement upon it was not made in good faith; and when it was not occupied by the settlement or improvements of any other person.

When the case was heard before the department of the interior, and all the facts were presented, that department decided that the plaintiff was not entitled to the land. What the facts were which were presented before the department we are not advised, but it is evident the decision must have been made upon the ground that plaintiff's settlement was not made in good faith, he knowing at the time of Jaughin's claim. Whether it was made in good faith or not was a question of fact, or, at any rate, a mixed question of law and fact, and the decision of the department upon it was final.

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination." *Quinby v. Conlan*, 104 U. S. 426.

"It is a sound principle that when there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive." *Marquez v. Frisbie*, 101 U. S. 476.

There are many averments in the complaint of fraud, conspiracy, and fraudulent acts on the part of the defendants' grantor, but they cannot be regarded, because there are no particulars of the fraud, showing what it was, and how it was perpetrated. *U. S. v. Atherton*, 102 U. S. 372; *Semple v. Hagar*, 27 Cal. 163; *Kent v. Snyder*, 30 Cal. 666.

Besides, whatever defects or irregularities there may have been in Jauhin's application to purchase the land from the state, they were cured by the issuance of the patent, and cannot be called in question in this action, where the plaintiff is not seeking to obtain the state's title.

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 282

SCHUYLER v. BROUGHTON. (No. 11,048.)

(Supreme Court of California. July 28, 1886.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—DEBTS OF HUSBAND—EXECUTION.

Real property, purchased with the community funds of husband and wife, is liable for the debts of the husband.

2. SAME—DEED IN WIFE'S NAME.

Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by the community property of the husband and wife.

3. SAME—PRESUMPTION—HOW REBUTTED.

If it appear, by extrinsic evidence, that the consideration paid for real property was, in whole or in part, the separate funds of the wife, or funds which had come to her after marriage, by gift, bequest, devise, or descent, or funds borrowed by her on the faith of existing separate property belonging to her, the legal presumption that it was purchased by the community funds of husband and wife may be overcome, and such property will belong to the wife's separate estate to an extent proportionate to her investment therein.

4. SAME—CONSIDERATION IN PART PAID BY WIFE—TENANCY IN COMMON.

If real property be purchased in part with the community funds of husband and wife, and in part with the wife's separate funds, the wife becomes a tenant in common of the land with her husband, her interest being proportionate to her investment.

5. SAME—LIABILITY FOR HUSBAND'S DEBTS.

Real property, purchased in part with community funds of husband and wife, and in part with wife's separate funds, is liable for the husband's debts to the extent of his interest therein, which is to be determined by the ratio between the amount of community funds invested in the purchase and the total consideration.

In bank.

The opinion states the facts.

B. F. Thomas, for appellant, Broughton. *W. C. Stratton*, for respondent, Schuyler.

McKEE, J. By an execution issued upon a money judgment, recovered on the eighteenth of February, 1884, by Henry Miller against W. H. Schuyler, the sheriff of Santa Barbara county levied upon a tract of land as the property of the judgment debtor. The land was afterwards sold at execution sale, according to law, to the judgment creditor, to whom the sheriff issued a certificate of sale, which entitled the purchaser to a deed if the land was not redeemed from the sale within the time allowed by law for that purpose. No

redemption having been made within statutory time, the sheriff was about to execute and deliver to the purchaser a deed, when the plaintiff in this action, who is the wife of the judgment debtor, sued out an injunction to restrain the sheriff from executing and delivering such a deed, upon the ground that the land is her separate property, and was not subject to the judgment and execution against her husband, and that the deed, if executed and delivered, will create a cloud upon her title.

Admittedly, the land was acquired by the wife during marriage, and after the rendition of the judgment against her husband. But it was conveyed to her in her own name, by a deed which, on its face, showed a consideration paid by the wife, and did not show that the land was conveyed to her to hold as her separate property. Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by community funds, and became community property of the husband and wife; and as such, it is liable for the debts of the husband. *Riley v. Pehl*, 23 Cal. 70; *Ramsdell v. Fuller*, 28 Cal. 38; *Peck v. Vandenberg*, 30 Cal. 11; *Peck v. Brummagim*, 31 Cal. 488; *Vassault v. Austin*, 36 Cal. 691.

It is true that the legal presumption which arises from the face of the deed may be overcome by extrinsic proof that the consideration paid was the separate funds of the wife. (*McDonald v. Badger*, 23 Cal. 393; *Tustin v. Faught*, Id. 241; *Landers v. Bolton*, 26 Cal. 393;) but, in the absence of such proof, the presumption is absolute and conclusive, (*Pixley v. Huggins*, 15 Cal. 129.) Presumptively, therefore, the land in controversy was the common property of the husband and wife, and subject to the judgment and execution against the husband.

To overcome that presumption in this case, it was proved at the trial, and the court finds, that the wife purchased the property on the sixteenth of May, 1883, and paid therefor the sum of \$900; "that \$200 of said money was acquired by plaintiff by gift and descent, and \$700 thereof was borrowed by her of her sister, who loaned the same to her for the purpose of paying a part of the purchase price of said real property, and plaintiff gave to her said sister a promissory note and mortgage upon said real property for the amount so borrowed, no part of which has been paid; that said W. H. Schuyler, the husband of plaintiff, did not sign said note or mortgage, and no part of the money paid for said real property was the separate property of said W. H. Schuyler, and no part of the money so paid was the community property of said W. H. Schuyler and plaintiff."

There is no doubt that property acquired after marriage, by either husband or wife, by gift, bequest, devise, or descent, with its rents, issues, and profits, is the separate property of the spouse who acquires it, (Deer. Ann. Civil Code, §§ 162, 163,) and that all other property acquired after marriage by either husband or wife, or both, is community property, (sections 164, 687, Id.) The sum of \$200, which the plaintiff, as the wife of W. H. Schuyler, acquired by gift, was therefore her separate property, and the land in which she invested that money was, to the extent of the investment, her separate real property. But the sum of \$700, which she borrowed, was not acquired by gift, bequest, devise, or descent, nor was it rents, issues, or profits of property so acquired; it was money acquired by contract.

By the Code law a married woman is qualified to enter into contracts as freely as if she were unmarried, (section 158, Civil Code,) and the obligation which springs from any contract she makes is enforceable against her out of her separate property, (section 170, Id.) It follows that a married woman may borrow money to invest in real property, but money borrowed by her for that purpose, during marriage, will be regarded in law as community property, unless it be borrowed by her upon the faith of existing separate property belonging to her, which she mortgages or pledges as security for its

payment, or against which her contract may be enforced. In this case the money borrowed by the wife was not secured by mortgage lien, or otherwise, upon existing separate property of the wife. It appears that she had no separate property other than the \$200 before she purchased the land. Under these circumstances, she borrowed the \$700 "for the purpose of paying a part of the purchase price of said real property." The money borrowed was therefore common property, and, to the extent of the common fund, the land in which she invested it was also common property, against which her separate contracts could not be enforced. Section 170, Id.

We have, then, a case arising out of a transaction by a married woman, in which she purchased a tract of land, in part with money belonging to her separate funds and in part with money belonging to the community funds; so that the land became in part separate property of the wife, and in part common property of the husband and wife. Under the law, a husband and wife may acquire and hold real property in joint tenancy, tenancy in common, or as common property. Section 161, Civil Code. By the purchase the wife, therefore, became a tenant in common of the land with her husband in proportion of the separate estate to the whole purchase price. *Ewald v. Corbett*, 32 Cal. 498; *Estate of Holbert*, 57 Cal. 259. Such being the case, the execution upon the judgment against the husband ran against his interest in the land, and the purchaser at the execution sale became substituted to and acquired whatever interest the execution debtor had in the land, (section 700, Civil Code,) so that he was legally entitled to a conveyance. It follows that the court below erred in holding "that no part of the money paid for the purchase of the land was common property."

Judgment and order reversed, and cause remanded.

We concur: ROSS, J.; SHARPSTEIN, J.; THORNTON, J.

70 Cal. 231

MACE v. O'REILLEY. (No. 11,385.)

(*Supreme Court of California.* July 28, 1886.)

1. JUDGMENT—EXPIRATION OF TRIAL JUDGE'S TERM BEFORE ENTRY.

When a judge before whom a case has been tried goes out of office after entering an order for judgment, but before the findings have been filed and judgment entered, unless agreed findings be filed or waived by both sides, no proper judgment can be entered.

2. SAME—PROPER COURSE.

The proper course, when the trial judge's term of office expires between the time of entering the order for judgment and of filing the findings, is to enter judgment in accordance with the order, and then to have the same set aside and vacated for want of findings, either by a motion to that effect, or by a motion for a new trial.

3. SAME—NOTICE OF MOTION FOR ENTRY.

It is not necessary to give the opposing party notice of an application to have judgment entered upon a former order therefor.

4. SAME—MOTION TO VACATE JUDGMENT FOR WANT OF FINDINGS—TIME UNDER SECTION 473, CODE CIVIL PROC.

Section 473, Code Civil Proc., has no application to a motion to vacate a judgment for want of findings, and such a motion is not limited to six months from the time of entering judgment.

5. SAME—RENEWAL OF MOTION—DISCRETION OF COURT.

A court may in its discretion permit a motion to be renewed which it had formerly denied, and the fact that this denial had been made at a previous term of the court makes no difference.

Commissioners' decision. Department 2.

The opinion states the facts.

Graves & Chapman, for appellant, O'Reilley. *H. K. S. O'Melveny and C. N. Wilson*, for respondent, Mace.

v.11p.no.18—46

FOOTE, C. Mace brought an action for malicious prosecution against O'Reilly, claiming \$5,000 damages. The cause was tried by the court without a jury, and an order for judgment for \$100 entered in the minute book of the trial court in favor of the plaintiff, but no findings were *filed* or *waived*, and no final judgment ever entered. The order for judgment was made on the sixteenth of September, 1884. On the nineteenth of January, 1885, plaintiff moved the court to set the cause for trial, assuming that such was the proper course to pursue. That motion was denied by the court, and afterwards, on the thirtieth day of March, 1885, the plaintiff served a notice and affidavit for the hearing on the thirteenth day of April, 1885, of a renewal of that motion, which the court had granted him leave to make. The affidavit set out, among other things, that the cause had been tried originally by Judge HOWARD, whose term expired in January, 1885, and that no findings had ever been filed, or final judgment entered, or any other proceeding had, since the entry of the minute order of the judge of the sixteenth of September, 1884.

The defendant resisted this last motion on the grounds that after the entry of the order of September 16, 1884, he had paid the amount of the judgment to the clerk of the court for the plaintiff, and had thereby waived all findings and entry of formal judgment in the action, because the court had no jurisdiction to grant the motion on the ground alleged, and that no notice was served within six months from the entry of the order for judgment, and, further, because the defendant again waived all findings or judgment, and tendered and offered the money to the plaintiff then on deposit with the clerk. On the thirteenth of April, 1885, the motion to place the cause on the trial calendar and vacate judgment was denied; the court basing its ruling upon the ground that the minute order of September 16, 1884, was not a nullity, and therefore that it could not wholly grant the motion, and that a final judgment must first be entered upon said order, and then plaintiff could attack that judgment thus made.

In pursuance of that suggestion, on the first day of June, 1885, the plaintiff moved the court to enter judgment in accordance with the order of Judge HOWARD. On the fourteenth of September, 1885, the judgment on that order was made and entered by the clerk of the court. The motion of the first of June, 1885, for entry of judgment, and the order of the fourteenth of September, 1885, in relation thereto, were without notice to the defendant. On Monday, the twenty-first of September, 1885, the plaintiff made a motion (and filed an affidavit in support of it, setting out that no findings had been made or waived in the cause) that the judgment be vacated, and the cause set for trial anew. Upon the argument of that motion the defendant offered, by an entry on the minutes of the court, to waive all findings, or to agree to any findings necessary to support the judgment which the plaintiff might desire or the court make. The court, however, on the twenty-fourth of September, 1885, granted the motion of the plaintiff, and made an order setting aside the judgment *for the want of findings*, as they had not been waived.

From that order the defendant appealed, and specified as errors of the court in granting it, the following: The court had no jurisdiction to make the order of June 1, 1885, as the defendant had no notice of it; until the orders made by the court on the twenty-first of January and April 13, 1885, were vacated, the court had lost its jurisdiction; because the session of the court had expired at which the judgment ordered in 1884 had been entered, and more than six months had intervened; the order of June 1, 1885, was granted upon the express condition that plaintiff was thereby to be enabled to move for a new trial, and the court erred in granting a resetting of the case for trial, without such motion being made, and by indirection allowing plaintiff to evade that condition; that the court ought to have filed the necessary findings, which the defendant stipulated might be done; because the order of the

court, in granting the motion of twenty-first of September, 1885, was against law, and against the express condition on which the judgment was ordered on the first of June, 1885. All the matters thus adverted to were included in a bill of exceptions.

It is very evident that no valid judgment was entered in this cause during the administration of Judge HOWARD, as an order for judgment is not a final judgment. *Macnevin v. Macnevin*, 63 Cal. 186. When that judge went out of office, the trial was incomplete, and no proper judgment could be entered. It seems to us that a new trial was inevitable, unless agreed findings should be filed or waived by both sides to the controversy. The motion to vacate the judgment, as made, was initiated within about seven days after its rendition.

The fact that plaintiff did not formally move for a new trial, but chose rather to move to set aside and vacate the judgment, is of no material consequence. A new trial was inevitable in either event, and no error was committed by the court in setting aside the judgment for the want of findings. *Van Court v. Winterson*, 61 Cal. 615. We are aware of no statute which required the defendant to be notified of an application to the court to have a final judgment entered against the defendant upon an order therefor formerly entered. In the case of *Savings & Loan Soc. v. Thorne*, 7 Pac. Rep. 26, this court declared that a motion made to vacate a judgment for the want of findings was not limited to six months from the time of the entry of the judgment, and that section 473, Code Civil Proc., was not applicable to such a case. There is no waiver of findings shown in this record, as required by the statute, unless it should be held that the waiver of the defendant of all findings should entitle him to have a judgment entered up against himself, without the plaintiff ever having waived findings. Such is the ruling which the defendant desires made, but we cannot concur with him, as, according to our view, a waiver of findings, to be conclusive, must be assented to by all the contending parties to an action.

The objection that the court lost jurisdiction to make the order appealed from, because it had previously made orders denying motions to set aside the judgment, at a session of court which had expired, is without merit. "Our constitution and Code have abolished terms of court; and the rules which formerly prevailed for the correction of errors and irregularities cannot, as to time, be literally applied," (*Wiggin v. Superior Court*, 9 Pac. Rep. 646;) and we see no reason why the court could not in its discretion allow a motion to be renewed which it had formerly denied.

The fact that the defendant paid the \$100 to the clerk for the plaintiff, before any final judgment was entered, and the plaintiff did not take it, furnishes no reason why the court should not have made the order appealed from. Nor do we perceive why the judge should have filed findings in a cause which he had not tried, and the evidence in which he had not heard, upon the offer made by the defendant to allow such a course to be taken without the concurrence of the plaintiff.

We perceive no prejudicial error in the record, and the order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(70 Cal. 350)

BATH v. VALDEZ and others. (No. 9,938.)*(Supreme Court of California. July 30, 1886.)***1. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—CO-TENANCY.**

Where a conveyance is made by a party in the exclusive possession, under a deed which purports to convey the whole property, and the grantee goes into the open and notorious possession of the whole, neither grantor nor grantee having notice of a co-tenancy, their possession, if for the statutory period, will create a good title by adverse possession in the grantee.

2. ESTOPPEL—PROBATE COURT—JURISDICTION—ADVERSE POSSESSION.

A party who is in possession of land under a deed will not be estopped from asserting title, by adverse possession, by the action of the probate court in decreeing to the heirs of a former owner an undivided one-half of the property. Had he appeared in the probate proceedings, and set up his adverse title, the probate court would have had no authority to hear and determine the question raised.

THORNTON and McKEE, JJ., dissenting.

Commissioners' decision. In bank.

Brunson, Graves & Chapman, for appellant, Bath. *Bicknell & White, G. M. Holton, Howard & Roberts*, and *H. A. Barclay*, for respondents, Valdez and others.

SEARLS, C. This action was brought to quiet title to the north half of lot 8, block 3, of Ord's survey of the City of Los Angeles. The decree of the court below established the ownership of the plaintiff to an undivided one-half of the whole of lot 8, and that certain of the defendants were the owners of the other undivided half of said lot, in the proportion of one-twelfth each, and that plaintiff had not acquired the interest of the defendants by adverse possession. The appeal is prosecuted by plaintiff from the judgment, and from an order denying his motion for a new trial.

In 1862, Julian Valdez had title to the premises as the common property of himself and his wife, Manuela. In 1863, Julian Valdez died intestate, leaving him surviving Manuela, his widow, and his mother, and several brothers and sisters, as his heirs. In April of that year the widow obtained letters of administration. In 1865, Manuela intermarried with one Chavez, and thereafter, in the same year, she and her then husband executed a deed of the premises to one Peppers, by which they remised, released, and quitclaimed "all that lot," describing a tract including the premises in controversy. Under this deed Peppers took and retained possession until, in July, 1872, she executed a grant, bargain, and sale deed to Burrows, and from Burrows the title comes, by mesne conveyances of grant, bargain, and sale, to plaintiff. Plaintiff's grantors were, respectively, in the undisturbed possession of the premises during the periods while they had title. They placed improvements on the property, received the rents, and had the entire enjoyment thereof. Plaintiff purchased in January, 1882, and this suit was commenced in October, 1882.

The court also found "that the said plaintiff, his grantors, ancestors, and predecessors, from the fourth of October, 1865, have received all the rents, issues, and profits of the premises, paid all taxes that have been imposed thereon, and occupied the same; and that neither the said plaintiff, nor his grantors, or ancestors, or predecessors, or any of them, ever gave any notice, actual or otherwise, to the defendants, or any of them, that he or they, or any of them, intended to or did or were claiming and holding the said premises, or any part thereof, adverse to the said Jose E., Brigido, Vincente, Juan, Felipe, and Maria de Los Angeles Valdez, and Guadalupe V. de Rocha, or either or any of them, nor was the said plaintiff, or the said Burrows or Roques, or the said Dassaud, or the said Goodwin, or any or either of them, ever heard to make or assert any claim to the land in controversy adverse to the said defendants Valdez or Rocha, or any of them, or under whom they claim, prior to the commencement of this action." The court found further

that neither the plaintiff nor his grantors, Dassaud, Roques, or Goodwin, or any or either of them, had or claimed to have any knowledge or notice of the interests or claims of the defendants, or any of them, in or to the premises, until after the purchase of plaintiff in 1882.

From the marriage of the widow of Julian Valdez, in 1865, until 1882, nothing was done in the administration of the Valdez estate; but, in 1882, Brigido Valdez, one of the brothers of the deceased, obtained letters, and such proceedings were had that in 1883, after the commencement of this action, distribution of the property was made by the superior court, sitting in probate,—one-half to Burrows, grantee of Manuela, and the other half to brothers and sisters of the deceased, (one-twelfth each,) the mother and one brother having died in the mean time.

The court below based its decree on two propositions, viz.: *First*, the plaintiff had not acquired the property, as against the heirs of Julian Valdez, by virtue of the statute of limitations; and, *second*, he was estopped by the decree of distribution in probate from asserting that the Valdez heirs had no title.

Some question was made at the hearing in this court as to whether the parties in interest were all before the court. By a memorandum filed April 9, 1886, we are referred to the various amendments, pleadings, supplemental pleadings, and stipulations whereby they were brought in and the objection obviated. There is on file a written consent on the part of defendants and respondents that the decree be so modified that the undivided twelfth interest in the premises awarded to Vincente Valdez be decreed to belong to the plaintiff, whereby it is conceded plaintiff is entitled to a decree for an undivided seven-twelfths of the premises.

The plaintiff brought his action to quiet title to the north half of lot 8. His testimony showed (1) that he had purchased such north half of the lot, and no more; and (2) that he claimed the north half, and no more, by virtue of the adverse possession of himself and his grantors. The decree should therefore, in any event, be so modified as to award to plaintiff the undivided seven-twelfths of the north half only, of lot 8. Such modification of the decree can be made by the court below without the necessity of a retrial of the cause, provided a new trial is not made necessary by the validity of the other errors assigned.

These alleged errors involve the two propositions above mentioned as the basis of the decree, and to them we address our attention. *First*, did plaintiff establish a title under the statute of limitations as against defendants, the heirs of Julian Valdez? The findings are against the claim under the statute. It is true that the prominent facts which negative plaintiff's adverse holding under the statute of limitations are to be found in the conclusions of law. This displacement, however, does not alter or detract from their efficacy as facts, and, under the former rulings of this court, does not prevent the finding from being accepted as sufficient to support a judgment. *Jones v. Clark*, 42 Cal. 192; *Breuner v. Insurance Co.*, 51 Cal. 107; *Edwards v. Sonoma Valley Bank*, 59 Cal. 148. We shall therefore treat the findings as sufficient, in this respect, to support the judgment, and confine our attention to the question whether or not the findings are warranted by the evidence.

The testimony on the subject is all one way, and shows that, in 1865, Manuela Valdez, the widow of Julian Valdez, having intermarried with one Chavez, united with her husband in the execution of a quitclaim deed to one Peppers, by which they remised and quitclaimed to the latter, lot No. 8, etc., which deed was properly acknowledged and recorded in 1866. Peppers entered into possession of the lot, and retained such possession until July, 1872, when she conveyed, by deed of grant, bargain, and sale, the entire lot to Burrows, and from the latter the title to the north half of the lot passed to

July, 1875, to Dassaud and Roques, under whom plaintiff claims through sundry mesne conveyances, all purporting to convey the legal title. The several deeds of conveyance were recorded at or about the date of their execution.

Plaintiff leased the north half of the lot in 1872 from Burrows, for a term of three years, entered into the exclusive possession under his lease, erected improvements thereon, and occupied the land as a tenant of the owners under these deeds until about 1876 or 1877, when he contracted for the purchase of the property from Dassaud and Roques, grantees of Burrows. He did not obtain a deed under the agreement until January, 1882. The evidence is ample to show, and we think shows conclusively, and without conflict, that plaintiff and his grantors, from July, 1875, were in the open, notorious, peaceable, continuous, and exclusive possession of the north half of the lot, claiming to hold, own, and possess the same in their own right, and adverse to all the world. They placed improvements on the property of the value of \$8,000, and had no knowledge whatever of any claim, or pretended claim, to said north half of the lot by the heirs of Valdez until in 1882,—a few months before this action was instituted. We think the evidence entitled the plaintiff to a finding in his favor upon the issues joined, under the statute of limitations, unless he and his grantors were bound to give notice to their co-tenants, the heirs of Valdez, that they held adversely to them. We infer from the findings that the court below placed great stress upon a want of such notice. We should doubt the justice of a rule which required the purchaser of real estate, from one in the actual and exclusive possession, and who enters into possession under a deed of conveyance purporting to convey the entire title in fee, and who has no knowledge of any tenancy in common therein, to give notice to tenants in common of whose claim or existence he had no knowledge. To set the statute of limitations in motion in favor of a tenant in common, and against his co-tenant, requires on his part the exercise of such acts as amount to an ouster of his co-tenant. Ouster is a wrongful dispossession or exclusion of a party from real property who is entitled to possession. Ouster, both where the property is owned in severalty, and where it is held in divided interests, depends upon the *intent* of the party taking and holding possession.

If a person without title enters into possession of land, and subjects it to his will and dominion, claiming and exercising over it the rights of ownership, the inference of his intent to oust the true owner is patent. A co-tenant, however, has a right of entry upon the realty, and, when he does enter and exercise acts of ownership, the law presumes that he intends nothing beyond an assertion of his right, and the apparent intent to oust his co-tenant is wanting. It is the *intent* with which the necessary acts are performed that must in all cases determine whether or not they amount to an ouster, and to hold that acts which would amount to an ouster against a stranger do not have that effect, as against a tenant in common, of whose very existence the co-tenant had no notice, and no information to put him on inquiry, is to assert a proposition which cannot be supported by reason, or by the great weight of authority.

The true rules, we think, are: *First*. Where a tenant in common is in possession, acknowledging or with knowledge of the rights of his co-tenants, there must, to constitute an ouster, be such acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature, as by their own import to impart information and give notice to the co-tenant that an adverse possession and a disseizin are intended to be asserted against him. *Freem. Co-tenancy*, § 221. *Second*. Where a co-tenant enters under a conveyance which purports to convey a moiety, or any other portion less than the whole, or which purports to convey the interest only of the grantor, the inference is the same as in the first instance mentioned above, and the acts to constitute an ouster must be of like tenor and effect. *Third*. When a conveyance is made by a party in the exclusive possession under a deed which purports to

convey *the whole of the property*, and the grantee enters into the open and notorious possession of the whole without notice of a co-tenancy, the entry will be presumed to be in the assertion of an exclusive right in severalty, and is equivalent to an express declaration on the part of the grantee that he enters "claiming the whole to himself," and is therefore such a disseizin as sets the statute of limitations in motion in his favor.

These propositions are substantially as laid down by Freeman in his work on Co-tenancy, c. 10, §§ 221-227. A reference to the authorities cited under sections 223, 224, *supra*, shows that the doctrine which we have enunciated is supported by the most eminent jurists of the country, and in cases so numerous as to leave no doubt as to the weight of authority. We are aware that a doctrine at variance with these rules is supported by the case of *Seaton v. Son*, 32 Cal. 481. In speaking of this last case, Mr. Freeman, after stating its positions, says: "It states an unqualified proposition of law, and must therefore be considered as in direct conflict with the authorities,—as unsustained and unsustainable." We confess to a high appreciation of the judgment and experience of the eminent jurist who prepared the opinion in *Seaton v. Son*, and it is with great reluctance that we express our dissent from his views; but in the face of the very cogent reasons which seem to us to exist therefor, and in view of the weight of authority the other way, we are forced to the conclusion that, if correctly reported, of which there is grave doubt, *Seaton v. Son* cannot be upheld.

Tested by the rules we have formulated, the evidence was sufficient to support the plea of the statute of limitations, and the findings are not supported by, but are contrary to, the evidence.

The next proposition relates to the estoppel of the plaintiff by the decree of distribution in probate, whereby the undivided one-half of the property was decreed to the heirs of Valdez, and the other undivided half to Burrows as assignee of and successor in interest of Manuela Valenzuela de Valdez, the widow. The widow of Valdez had been appointed administratrix of his estate, April 30, 1863, but did nothing towards administering except to qualify. In 1865 the administratrix intermarried with Chavez. On the twenty-seventh day of April, 1882, Brigido Valdez was appointed administrator of the estate, and such proceedings were had therein that on the twenty-fifth day of June, 1883, the decree of distribution was entered as above specified.

It does not appear that plaintiff was a party to or had any notice of the proceedings in probate, except what is to be inferred from the usual publication of the notices as by statute required. We may admit, for present purposes, that plaintiff is estopped by the decree of distribution so far as he acquired any title to the Valdez estate by the several mesne conveyances through which title from that estate passed to him. The real question, however, remains, and is, was he estopped by the decree from setting up the independent estate which he had acquired under the statute of limitations? Had the plaintiff appeared in the probate proceedings, and set up his title adverse to the estate acquired by him under the statute of limitations, the court had no authority to hear and determine the question thus raised. "The probate court has jurisdiction to settle *the estate* of a deceased person, and has no power, save in certain excepted instances, to determine disputes between the heirs or representatives of the deceased and third persons." *Theller v. Such*, 57 Cal. 447. It is *the estate* of the deceased upon which the probate court administers. It is the title which the deceased had in and to real property at the time of his death, or which has inured to the estate after death and before distribution, which passes to the heirs and devisees. If there are outstanding or adverse claims to the estate vested in third parties, they are not affected by the probate proceedings, save as in cases of liens, etc., especially provided for by statute. Actions may be maintained by the executor or administrator of an estate to recover possession of the real prop-

erty, for partition thereof, or to quiet title thereto. Code Civil Proc. §§ 1581, 1582. The probate court may inquire if the estate has an interest in or title to real property, and, if this question is decided in the affirmative, may distribute such estate, but it has no jurisdiction to determine the quality of the title, whether it be good or bad, but will leave the parties to pursue their remedies in a proper forum. *Estate of John Dunn*, Myrick, Prob. Rep. 122. Judgments in probate are conclusive between the parties and their privies in respect to the matter directly adjudged, when litigating for the same thing or under the same title, as in the case of other judgments. Code Civil Proc. § 1908. But the title of plaintiff under the statute of limitations was not, and could not be, litigated and determined in the probate court; hence the judgment of that court distributing the property did not affect that title, and plaintiff is not estopped by the decree.

It follows from these views that the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

THORNTON and MCKEE, JJ., dissent. ROSS, J., expresses no opinion.

70 Cal. 326

SCHLESSINGER and others v. MALLARD and others. (No. 11,172.)

(*Supreme Court of California*. July 30, 1886.)

1. TRUSTS—RESULTING TRUST—TERMINATION OF TRUST.

The author of an express trust, not having provided, in the creation of such trust, to whom the property should belong upon a failure or termination thereof, has a right to transfer the property. The purchaser takes subject to the trust, and stands in the position which the grantor would have occupied but for the conveyance.

2. CEMETERY—RESULTING TRUST—PART OF LAND NOT USED FOR CEMETERY.

Where land was conveyed to a trustee by the city of Los Angeles to be used for cemetery purposes, and only a small portion of the land was devoted to such purpose, there was, as to the portions not so used, when it was established that it could not be used for such purpose, a resulting trust in favor of the city and its assigns.

3. SAME—ABANDONMENT OF CEMETERY—RECONVEYANCE BY TRUSTEE.

By abolishing a cemetery the land for which had been conveyed by the city of Los Angeles to a trustee to be used for cemetery purposes, the city terminated the trust relation, and it thereupon became and was the duty of the trustee to reconvey the property.

4. TRUST—ADVERSE POSSESSION BY TRUSTEE.

A trustee cannot retain possession of lands held by him in trust after repudiating his trust, and claim adversely, until his claim ripens into a title under the statute of limitations.

5. SAME—APPOINTMENT OF TRUSTEES.

A court of equity will see to it that trustees are appointed to manage trust property when required for its safety or proper administration, but it will not do so when no good result is to be accomplished thereby.

Commissioners' decision. In bank.

Glassell, Smith & Patton, for appellants, Schlessinger and others. *Wells, Van Dyke & Lee and Brunson & Wells*, for respondents, Mallard and others.

SEARLS, C. This is an action to compel the defendants, as trustees, to convey to the plaintiffs certain premises situate in the city of Los Angeles, and for an accounting for the rents and profits thereof. Plaintiffs had judgment. Defendant J. S. Mallard moved for a new trial, which was granted, and this appeal is taken from the order granting such new trial.

It appears from the record that the lands in question are part of the pueblo

lands of the city of Los Angeles, and have been duly patented by the government of the United States to the authorities of said city. In 1857 the city of Los Angeles, by its proper officers, set apart the land in question as a public cemetery, and caused the same to be conveyed to defendant, J. S. Mallard, and two others, (now dead,) in trust for the uses and purposes of a cemetery. The property was used for cemetery purposes, and bodies were interred therein until 1861, when the city resolved by ordinance to discontinue its use as a cemetery, and to remove the bodies buried therein to another place, which was done, except that from two to five bodies were not removed. Since that date it has not been used as a place of sepulture. On the fourteenth day of November, 1870, the city of Los Angeles, for a valuable consideration, conveyed the property by quitclaim deed to one T. A. Sanchez. The conveyance to Sanchez was confirmed by act of the legislature of the state of California, (St. 1871-72, p. 93,) and the plaintiffs herein have succeeded to the title of Sanchez. Defendant J. S. Mallard is in possession under the deed of trust, and the other defendant holds a portion of the land under him.

In 1876 plaintiffs brought an action of ejectment against the defendant Mallard and the others, to recover the property. Defendants had judgment, which on appeal was affirmed by this court (58 Cal. 63) in an opinion in which the following language was used: "We are of the opinion that the deed from the city of Los Angeles to Mallard and his associates passed the legal title, and that the trust thereby created is still in force, or was at the time this suit was tried. It will be time enough for the city, or its subsequent grantees, to assert title to the premises after the bodies now lying in the cemetery have been decorously removed to another resting place, and the purposes of the trust have fully terminated."

This action was then brought, and, after trial, all the allegations of the complaint were found true, except as to the facts established in the former case, which are set out in full, and as to the value of the rents, issues, and profits; and judgment was rendered in favor of plaintiffs, requiring the defendants to convey the property to said plaintiffs, and decreeing that a small rectangular tract, 80x30 feet, in the south-east corner, be held by the plaintiffs subject to a public easement as a place of burial of the bodies therein interred until the same shall be removed by public authority, or by the friends of the deceased parties, and providing that the graves should not be disturbed, etc.

The new trial was granted by the successor of the learned judge by whom the cause was tried, and seems to be based upon the following propositions: (1) The bodies have not been removed from the cemetery, and the legal title is yet in the defendants; (2) that the fact that the defendants claim title as trustees, and then deny the title and claim adversely, cannot affect this action; (3) plaintiffs cannot recover the legal title from defendants unless the latter hold it, and, if they hold it as *trustees*, it cannot be recovered so long as the trust remains incomplete; (4) whether defendants have abused the trust or not is of no importance in this action, as it is not brought to remove the trustees and appoint others in their place to carry out the trust, but is brought to recover the legal title from the defendants, which cannot be done at present.

These views, at first glance, seem formidable, if not conclusive. If the conclusions are erroneous, it must be not from any fault in the deductions, but from assuming as premises facts not warranted by the record. All of the allegations of the complaint are found to be true, except those hereinbefore noted.

Turning, then, to the complaint, we find that, among other things, it is averred (1) that no portion of the land was ever used as a cemetery, except a rectangular piece, 80 feet by 30, in the south-east corner; (2) there now

remains buried on said tract about two bodies, the graves of whom are in the rectangular piece of land aforesaid; (3) defendant Mallard has planted the greater portion of the remainder of the land to vines and fruit trees, and since 1870 he and those under him have used the land for agricultural and other private purposes; (4) that, prior to the commencement of this action, defendants repudiated the trust created by the deed of 1857; (5) the objects of the trust have been fulfilled.

All of the foregoing allegations are sustained by the testimony of defendant Mallard, except it may be the fifth; and as he states that after he went on there the grave-yard was abandoned, and he did not know where it was, it is not singular that the court should have found the allegation supported by the proofs.

The complaint further avers that Mallard and his grantees have violated the conditions of said trust; that said Mallard has never performed his duties as such trustee, but has used his powers and the trust property for his own private use and advantage; and that he is an unfit person to be a trustee. Plaintiffs further offer to have the portion occupied by the graves of deceased persons conveyed to trustees, or to submit to such terms and conditions in relation thereto as to the court may seem proper.

Our Code has included within its provisions many of the rules previously established by courts of equity, and in most instances has not departed from the doctrine previously upheld.

The following extracts have a bearing on the present case:

First. "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." Civil Code, § 863.

Second. "Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property subject to the execution of the trust." Civil Code, § 864.

Third. "Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust, or his successors." Civil Code, § 866.

Fourth. "Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees in contravention of the trust is absolutely void." Civil Code, § 870.

Fifth. "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases." Civil Code, § 871.

Sixth. "A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful." Civil Code, § 2279.

In the present case the city of Los Angeles was the author of the trust, and, not having provided, in the creation of such trust, to whom the property should belong upon a failure or termination thereof, had a right to transfer the property, and the purchaser took subject to the trust. The plaintiffs, having purchased, stand in the position which their grantor would have occupied but for the conveyance.

The fact that the deed from the city of Los Angeles to Sanchez was in form a *quitclaim* does not alter the position of plaintiffs. Taken together with the act of the legislature, it constituted him an assignee of all the interest of the city. As provided by section 864 of the Civil Code, the city might "transfer or devise such property subject to the execution of the trust." The reversion, if such it may be termed, of the property upon the execution of the trust, was in no sense the acquisition of another title.

The defendant went into possession as the trustee of an express trust.

For a series of years he has devoted nearly all of the land, deeded to him for cemetery purposes, to agricultural and horticultural purposes, has sold a portion of it, and now deliberately urges as reasons why he should not be required to convey—*First*, that a small portion of the land is still devoted to cemetery purposes, and therefore the objects of the trust are not consummated; and, *second*, that he holds the land adversely to all the world, the plaintiffs included, except the portion sold, and the parcel occupied by the graves, as to which parcels he disclaims all title.

The answer to these propositions is:

(1) It appears that, except as to the small subdivision in the south-east corner, the land was never devoted to the purposes of a cemetery, and there was as to the portions not used, when it was established that it could not be used for such purpose, a resulting trust created by operation of law in favor of the city of Los Angeles and its assigns. This principle of equity is recognized by the Civil Code quoted *supra*.

(2) The city of Los Angeles terminated the trust relation by abolishing the cemetery in 1861, as it had a right to do, and thereupon it became and was the duty of the trustees to reconvey the property. The duty of the city to the friends and relatives of deceased persons buried in the cemetery became a question as between the city and its grantees and such friends and relatives of the deceased so interred, and after its abandonment as a cemetery such duty did not concern the trustees.

(3) The defendant cannot be permitted to retain possession as a trustee after repudiating his trust and claiming adversely. To permit such a course would be inequitable and an encouragement to fraud. By such a rule the trustee could remain in possession by virtue of his office, and at the same time claim adversely until his claim ripened into a title under the statute of limitations.

The court below had full jurisdiction to do what was essential to be done in the premises, and by its judgment, it seems to us, did do what was proper.

There was no necessity for the appointment of other trustees, as suggested in the complaint. The action of the court in requiring the plaintiffs to take the plat containing the bodies of deceased persons, subject to the easement or right of sepulture until such bodies were lawfully removed, was all that was required. A court of equity will at all times see to it that trustees are appointed to manage trust property when required for its safety or proper administration, but it will not do so when no good result is to be accomplished thereby. If, however, it shall at any time become necessary or proper to appoint trustees, the superior court has ample authority to do so. Civil Code, §§ 2287-2289.

The contention of the defendants, that no proper case is made for the removal of the defendants, cannot be sustained. The allegations of the complaint charge a state of facts sufficient to warrant their removal; nay, more, to make it the duty of the court to remove them. They answered to the complaint, and, under section 580 of the Code of Civil Procedure, the court was authorized to grant any relief consistent with the case made by the complaint, and embraced within the issue. The complaint set up the trust, and all the facts connected with it, and alleges that the trustee has violated his trust,—has repudiated such trust; that he has used the trust property for his own benefit; and that he is an unfit person to be trustee, etc. These things being true, the court had a right to remove the trustee, and, if necessary, to appoint another in his place. The court did this in effect, by requiring the trustee to convey the property to the plaintiffs, and providing that the plaintiffs should hold the lot in which the bodies are buried, upon the conditions and subject to the servitude imposed by the decree.

We see nothing in the action of the court below inconsistent with the case Cal.Rep. 9-11 P.—59

of *Weisenberg v. Truman*, 58 Cal. 63. That was an action of ejectment, and the court held that, the legal title being in the defendants, plaintiffs could not recover. This is an action in equity against the trustee, charging both a breach and completion of the trust, and seeking, for either or both of such causes, to compel him to convey the title, for the want of which it was held the plaintiffs could not recover in the action of ejectment.

The error, if any, in refusing the motion for nonsuit was cured by the testimony subsequently introduced by defendant. *Ringgold v. Haven*, 1 Cal. 108; *Smith v. Compton*, 6 Cal. 24; *Perkins v. Thornburgh*, 10 Cal. 189; *Winnans v. Hardenbergh*, 8 Cal. 291.

We are of opinion the judgment of the court below was correct, and that the order granting a new trial should be reversed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed.

THORNTON and MCKEE, JJ., concur in the judgment.

70 Cal. 345

COX and others v. CLOUGH and others. (No. 9,990.)

(Supreme Court of California. July 30, 1886.)

1. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—USER OF WATER.

An adverse possession and user of water for five years continuously and uninterrupted, with the knowledge of and to the injury of the true owner, will bar his right thereto; but a mere claim of right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto.

2. SAME—DISPUTING RIGHT OF POSSESSION.

If water is held and used adversely to the true owners for five years next before suit is brought, the mere disputing of the right to such possession by the owners will not prevent the bar of the statute.

Commissioners' decision. In bank.

Byron Waters and Latlerwhite & Curtis, for appellants, Clough and others. *H. M. Willis and C. W. C. Rowell*, for respondents, Cox and others.

SEARLS, C. This is an action to determine the right to the use of the water of certain springs, and of a stream flowing therefrom, situated in the county of San Bernardino. According to the allegations of the complaint, plaintiffs have a right to the uninterrupted use and flow of five-ninths, and the defendants are entitled to the flow and use of four-ninths, of the water of San Timoteo creek, and they pray judgment that they are so entitled, and that defendants be enjoined from interfering with the flow of water five out of every nine days, etc. Defendants, in addition to other defenses, pleaded the statute of limitations. The cause was tried by the court without a jury, written findings filed, and judgment entered thereon, in which it was adjudged and decreed that the plaintiffs were entitled to the use of one-half of the waters of San Timoteo creek flowing from or through the lands of both plaintiffs and defendants, save and except the water of certain springs, the waters of which do not flow to and into the creek, and a perpetual injunction was decreed in accordance with the rights as thus established. The appeal is by defendants from the judgment, and from an order denying a motion for a new trial.

Appellants contend that the judgment should be reversed for want of findings upon the issues raised by their plea of the statute of limitations. The seventh finding of the court, against which the argument of appellants is directed, is defective as a finding of fact under the statute. The finding is, in effect, that ever since the issuance of a certain patent the defendants and

their grantors have claimed the right to the exclusive use of all the waters of the stream, to be used upon their land for agricultural and domestic purposes, but said right has never been acquiesced in by the plaintiffs and their predecessors in interest, who have disputed the right of the defendants to such exclusive use of the waters, and claimed an equal right with defendants to the use of the same for like purposes.

An adverse possession and user of water for five years, continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar his right thereto. *Union Water Co. v. Crary*, 25 Cal. 509; *Davis v. Gale*, 32 Cal. 35; *Evans v. Ross*, 8 Pac. Rep. 88. But a mere claim of a right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto. It is the actual appropriation, followed by open, notorious, continuous, and exclusive possession for the time limited by statute, under claim of title, that gives the right. So, too, on the other hand, if the defendants used and held the water adversely for five years next before suit was brought, the mere disputing their right to such possession by the plaintiffs would not prevent the bar of the statute. The peaceable possession must be disturbed—the continuity of such possession broken—within the statutory period, in order to defeat the plea, if otherwise supported by proof. The seventh finding might be literally true,—that is, defendants and their grantors might have “claimed the right to the exclusive use of all the waters,”—and yet they may never have been for a moment in possession of any such waters. It follows that, unless the other findings settle the question raised by this issue, the error assigned must be upheld.

Referring to such other findings, it appears, (1) under the fourth finding, that the lands owned by plaintiffs were public lands of the United States until they or their grantors acquired title thereto, which was as follows: J. R. Frink on the ninth day of August, 1872; Silas Cox on the twentieth day of August, 1874; Berry Roberts, 1877; George M. Frink, September 2, 1878. (2) The sixth finding is to the effect that defendants or their predecessors did not appropriate the water of said stream to their exclusive use, *or at all*, while the lands of plaintiffs, or any part thereof, was the property of the United States, nor prior to the issuance of the patent to Rubidoux, their grantor.

If defendants did not appropriate the water while any part of the lands of plaintiffs was the property of the United States, then they did not appropriate it prior to the second day of September, 1878, for that is the date of the patent to George M. Frink. The complaint in this cause was filed August 13, 1883, less than five years after the date of such patent. It must therefore follow from these findings that defendants had not been in the exclusive possession of the water for five years prior to suit brought. It is true that by the seventh finding the claim of right to the exclusive use of all the waters of the stream is made to run back to the date of the Rubidoux patent, which is August 13, 1872. Taking these several findings together, and it will be seen they are not inconsistent. In substance, they say the defendants and their grantors have claimed the exclusive right to all the waters of the stream since August 13, 1872, but they had not appropriated such waters to their exclusive use as against the plaintiffs up to September 2, 1878.

The whole theory of the defendants' plea of the statute of limitations is founded upon appropriation and exclusive adverse possession of all of the water for five years, and the findings negative the facts essential to support the plea. Does the testimony support the findings? In an examination of this question we are met with the difficulties usually attendant upon an inquiry into the origin and acquisition of the right to the use, by individuals, of water for irrigation. The appropriation of water for mining purposes, through ditches conducting it away from the natural streams of the country, is usually preceded by a formal location or designation of the quantity of water to be

claimed, the character, size, grade, and extent of the ditch, flume, or viaduct through which it is to be conducted,—all of which specifications afford a criterion by which to measure and limit the extent of the right when consummated by an actual appropriation. Like observations apply to the appropriation of water on a large scale for agricultural or mechanical purposes. In appropriating water for irrigation, by agriculturalists, of land adjacent to the small streams, so far as our observation extends, as in the present case, no extended works are required, and the quantity of water actually appropriated is at first limited to the wants of the appropriator, and gradually expands with the increasing demands of the owner, which are usually in direct ratio with the increased acreage brought under cultivation. In the one case the right may be said to be created,—to spring up full grown, with definite limits and bounds; in the other, it grows up imperceptibly, and the criterion by which to measure it at one date cannot be relied upon at another. We need not, therefore, be surprised in this last class of cases at finding the testimony of different witnesses varying greatly, when speaking of facts only treasured in memory, or obtained from observation at different periods.

Again, the problem is complicated by the fact that the water is frequently used only at intervals, as the wants of the appropriator may demand, and the lower appropriator on the same stream having found the water flowing, and having also used it at intervals during each year, and having accommodated his wants to the fitful supply, in process of time ceases to remember aught except the important fact of his user, and is ready to say, in all honesty and sincerity, that his appropriation has been regular and continuous. Appropriation and user of water are facts to be determined, like any other facts, from the testimony adduced; and in view of all the testimony, we do not feel warranted in disturbing the findings of the court below, upon the ground that they are not supported by the evidence.

These observations cover the points relied upon by appellants, and we are of opinion that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 361

BURROUGHS and others v. DE COURTS, Ex'x, and others. (No. 11,235.)

(Supreme Court of California. July 31, 1886.)

1. DEED—TRUST DEED—ESCROWS.

Where title is claimed under a conveyance from a trustee and the *cestui que trust*, an allegation that the deed giving them title and power to sell was never delivered, but was left with the trustee for safe-keeping, and subsequently delivered up and canceled, is a good defense.

2. WILL—ELECTION BY WIDOW.

Where a widow, with knowledge of her rights, makes an unequivocal assumption of ownership of one of two properties between which she has a right to choose, it is an election.

3. ESTOPPEL—DECREE OF PARTITION—CO-TENANTS.

Parties taking under a decree of partition are estopped from setting up title derived from the deceased owner of the property adverse to that of their co-tenants under the decree.

Commissioners' decision. In bank.

Arnold & Jones and *Works & Titus*, for appellants, *Burroughs* and others, *Leach & Parker*, *Conkler & Hunsaker*, and *Geo. H. Smith*, for respondents, *De Courts*, Ex'x, and others.

SEARLS, C. This is an action of ejectment to recover certain premises situate in the county of San Diego, and known as the "Rancho Los Vallecitos de San Marcus," containing two square leagues of land, more or less. The

cause was tried by the court, and findings in writing filed, upon which judgment was rendered in favor of defendants, from which, and from an order denying a new trial, plaintiffs appeal.

The first error assigned is based upon the action of the court in overruling the demurrer of plaintiffs to the sixth count of defendants' answer. The demurrer is upon the ground that the sixth count of the answer does not state facts sufficient to constitute a defense to plaintiffs' cause of action. The sixth defense to the complaint sets out, by averring the truth of, and makes a part of the defense, the first, second, third, fourth, and fifth paragraphs of the second defense, which paragraphs may be summarized as follows:

In 1840 the governor of California granted to Alvarado and Sepulveda the demanded premises. In 1852, Lorenzo Soto, claiming the premises as the successor of the grantees, filed his petition for confirmation of the grant with the board of United States land commissioners. That the commissioners rejected the grant, and the district court of the United States, on appeal, reversed the decree of the board of land commissioners, and confirmed the grant. Thereafter, and on the first of March, 1883, the United States issued a patent in due form for said land to Lorenzo Soto, his heirs and assigns, and that all the interest or title which plaintiffs, or either of them, have in the demanded premises, is derived under said grant and under Lorenzo Soto. That on February 21, 1859, said Lorenzo Soto and one Jose Machado signed and acknowledged a certain writing, in which the former conveys in trust to the latter, among other property, the demanded premises; the grantee to pay over the net proceeds to Maria Ignacio Moreno de Soto, the wife of the grantor, during her life, and upon her death the property to revert to the grantor, or his heirs or assigns, subject to the proviso that the grantor, trustee, and beneficiary might jointly convey any or all the property during the continuance of the trust, or, in case of the death of Soto pending the trust, then the trustee and beneficiary could convey. That this deed of trust was never delivered to Machado, the trustee, but was left with him for safe-keeping only, with the understanding that it should be returned to Soto for cancellation on demand; and within one year thereafter, with the consent of the wife, it was surrendered to the grantor, and canceled by a destruction thereof. That this trust deed covered all the property Soto owned. That he had at that time one child, Rosa Soto, dependent upon him for support, and that all the right, title, or interest which the plaintiff Burroughs has, or claims to have, in the demanded premises, is derived solely as the successor to the rights of the trustee and beneficiary under the trust deed signed, canceled, and destroyed as aforesaid.

The answer then proceeds to aver that the power to convey, as contained in the writing, was a personal confidence reposed by Soto in the trustee, and was separate from the trust created, and terminated with the death of Soto, who died in 1863, and that the power of sale was never exercised by Machado, the trustee; that plaintiff, conspiring with Tomas Alvarado and Maria Ignacio Moreno de Soto (now the wife of Alvarado) to defraud defendants, who own the property in fee by purchase from said Alvarado and his said wife, procured an order from the superior court appointing Alvarado trustee in place of Machado, and thereupon he, as such trustee, and his wife as the beneficiary, under the trust deed, conveyed the demanded property to the plaintiff Burroughs, nominally for \$20,000, but really without consideration, and to defraud defendants.

A copy of the deed of trust, marked "Exhibit A," is attached to the answer, and made a part thereof, from which it appears it was duly acknowledged and recorded on the ninth day of March, 1859, in the office of the county recorder of the county of San Diego.

This sixth defense is manifestly interposed as an equitable defense to the cause of action set out in the complaint. If it is true, an apparent title

passed from Soto to his trustee, and from the successor of that trustee, and the beneficiary under the trust deed, to plaintiff Burroughs, which can be enforced in an action at law, because fair on its face, but which, for the facts set out in the defense, it would be inequitable to uphold. It was therefore proper to set them out as a foundation for invoking the equitable interposition of the court against the assertion of the legal title.

Counsel for appellants overlook *two facts* stated in this defense, without the presence of which his argument would be unanswerable. The first is the allegation "that said Lorenzo Soto died on the twenty-third day of February, 1863;" the second, that by the terms of the trust deed the trustee and beneficiary were authorized, in case of the decease of the party of the first part, (Soto,) to sell and convey absolutely any or all of the trust property. Under the allegations of the answer, therefore, the conveyance to Burroughs by the trustee and the beneficiary, if the trust deed was still in force, passed the legal title to the demanded property.

The case of *Bruck v. Tucker*, 42 Cal. 352, is not in point. That was an action in which a verbal agreement to convey certain property to the grantor of defendant was set up, and, if sustained, it could only be upon the ground that a case was made warranting a specific performance; and, as adequacy of consideration is a *sine qua non* in actions for that purpose, the answer was held insufficient for want of a proper averment of adequate consideration proportionate to the value of the property. In the present case, defendants aver title in themselves. The manner of the averment is not free from objection, and, had a special demurrer been interposed, it would probably have been sustained; but, in the absence of such special demurrer, it is deemed sufficient, and we are of opinion the demurrer was properly overruled.

The seventh cause of defense, to which a demurrer was for like cause interposed, treated as an answer setting up a defect of parties plaintiff, is deemed insufficient, and the demurrer should have been sustained, but, as no action was afterwards taken upon this issue, and being in the nature of a plea in abatement, it was waived by the defendants, and no harm accrued to plaintiffs by reason of the erroneous ruling upon the demurrer.

Appellants attack so much of the second finding of the court below as finds that Lorenzo Soto was the sole owner of the property in controversy from 1844 to the date of the trust deed, February 21, 1859. A reference to the record will show that the record of a deed dated the third day of March, 1853, from Lorenzo Soto and Maria Rosa Soto, his wife, to Antonio Serrano, conveying to the latter the demanded premises, and duly recorded on the fifth day of March, 1853, was admitted in evidence; also the record of a deed from Antonio Serrano to Maria Rosa Soto, under date of April 9, 1853, conveying to the latter the same premises, and recorded on the day of its date. There is also evidence tending to show that Maria Rosa Soto died December 20, 1857, leaving as heirs Lorenzo Soto, her husband, and a daughter, Rosa Soto; that the latter intermarried with plaintiff Seamans, and departed this life leaving a last will devising the demanded premises to said Seamans, etc.

The position of the appellants is that the court below, in arriving at the conclusion that Soto continued to be the sole owner of the demanded premises, based its decision upon the theory that the record of the deeds from Soto to Serrano, and from Serrano back to Mrs. Soto, was not sufficient evidence of delivery. We do not so understand the position of the court.

It may be that the court below held that under section 1919 of the Code of Civil Procedure, which provides that "a public record of a private writing may be proved by the original record, or by a copy thereof certified by the legal keeper of the record," it was only intended to say that the fact or existence of the record only can be thus proven, and that, if the execution and contents of a deed conveying real property are required as evidence, it can only be had as provided in section 1951 of the same Code as enacted in 1874,

and after proof that the original is not in possession or under the control of the party offering the evidence.

In the late case of *Brown v. Griffith*, ante, 500, (decided by this court in bank May 31, 1886,) and involving the question of the admissibility of records of conveyances as evidence, the court, referring to section 1919, *supra*, says: "But the record only proves itself as a record. The record is not made primary evidence of the original writing." Be this as it may, if it be conceded that, as the records were introduced in evidence without objection, and are therefore *prima facie* evidence of the genuineness, due execution, and delivery of the original deeds, still it was only *prima facie* evidence of those facts, and was liable to rebuttal.

And, on the other hand, defendants introduced as a witness Jose Antonio Serrano, the grantee named in the deed from Soto and wife, of March 3, 1853, and grantor in the deed to Mrs. Soto, of April 9, 1853, who denied in direct terms that the deed of Soto was ever delivered to him. The witness testified in Spanish through an interpreter; and, judging from the record, his evidence does not seem altogether satisfactory, owing to his apparent want of memory in reference to most of the transactions, but the court below, in such a case, with the witness before him, had greatly the advantage over us in his opportunities for arriving at the truth.

In addition to this testimony there were other facts of some importance as militating against the delivery of the deeds; such as the fact that no one seems to have seen the originals, or know anything of them except what appears of record. The records fail to show by or for whom they were recorded. For 30 years or thereabouts after the execution of the instruments no possession was taken or claimed under them. Soto seems to have retained possession of the property, and to have exercised over it all the acts of ownership incidental to and illustrating such ownership.

These considerations and some others bearing upon the question, induce us to conclude the evidence was sufficient to warrant the court below in finding that Soto was the owner of the property during all the period of time mentioned in the second finding, for the reason that the deed from him to Serrano of March 3, 1853, was never delivered.

Appellants challenge, as unsupported by evidence, so much of the third finding as relates to the delivering up to Soto of the trust deed of February 21, 1859, to Machado by the latter, with the intention and agreement that any and all trust therein provided for should cease, and the property should be owned by Soto as if no such deed had been made, and that Mrs. Soto, with full knowledge of the facts, fully acquiesced therein. There seems to us to be an important fact in the finding which is omitted in the statement of appellants, which is that "it was intended that a proper deed should be executed reconveying said property to Lorenzo Soto and terminating said trust; but on account of neglect said deed was never executed."

We think the court was fully warranted from the evidence in finding the facts as set out in the third finding. The evidence of knowledge on the part of Mrs. Soto and acquiescence is to be found in the facts that upon the redelivery of the trust deed to Soto it was for some time in her possession; that during the life of her husband he managed and possessed the property as his own; that at his death he devised a portion only of it to her, and the residue to his children; that she was appointed and acted as the executrix of his last will, described the property as the separate estate of her deceased husband, submitted to a division of it as in the will provided, sold her interest in it as devised to her, and, so far as appears, never set up or pretended to make any claim under the trust deed until 1883.

The finding is not without the issues made by the pleadings. It is true, the answer avers that the trust deed was never delivered as a conveyance to Jose Machado, the trustee, but only for safe-keeping, and the finding is

against this averment; but immediately the answer proceeds to aver that within one year thereafter, and with full knowledge and consent of the beneficiary, the deed was surrendered up for cancellation on demand of Soto, and destroyed, etc.,—facts which, if true, were proper to be found, subject to such conclusions of law as might be deduced from their existence, or from them and other facts combined.

Objection is made to that portion of the fourth finding in the following words: "That she, the said Maria Ygnacia Mareno de Soto, duly elected to take under said will according to the terms thereof." It follows logically that if the trust deed executed by Soto to Machado was delivered up and canceled so as to extinguish the trust, and the estate created by such deed, so far as Mrs. Soto, the beneficiary, was concerned, there was no occasion for an election; but as the defense, under which it is claimed she elected to take under the will, is a separate one, having for its basis the assumption of the existence in full force and vigor of the trust relation between the parties, it was proper to find the facts necessary to determine the questions presented under that issue.

Whether the last will of Soto did or did not present a case requiring his wife to elect whether she would take under such last will, or under the trust deed, (which for present purposes we shall consider in full force and vigor,) is a question of law to be determined by other considerations than those which apply to her acts and conduct as a devisee. Assuming, however, that it was her duty to elect, we think there was sufficient evidence to sustain the finding of the court. An election may be express,—as where the party elects, by some specific and unequivocal act whereby the intention is clearly indicated, as by the execution of a written instrument declaring the election; or it may be implied from the acts of the party; from his conduct, his acts, or omissions; from his mode of dealing with and treating the property, etc.

"To raise an inference of election from the party's conduct merely, it must appear that he knew of *his right to elect*, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties. As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must evince an intention to elect, and *must show such an intention*. The intention, however, may be inferred from a series of unequivocal acts. * * * Where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will, and to reject her dower." Pom. Eq. § 515.

There was nothing equivocal in the acts of ownership exercised over the demanded property by the widow of Lorenzo Soto. She sold it absolutely, and conveyed what purported to be the fee of the land to Coutts, the testator of the defendants; reciting in her conveyance that it was her right in the said land derived by virtue of the will of Soto "and of her separate property."

Both Burroughs and Seamans are estopped, by the decree of partition in probate, from setting up title derived from Soto adverse to that of their cotenants under the same title. Code Civil Proc. § 1908; Freem. Co-tenancy, §§ 530-532; Freem. Judgm. § 249.

Proceedings of the courts of probate within the jurisdiction conferred upon them by the law are to be construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and their judgments and decrees have like force and effect as judgments of the district courts. Hittell, Gen. Laws, art. 1229.

The record in the probate proceedings shows that the property belonged to

the estate of Soto, deceased, and, so far as we can see, the allegations of all the parties in the proceedings were to that effect, and they cannot now be heard to allege, in contradiction of the record, that what they, in effect, by their silence or by direct averments, said was true, is not so in fact.

The decree of distribution in the probate court cannot be held binding for the purpose of giving to them property under the will of Soto to which they would not otherwise have been entitled, and at the same time as without force when they would set up rights to the property in opposition to the will or decree which settled the same title.

The objections made to the eighth finding of the court relate to the proceedings appointing Jose Machado guardian of the estate of Rosa Soto, the infant daughter of Lorenzo Soto, deceased, and to the proceedings under which her estate was sold, as well as to his acts as such guardian in the partition and distribution of the estate of Lorenzo Soto. The petition under which Machado was appointed as guardian was filed May 2, 1886, and is in the usual form. Service was waived by the attorney for the administrator, and a hearing had on the same day. The order appointing Machado as guardian shows that the attorney for the estate was present, etc., recites as follows: "And it appearing satisfactorily that all the near relatives of said minor, in said county, are consenting hereunto," etc. Beyond this recital, and the fact that Jose Serrano and Maria Serrano de Machado, who are shown by the records to be relatives, filed their consent in writing to the appointment, there is no evidence as to notice to relatives.

The statute then in force provided: "Before making such appointment, the judge shall cause such notice to be given to the relatives of the minor residing in the county, and to any person under whose care such minor may be, as he shall on due inquiry deem reasonable." Hittell, Gen. Laws, art. 3362. The manner in which the notice shall be given to the relatives of the minor residing in the county is left to the judgment and reasonable discretion of the probate judge. *Gronfier v. Puymiroi*, 19 Cal. 629.

As against this collateral attack upon the action of the court in appointing a guardian, the record affords sufficient evidence of the regularity of the proceedings to warrant the presumption of the jurisdiction of the court and the validity of its acts. *Brodrigg v. Tibbits*, 63 Cal. 80. We observe no want of regularity in the proceedings under which the interest of Rosa Soto in the demanded premises was sold by her guardian to Fox, the grantor of Coutts, the testator of defendants. Rosa Soto, upon becoming of age, instituted proceedings against her guardian for a settlement, in which she charged him, among other things, with the proceeds of this sale, and which she finally received. This was an affirmation of the sale.

Again, under the probate act, (Belk. Prob. § 369,) as under the present Code of Civil Procedure, (section 1806,) an action to recover lands sold by a guardian must be brought by the infant within three years after arriving at majority, or it is barred, which was not done in this case.

Like considerations apply to the objections taken to the sale of the interest of Viviana Soto.

We cannot, in the limited time at our command, notice in detail all the objections made to the findings of fact and conclusions of law, and must pass the remainder of them with the observation that a labored examination of the record convinces us that the facts, as found, are warranted by the evidence; that the conclusions of law are properly applied; and that, notwithstanding some minor errors have crept into the record, substantial justice has been done, and a correct conclusion reached in the cause.

We are therefore of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., expressed no opinion.

(2 Cal. Unrep. 675)

BANK OF CHICO v. SPECT, Ex'x, etc. (No. 11,175.)

(*Supreme Court of California.* August 3, 1886.)

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIMS—EVIDENCE.

Where there was no proof of the signature of the executor to the rejection of a claim against an estate, held, that there was no proof of the presentation of the claim.

Department 2.

Park Henshaw, for appellant, Bank of Chico. *J. T. Harrington*, for respondent, Spect, Ex'x, etc.

BY THE COURT. The answer raised an issue as to the presentation of the claim to the executor. The decision is sustained by the evidence. There was no proof of the signature of the executor to the rejection of the claim, and therefore no proof of presentment.

Judgment and order affirmed.

(70 Cal. 392)

KIVEM v. PROVIDENCE G. & S. MIN. CO. (No. 11,543.)

(*Supreme Court of California.* August 12, 1886.)

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—DEFECTIVE SHAFT IN MINE.

In an action against a mining company for personal injuries suffered by an employe, where the testimony disclosed that the partition between the stairway and car-track in the shaft of a mine which plaintiff was ascending was defective, so that a timber thrown down the car-track went into the stairway, and injured him, but that the promoting cause of the injury was the negligence of a co-employe in throwing the timber down the shaft, held, that the defendant was not liable.¹

Department 1.

G. B. Buckley and *J. J. Caldwell*, for appellant, Kivem. *Cross & Simonds*, for respondent, Providence G. & S. Min. Co.

MCKINSTRY, J. The court below granted a nonsuit. The evidence showed that the shaft in which the plaintiff was injured had been divided by a row of posts extending down the center, at a distance of about four feet from each other, firmly fixed in the roof and base-pieces; that in the space to the right of the row of posts, looking down, there was a ladder-way, to be used by the men working in the mine, consisting of a row of steps about 14 inches wide and close to the posts; that in the other compartment of the shaft there was a double rail car-track. The plaintiff, when injured, was ascending the steps with a lighted candle. When plaintiff was injured three of the posts mentioned were wanting, or not in place; one of them was absent near the top of the shaft, thus leaving there a space of over eight feet between two of the posts.

Wilcox, the only witness whose testimony is set forth in the transcript, testified that, having been directed by Truan, shift boss, about two hours previously, to go up and throw a timber down the shaft, he cast into the shaft a log twelve feet long, and eight inches in diameter at the smaller end. The witness said: "He told me to throw it down,—that is all I know about it." "The mouth of the shaft, was under a building. I packed the timber to the mouth of the shaft on my back. I got it into the shaft by throwing it in. I threw it from my shoulder. I took no means to see if anybody was

¹ See *Trihay v. Brooklyn L. M. Co.*, (Utah,) *ante*, 612.

coming up the shaft before I threw it in. If I had looked in the shaft, and there was a man there, I should certainly have seen him." "If I had known there was a man in the shaft, I would have waited until he came up." The witness added that he had no time to look into the shaft; he had as much as he could do to get rid of what he had on his back; that he could have laid the timber down, and run it into the shaft; that there was no danger in getting timber down the shaft if the person sending it down looked to see if there was anybody in the shaft. And he said: "I threw it into the shaft. I intended for it to go down the trackway, but it went between the center posts, into the other shaft." "It started in the trackway." "I think it struck, as near as I can tell, the end of the post,—went right across, and struck the end of the post, and that turned it right around down the shaft." "I went in this way, [showing.] I wasn't facing square, and I threw myself half around, and threw the timber in. * * * The shaft was dipping east; my face was south." In answer to the question, "When you dumped it off, you dumped it in such a way that it struck the post?" the witness said: "Yes, went right between the center posts, and struck the end post." "Question. Now, if you had put the timber down into the shaft with care, don't you think it would have gone down the track? Answer. I don't know. Q. You don't know anything about that? A. I threw it in. I did not know exactly where it was going." All the testimony showed that the immediate and proximate cause of the injury sustained by plaintiff was the negligence of his co-employee.

Section 1970 of the Civil Code reads: "An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." There was no evidence that if the log had been sent down with reasonable care the plaintiff would have been injured. "The proximate cause of the injury is the object of inquiry, and, when discovered, must be regarded and relied on." *Hayes v. Western R. Corp.*, 3 Cush. 274. Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had. *Wood, M. & S.* 812. The same rule must apply where the appliances for doing work are defective. Even if we could assume, therefore, that the partition between the two compartments of the shaft was not as complete as it should have been, or that the plaintiff would not have been injured if a continuous bulwark had been erected between the two compartments, or if the posts had been nearer together, still, as the case clearly shows that the plaintiff would not have been injured except for the gross negligence of the co-employee, and that such negligence was the immediate and proximate cause of the injury, and if the appliances furnished by the defendant had been used with ordinary care the injury would not have occurred, the nonsuit was proper.

Judgment and order affirmed.

We concur: ROSS, J.; MYRICK, J.

70 Cal. 395

McNOBLE v. JUSTINIANO. (No. 9,548.)

(Supreme Court of California. August 12, 1886.)

STATUTE OF LIMITATIONS—ADVERSE POSSESSION—PAYING TAXES—CODE CIVIL PROC. CAL. § 325.

Under section 325, Code Civil Proc., the payment of the taxes by the adverse claimant of land is a necessary element of adverse possession of land, without which the adverse possession cannot be established.

Department 1.

W. K. Boucher, for respondent, McNoble. *Reddick & Solinsky*, for appellant, Justiniano.

McKINSTRY, J. The demanded premises are described in the complaint, and are a portion of a larger tract of 160 acres. The court found that taxes were assessed on the 160-acre tract for the fiscal years 1877-78, 1878-79, and 1879-80; that they were assessed to and paid by the plaintiff, and that defendant paid none of the taxes.

The proviso to section 325 of the Code of Civil Procedure reads as follows: "Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this Code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land."

Taxes were assessed on the land of which defendant claims to have had the adverse possession. It is said that taxes were not so assessed, because there was no separate assessment of such land. Certainly, the plaintiff was not required to recognize the land alleged to have been occupied by the defendant as a separate tract, by listing it, for purposes of assessment, separately. It does not appear that the defendant gave or offered to the assessor a list of his property containing a description of the land of which he claimed to be possessed. Had he done so, and offered to pay the tax, a different question might have been presented. Under the circumstances the defendant was not relieved of the consequences of a failure to pay the taxes by the fact (if such be the fact) that, after the assessment was made, he could not pay the taxes on the land of which he claimed the possession without paying those assessed on the larger tract, including such land.

It is insisted, however, that the whole purpose of the proviso is to secure the payment of taxes to the government, and, inasmuch as the taxes were paid by the plaintiff, the law of the proviso was complied with. It would be a strange result if, under a law which provides that an adverse possession can only be made out by proof of the payment of the taxes by the adverse possessor, the payment of the tax by one who is undoubtedly the owner of the land, unless the adverse possession is established, should inure to the benefit of him who seeks to make out an adverse possession. If this were the rule, the plaintiff here could never discharge his duty to the government, or preserve his title, except by aiding in the establishment of an adverse title. If, as we said with reference to the other point, the defendant had done all that he could do towards paying the taxes; if he had sought to have the lesser tract separately assessed, and had tendered the taxes on it,—a different question might be presented. It is not the sole purpose of the statute that the taxes should be paid by somebody. The payment of the taxes by the adverse claimant is made a necessary element of adverse possession, without proof of which the adverse possession cannot be established.

One can acquire title to real property by adverse possession only to the extent and in the manner provided by statute. It was for the legislature to fix the period of limitation, and to declare what facts must be proved to

establish an adverse possession for the period of the statute. With the policy or expediency of the law we have no concern, and are not authorized to interpolate in the statute words which shall give to a defendant who has not paid the taxes, nor attempted to pay them, the benefits of adverse possession in case the plaintiff has paid them. In the case at bar the plaintiff was entitled to recover the demanded premises, unless the defendant proved that he had paid the taxes, or unless, at least, he proved that he attempted to pay them, but was prevented from paying them by the action of the assessor or tax collector. Judgment affirmed.

We concur: Ross, J.; MYRICK, J.

70 Cal. 399

TERNEY v. DOTEN. (No. 11,260.)

(Supreme Court of California. August 12, 1886.)

STATUTE OF FRAUDS—VERBAL AGREEMENT TO SELL HORSES—DELIVERY.

A verbal agreement to sell a number of unbroken horses at a price exceeding \$200, there being no delivery of them except that part of the number were corralled, broken, and turned into the vendor's pasture, and no part of the purchase money being paid, is a contract within the statute of frauds, and void.

Department 1.

Ewing & Clafin, for respondent, Terney. *Goodwin, May & McDonald*, for appellant, Doten.

ROSS, J. The agreement testified to on the part of the plaintiff is within the statute of frauds, and therefore void. It was a contract for the sale of a certain lot of horses at a price exceeding \$200. The agreement was not in writing, nor was there any note or memorandum thereof made in writing, and consequently none such was subscribed by the parties to be charged, nor by any one for them. It is not pretended that any part of the purchase price was paid at the time of the agreement of sale, or at all; so that, unless there was such acceptance and receipt of a part of the horses as is contemplated by section 1739 of the Civil Code, it is clear that the agreement was invalid. The section referred to reads: "No sale of personal property, or agreement to buy or sell it, for a price of \$200 or more, is valid, unless (1) the agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent; or (2) the buyer accepts and receives part of the things sold, or, when it consists of a thing in action, part of the evidences thereof, or some of them; or (3) the buyer, at the time of sale, pays part of the price."

The agreement, as testified to on the part of the plaintiff, was, in effect, this: Defendants agreed to sell him, and he agreed to buy, 100 unbroken horses of a certain description, at the price of \$75 each, out of defendants' band of horses, then running at large on their stock range; said 100 horses to be selected, paid for, and taken by plaintiff in this wise: Defendants were to gather up a number of the horses of the band from time to time, and place them in their corrals, from which plaintiff was to select not less than 20 of the description agreed on, and commence "rough breaking" them, having for that purpose the use of defendants' harness, cart, etc.; after which the number so selected and broken were to be turned into defendants' pasture field, and another selection made in like manner, and for a like purpose, and so on, until the whole number of 100 agreed to be sold and bought as aforesaid should be gathered up, selected, and broken,—all of which was to be done within two months from the time of the agreement of sale. At the expiration of that time the horses were to be paid for by plaintiff at the rate agreed on, and were then to be taken by him from defendants' premises. Under the contract plaintiff went to defendants' ranch, and the latter got together a large num-

ber of horses, from which the plaintiff selected 22 answering the description agreed on, and commenced breaking them; upon the conclusion of which he turned them into the pasture field of defendants, and waited for defendants to gather another lot, from which to select another batch, in accordance with the agreement. The testimony tended to show that defendants failed in that regard, and finally failed and refused to comply with their part of the contract; and, as the verdict of the jury was against them, we take that as an established fact. The real question, however, is, do the facts in respect to the 22 horses selected and broken by plaintiff constitute an acceptance and receipt of part of the lot of horses sold, within the meaning of the section of the Civil Code above quoted? We think it clear that they do not. "The acceptance," as said by Story in his work on Sales, § 276, "must be final, complete, and irrevocable, and the subject-matter must have come into the absolute possession of the purchaser, or of some person authorized finally to receive it for him. * * * If the agreement be that the title of the subject-matter of sale shall remain in the vendor until a certain date, when payment shall be made, it would not be binding, if made verbally. Thus, where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, and about the expiration of such time A. rode the horse, and gave directions as to its treatment, but requested that it might remain in the possession of B. for a further time, at the expiration of which he promised to remove it, and pay the price, to which B. assented, and the horse died before A. took him away, it was held that there was no acceptance, within the meaning of the statute. *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680."

In the case at bar none of the horses forming the subject-matter of the contract ever passed into the absolute possession and control of the plaintiff. There was therefore no acceptance and receipt of any of them by plaintiff, within the meaning of the statute.

Judgment and order reversed, and cause remanded.

We concur: MCKINSTRY, J.; MYRICK, J.

2 Cal. Unrep. 679

LAMET *v.* MILLER and others. (No. 11,177.)

(Supreme Court of California. August 12, 1886.)

EXCEPTIONS—BILL OF—APPEAL FROM JUDGMENT ON PLEADINGS.

On appeal from a judgment on the pleadings, the bill of exceptions must show that the appellant excepted to the order granting the motion for judgment, or that he was absent from court when the order was granted, in which case the order is deemed to have been excepted to. Section 647, Code Civil Proc. Cal.

Department 1.

W. A. Gett, Jr., and *Martin & Jones* for respondent, Lamet. *Grove L. Johnson*, for appellants, Miller and others.

BY THE COURT. We cannot take notice that plaintiff moved for judgment on the pleadings, or that the motion was granted. Recitals in a judgment entered by the clerk are ordinarily immaterial; at least, on direct appeal. They are not necessary to the judgment, are not ordered by the court, and are frequently but the clerk's exposition of events antedating the judgment. *Leese v. Clark*, 28 Cal. 36.

Here the judgment, with the recitals preceding it,—all constituting one continuous writing,—is signed by the superior judge. We do not find it necessary to say that, if the recitals contained all the essential elements of a bill of exceptions, we would treat them as a bill of exceptions signed and settled by the judge. Regularly, a bill of exceptions should be a distinct writing from the judgment. It may be that the introduction of matter which would constitute a bill of exceptions, into a writing, including both such

matter and the judgment proper, and signed by the judge, will not deprive the matter alleged to be improperly inserted of its character as a bill of exceptions. The only important thing may be the certificate of the judge to a statement of facts which occurred in the court below.

It is enough to say in this case, however, that, even if the writing signed by the judge should be treated as a bill of exceptions as well as a judgment, it does not appear therefrom, either that the defendants excepted to the order granting the plaintiff's motion for judgment on the pleadings, or that they were absent when the order was made. An order made in the absence of the party is deemed to have been excepted to. Code Civil Proc. 647. But this does not relieve the party against whom such an order is made of the necessity of presenting and having settled a bill which shall show that the order was made under circumstances which would give him the benefit of the presumed statutory exception; that is, that it was made in his absence.

The recitals preceding the judgment do not show that the defendants were absent when the order was made. The fact that the motion was taken under advisement would not create a presumption of defendants' absence.

When a bill of exceptions is necessary, it must always contain a statement of the facts which will authorize this court to review the action of the court below. If the defendants were present when the order was made, they should have excepted to it. If they were not present, that fact should have been made clearly to appear in a bill of exceptions. Judgment affirmed.

70 Cal. 398

LEE and others v. ORR and others. (No. 11,261.)

(*Supreme Court of California*, August 12, 1886.)

1. PARTNERSHIP—ACTION NOT UPON PARTNERSHIP MATTER—SURPLUSAGE—PLEADING.

Describing the plaintiffs in the title of an action as partners is surplusage, where the suit is not upon a partnership matter, and an allegation of compliance with the law relative to filing and publishing notice of partnership is unnecessary.

2. JUDGMENT—ACTION TO SET ASIDE FORMER JUDGMENT—PLEADING.

In an action to set aside a judgment brought by a subsequent creditor, an allegation that the property levied upon by the defendants is all the property of the common judgment debtor is sufficient, without the further allegation that an execution had been issued, and returned unsatisfied.

Department 1.

Goodwin & Jenks, for respondents, C. Lee and others. *W. W. Kellogg* and *E. T. Nogar*, for appellants, H. W. Orr and others.

MYRICK, J. One of the defendants herein, H. W. Orr, obtained a judgment against the Hungarian Hill Gravel Mining Company, and, by virtue of an execution issued thereon, certain real estate was sold to said Orr. The plaintiffs herein obtained a junior judgment against the same company. This action was brought to set aside the former judgment and sale on the ground of fraud, and to restrain the execution of a sheriff's deed.

1. The plaintiffs in their complaint in this action entitled the suit "*C. Lee, P. C. Lee, and C. J. Lee, Partners, doing Business under the Firm Name of C. Lee & Sons, v.*" etc. The answer presented the issue that it nowhere appeared in the complaint that plaintiffs had complied with the law requiring the filing and publishing of a notice of partnership. Civil Code, §§ 2466, 2468. The court below made no finding on this subject, and the omission is urged as ground for reversal. It nowhere appears in the complaint, nor is it averred in the answer, that the cause of plaintiff's action was upon or on account of any contract made, or transaction had, in the partnership name of the plaintiffs. The part of the title of the action relating to the plaintiffs as partners may be disregarded as surplusage, leaving the complaint as stating, in effect, that the judgment recovered by plaintiffs was recovered in their capacity of co-plaintiffs, not as partners.

2. The complaint alleged that the mining company had not, and never had, any property or assets whatever, except the property sold, as before stated, to the defendant Orr. With that allegation in the complaint it was not necessary to allege, in addition, that an execution had been issued, and returned unsatisfied. The finding of the court upon this subject is sufficient. Judgment affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

70 Cal. 454

QUINN v. ANDERSON and another. (No. 11,300.)

(Supreme Court of California. August 26, 1886.)

1. WAYS—PUBLIC HIGHWAY—DEDICATION—ANIMUS DEDICANDI.

Dedication of a public highway by the owner of the soil to the use of the public is never to be presumed without evidence of an unequivocal intention to dedicate on the part of the owner.¹

2. TRIAL—FINDINGS OF COURT—ISSUE MADE IMMATERIAL BY FINDINGS.

The findings of fact by the trial court must be responsive to and cover all the material issues; but a material issue may become immaterial, so as to require no findings, by reason of findings upon other issues.

3. DAMAGES—DAMNUM ABSQUE INJURIA.

No damage can be recovered for the consequences of a lawful act properly performed. If an injury is sustained, it is *damnum absque injuria*.

Commissioners' decision. Department 2.

Street & Street, for appellant, Quinn. J. D. Nicol, for respondents, Anderson and another.

SEARLS, C. This is an action to enjoin the defendants from obstructing a highway in the county of Tuolumne, and to recover damages for obstructing the same. Defendants had judgment, from which, and from an order denying a new trial, the plaintiff appeals.

The cause was tried by the court without a jury, and the findings show (1) that in September, 1883, defendants closed up that certain road leading from the county road, known as the "Sonora and Montezuma Road," through the lands of the defendants, to the ranch of the plaintiff; (2) that plaintiff had been accustomed to travel said road during the summer season for some 10 years, and that persons having business with the plaintiff occasionally traveled the same in going to his ranch; (3) that said road was traveled by the public generally from 1850 to 1858, but for a period of 27 years last past has been abandoned by the public as a highway; that said road was never dedicated to or accepted by the public as a highway, and was never marked off or declared a highway; (4) that plaintiff has a good road leading through his own lands to the county road, which causes him to travel some two miles further to market.

The conclusions are that the road in question is neither a public nor private highway, and that plaintiff has suffered no damage by reason of defendants' acts in obstructing the road.

Public highways in this state "are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or, if laid out or erected by others, dedicated to or abandoned to the public, or made such in actions for the partition of real property." Pol. Code, § 2618.

It is not shown by the record that the road in question was ever laid out or erected by the public as a highway. Was it ever *dedicated* or abandoned to the public as such highway? The findings of the court below answer the question in the negative. "The vital principle of dedication is the intention to dedicate,—the *animus dedicandi*; and, whenever this is unequivocally

¹ See note at end of case.

manifested, the dedication, so far as the owner of the soil is concerned, has been made." Ang. Highways, § 142. Dedication is therefore a *conclusion of fact* to be drawn from all the circumstances of each particular case. The sole question, as against the owner of the soil, in such cases is, does the evidence show an intention on his part to dedicate the land to the public as a highway? Dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner. Ang. Highways, § 147. This intention may be inferred, however, by any acts on his part which satisfies the mind of the existence of the intent; and the character of the acts requisite will depend very much upon the situation of the land over which the way is claimed, its surroundings, uses, and a variety of other circumstances tending to illustrate the intent.

We do not find in the evidence before us such proof of a dedication of the *locus in quo* to the purposes of a highway, either public or private, as will warrant us in disturbing the findings of the court below. It appears that the passage of the road had for years been barred by gates or other obstructions, to be opened and closed by parties passing over the land. This, in the absence of a statute providing therefor, as is sometimes found in case of highways, has always been considered as strong evidence in support of a mere license to the public to pass over the designated way, and in rebuttal of a dedication to public use. Ang. Highways, § 152; *Com. v. Newbury*, 2 Pick. 51; *Proctor v. Lewiston*, 25 Ill. 153; *State v. Strong*, 25 Me. 297.

Again, stronger evidence is required of the dedication of a neighborhood or timber road than of a thoroughfare, (*Onstott v. Murray*, 22 Iowa, 457,) and in case of a country road than of a street in a town or city, (*Harding v. Jasper*, 14 Cal. 649.)

The complaint avers that the plaintiff has been damaged by the wrongful acts of defendants in obstructing the road in the sum of \$250. This is denied by the answer. There was some testimony on the part of plaintiff tending to show injury sustained by him on account of the obstruction of the highway. There is no direct finding by the court on this issue, and plaintiff assigns this omission as error. The rule is well established in this court that the findings must be responsive to and cover all the material issues in the case. A material issue may, however, become immaterial, so as to require no findings, by reason of findings upon other issues. *Porter v. Woodward*, 57 Cal. 535; *McCourtney v. Fortune*, Id. 617. That was precisely the case here. If the alleged highway was not such in fact, and if the defendants had a right, as the owners of the land over which it passed, to obstruct and close it, then, as their acts were lawful, there could be no recovery against them, and manifestly the question of the injury sustained by plaintiff became immaterial, and no findings as to the amount thereof could avail by way of benefit to him. No damage can be recovered for the consequences of a lawful act properly performed. In such cases, if an injury is sustained, it is *damnum absque injuria*.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

DEDICATION TO PUBLIC USE. A clear and unequivocal intent on the part of an owner is essential to every valid dedication of land to a public use. *Brooks v. Topeka*, (Kan.) 8 Pac. Rep. 392, note, 395; *Heiple v. East Portland*, (Or.) 8 Pac. Rep. 907; *Graham v. Hartnett*, (Neb.) 7 N. W. Rep. 280; *Tupper v. Huson*, (Wis.) 1 N. W. Rep. 332; *Maywood Co. v. Village of Maywood*, (Ill.) 6 N. E. Rep. 867, and note; *Tucker v. Conrad*, (Ind.) 2 N. E. Rep. 803.

Such intent will be presumed from platting the land and making conveyances thereof by reference to the plat. *Brooks v. Topeka*, (Kan.) 8 Pac. Rep. 392, and note; *Hurley*

v. Mississippi & R. R. B. Co., (Minn.) 24 N. W. Rep. 917; *Shea v. City of Ottumwa*, (Iowa,) 24 N. W. Rep. 582; *Morse v. Zeize*, (Minn.) 24 N. W. Rep. 287; *Gregory v. Lincoln*, (Neb.) 14 N. W. Rep. 423; *Stange v. Hill & W. D. St. Ry. Co.*, (Iowa,) 7 N. W. Rep. 115; *Maywood Co. v. Village of Maywood*, (Ill.) 6 N. E. Rep. 866, and note; *Mattheisen & H. Z. Co. v. City of La Salle*, (Ill.) 8 N. E. Rep. 81; *In re Pearl St.*, (Pa.) 5 Atl. Rep. 430.

As to other evidences of such intent, see *Brooks v. Topeka*, (Kan.) 8 Pac. Rep. 392, and note; *Hugh v. Haigh*, (Iowa,) 28 N. W. Rep. 650; *Eastland v. Fogo*, (Wis.) 27 N. W. Rep. 159, and note; *State v. Schwin*, (Wis.) 26 N. W. Rep. 568; *Ryan v. Kennedy*, (Iowa,) 17 N. W. Rep. 142; *Quinton v. Burton*, (Iowa,) 16 N. W. Rep. 569; *Cihak v. Kleke*, (Ill.) 7 N. E. Rep. 111, and note.

Acceptance by the public is also necessary to establish a dedication. *Hugh v. Haigh*, (Iowa,) 28 N. W. Rep. 650; *Bell v. Burlington*, (Iowa,) 27 N. W. Rep. 247; *Eastland v. Fogo*, (Wis.) 27 N. W. Rep. 159; *Morse v. Zeize*, (Minn.) 24 N. W. Rep. 287; *Maywood Co. v. Village of Maywood*, (Ill.) 6 N. E. Rep. 866, and note; *People v. Lohfilem*, (N. Y.) 5 N. E. Rep. 784; *In re Rebuilding Bridge*, (N. Y.) 3 N. E. Rep. 679.

(70 Cal. 412)

CURTIS and others v. CITY OF SACRAMENTO. (No. 11,267.)

(*Supreme Court of California.* August 17, 1886.)

STATUTE OF LIMITATIONS—EFFECT OF SPECIAL PROMISE.

An acknowledgment of indebtedness, made before the period of limitations had run, and coupled with a promise to submit to arbitration as to the amount thereof, is not such an acknowledgment of pre-existing debt as will support an action, brought after the limitations had run, on a general implied promise to pay.

Department 1.

Freeman & Bates, for appellants, Curtis and others. *W. A. Anderson* and *A. P. Catlin*, for respondent, City of Sacramento.

MCKINSTRY, J. 1. As was said by the learned judge of the superior court: "This action is not upon the original verbal promise. There is no averment that the defendant promised to pay plaintiffs what their services should reasonably be worth, and that they were worth \$10,000. The averment is [that in 1878 the defendant was indebted to the plaintiffs in the sum of \$10,000 for professional services, and that thereafter, on the twenty-ninth of July, 1878] the defendant promised in writing to pay to the plaintiffs the sum of \$10,000 within two years from the twenty-ninth day of July, 1878; and the only promise in writing offered in evidence is the agreement to arbitrate. But that agreement contains no promise to pay \$10,000, or any other specific sum of money. There was merely an agreement to submit matters in controversy to arbitrators. They awarded \$6,000, and the court set aside the award. The written promise is not, therefore, the promise alleged." If the court below had allowed the proposed amendment to the complaint, the result must have been the same.

It is urged that the recital in the arbitration agreement, "Whereas, the city of Sacramento is indebted to the firm of Curtis & Clunie for legal services rendered by said firm in the several actions; * * * and whereas, the board of trustees of said city and said firm differ as to the amount of said indebtedness," etc.,—is an acknowledgment in writing such as is contemplated by section 360 of the Code of Civil Procedure. While a debt barred by the statute of limitations may be revived by an implied promise, created by a clear and unqualified acknowledgment of the debt, yet, if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of a contract to pay except to the extent or upon the conditions named, no implied promise to pay absolutely is created. *Biddell v. Brizzolara*, 56 Cal. 380. The acknowledgment must be a direct, unqualified, and unconditional admission of a debt which a party is liable and is willing to pay. The most positive acknowledgment of a pre-existing debt is insufficient if accompanied by a declaration which is inconsistent with an intention to pay. *McCormick v. Brown*, 36 Cal. 185; *Chabot v. Tucker*, 39 Cal. 437. If the debtor simply acknowledges an old debt, the law implies from that sim-

ple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration; but if the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him. *Philips v. Philips*, 3 Hare, 281.

We agree with the learned judge below: "The agreement to arbitrate does not contain any such an acknowledgment of a pre-existing debt as will support a general implied promise to pay it." "When there is a written acknowledgment of a debt, not coupled with any promise, the law will imply a general promise to pay; but, when the acknowledgment is accompanied by a particular promise, the law will imply none other. In such case the acknowledgment is not direct and general, but qualified and conditional; and, if it contains any cause of action, that cause must be based upon the contract which the instrument expressly states. In the case at bar the acknowledgment contained in the recital in the first part of the written agreement to arbitrate is coupled with an express promise to do a particular thing, viz., to pay what the arbitrators shall award. The instrument contains no other promise to pay, express or implied. The recital which is claimed to be the acknowledgment is intended for the very purpose of explaining and pointing out the particular promise which follows. It cannot, therefore, be construed to be a 'new or continuing contract' to pay upon a former obligation."

It is insisted, however, that here the acknowledgment was made before the statute had run upon the original oral contract; that the defendant had no power to attach any condition; and that we must disregard the express promise, and look at the acknowledgment alone.

It has been said that a promise made before the statute has run vitalizes the old debt for another statutory period, while an acknowledgment or promise made after the statute has run gives a new cause of action, for which the old debt is the consideration. This distinction would seem, however, only to have affected the question of remedy. Wood, Lim. 81. Mr. Wood says: "The plaintiff may, in the latter case, but not in the former, declare upon the new promise; but," he adds, "the practice in most of the states is to declare upon the old debt, and, when the statute is pleaded, to reply the new promise, and the issue is then upon the plea and the replication; the replication to that extent being treated as a declaration upon the new promise. * * * It makes no difference in this respect that the promise is conditional. If the debtor does not perform the conditions agreed to by him, the creditor is remitted to his original remedy, and to a plea of the statute thereto, and he must rely upon the new promise; and if, upon the plaintiff's part, there is no fault as to the failure of conditions, the new promise becomes an absolute one upon the old debt." Id.

In this state, under the Code, whenever the action is brought after the statute has run, the plaintiff can avoid a demurrer to his complaint only by averring the new promise. *Chabot v. Tucker*, *supra*. The declaration is always on the new promise. Even if an unqualified promise made before the original cause of action was barred, could be treated as merely modifying the original contract, by extending the time of payment with reference to the statute of limitations, a qualified and conditional promise, differing from the general promise to pay, must be held to be a distinct and substituted contract, and the only contract in force after the original contract is barred. In an action brought on one promise a plaintiff cannot recover upon proof of another and different promise. The fact that the new contract was entered into before the original cause of action was barred, cannot control nor change the terms or conditions of the new contract.

In the case at bar the complaint alleged a new promise not proved. If the proposed amendment had been inserted in the complaint, the complaint would then have been subject to demurrer, because the complaint would have shown that no valid award had been made by the arbitrators.

Section 337 of the Code of Civil Procedure was properly pleaded. Even if it should be conceded that the first subdivision of section 339 should have been pleaded, (and not section 339 generally,) the action, as we have seen, was not brought on the oral promise. This is also an answer to the suggestion that the running of the statute against the oral promise was suspended during the arbitration proceedings. Order affirmed.

We concur: ROSS, J.; MYRICK, J.

70 Cal. 417

LAWRENCE and others v. GREEN and others. (No. 11,493.)

(Supreme Court of California. August 17, 1886.)

1. NEGLIGENCE—EVIDENCE—PRIMA FACIE CASE.

Where a plaintiff shows that she was injured by the overturning of a coach, caused by the breaking of one of its wheels while it was being driven round a curve, down grade, on a mountain road, where one side of the track was about a foot lower than the other, she has made out a *prima facie* case; and if no evidence is given to show that there was no defect in the wheel, and that the defendant was not guilty of negligence, she is entitled to recover.

2. SAME—CONTRIBUTORY NEGLIGENCE—PRUDENCE REQUIRED IN DANGER.

It is error for the court to instruct the jury "that a coach proprietor is never responsible for the imprudence of his passengers." The real question is whether, assuming the person injured to be ordinarily reasonable and prudent, the circumstances were so alarming as to deprive her of her ordinary reason, and to induce her instinctively to seek safety by an act which, although not such as the jury might believe to be prudent or *discreet*, was such as the generality of persons would have adopted in the dilemma in which she was placed.

Department 1.

Van Clief & Wehe, for appellants, Lawrence and others. *Hundley, Gale & Ford*, for respondents, Green and others.

MCKINSTRY, J. The complaint, after stating other facts, avers "that while she, said Mary A. Lawrence, was said passenger, and was being carried on said coach down the Goodyear Bar hill, between said Mountain House and Goodyear Bar, at a point on said road, * * * by and through the carelessness and negligence of the defendants, [proprietors of the coach,] said coach *broke down* and was overturned, by means whereof the said Mary A. Lawrence was greatly bruised and injured," etc. It was alleged in the answer that "said stage-coach had reached a point on said road a short distance above said Goodyear's Bar, and, while making a short and abrupt turn therein, said coach slid or lurched to the left, and the nigh or left hind wheel was dished or broken; * * * that defendants do not own or have the control or any management of said road."

The bill of exceptions shows that, when the accident occurred, the coach "was being driven down grade of a mountain road more than ordinarily steep, using the brake, and upon more than an ordinary curve therein to the left and towards the mountain, about four miles down said grade, wherein the track for the wheels on the left side of the road was about one foot lower than the track for the wheels on the right side thereof; but the condition of this part of the road, when the accident happened, had not been changed in any respect during the period of six months next before the time of the accident in question here, and during all of which period of six months the defendants had driven their coaches over it daily, except one day in each week, and had actual notice of its condition during that period, and at the time of the accident; and D. P. Cole, one of the defendants, testified that for some time before the accident he had considered it a dangerous part of the road." The bill of exceptions does not show the pace or rapidity with which the horses were being driven. The evidence, and the admission in the answer that the immediate cause of the overturn was the breaking of the wheel, established

prima facie that the wheel was defective. *Christie v. Griggs*, 2 Camp. 79; *Dawson v. Manchester, etc., Ry. Co.*, 5 Law T. (N. S.) 682; Shear. & R. Neg. § 268, note. There was no evidence that the breaking was caused by "heating," or that the defect in the wheel was *latent*, or that it had been examined without discovery of the defect.

The occurrence of an injury through a defect in the vehicle is at least *prima facie* evidence of negligence on the part of the carrier. Shear. & R. Neg. § 268. The carrier must have carriages adequate to the work to which they are subjected, and must see that they are kept in due repair. Whart. Neg. §§ 628, 629. But the carrier is not liable for damages incurred through latent defects which could not have been discovered by examination, and which are not traceable to any want of good business diligence in the manufacturer. Whart. Neg. § 631.

The negligence of the defendants was established *prima facie* by proof that the wheel broke, and the coach was thus overturned, and there was no evidence to overcome the *prima facie* case,—no evidence that the wheel was sound, or that the defect was *latent*. As the case was presented, was the court authorized to charge the jury upon the hypothesis that the accident would have happened if there had been no defect in the wheel? The fact that the road was a foot lower on the inner side did not perhaps prove, nor tend to prove, that the wheel was a good wheel. It left the unsoundness of the wheel still uncontested, and simply showed that the unsound wheel broke when subjected to the strain, or to the slide or lurch of the coach, on the uneven ground. If the condition of the road was merely sufficient to create a suspicion that a sound wheel might have been broken under the circumstances, the jury would not be justified in acting upon a mere surmise or conjecture of the existence of a possible fact of which there was no real evidence. But even if it should be conceded that evidence that one side of the road was lower than the other, and that the coach lurched towards the lower side, tended to overcome the *prima facie* case of the plaintiff, it was for the defendants to overcome it.

The court charged the jury: "The defendants in this class of actions are not bound to prove just how the accident occurred. They must prove, however, by a preponderance of testimony, that it was not the result of their carelessness or ignorance." The defendants were not bound to prove anything in the first instance; but when the plaintiff has shown, *prima facie*, that the accident was caused by the defective wheel, the burden was cast on the defendants to show that the wheel was not defective, or that the defective wheel did not cause the overthrow of the coach. It was for them to prove that the wheel was not in fact defective, or that the defect was latent, or, at least, that the cause was something entirely independent of the wheel, and one for which they were not responsible.

In *Boyce v. California Stage Co.*, 25 Cal. 468, the court said: "The fact that the coach did overturn is all that he [plaintiff] need establish in order to recover for such injuries as he may have sustained. In order to rebut this presumption of negligence the defendant must show that the overturning was the result of inevitable casualty, * * * for the law holds him responsible for the slightest negligence," etc. "In doing this the defendant must necessarily explain how the overturning occurred, and if he fails to do this the presumption of negligence remains." See, also, *Fairchild v. California Stage Co.*, 13 Cal. 599.

Here, not only did the plaintiff prove the overturning of the coach, but the immediate cause of the overturning is *admitted*. The defendants could not overcome the plaintiff's case, and show that the accident was not the result of their carelessness or negligence, except by proving how the accident did occur, and that it did not occur by reason of a defect in the wheel, or that such defect was latent. But the courts charge was that the defendants need

not prove how it occurred, but assumed that, as against the plaintiff's case, they could show their irresponsibility in some other way.

The court below instructed the jury: "If you believe from the evidence that the plaintiff rashly or imprudently, and of her own fault, leaped from the stage-coach, and thereby caused or contributed towards the injury complained of, your verdict should be for the defendants." "When a party has been injured, and such injury was caused or contributed to by his own rashness, imprudence, or *indiscretion*, he is not entitled to recover damages for such injury. A coach proprietor is certainly not responsible for the rashness or imprudence of his passenger." "It is not sufficient to constitute contributory negligence that the plaintiff's own act contributed to her injury; but it must also appear that she so contributed by her own fault, or by neglecting to take ordinary care of her own personal safety."

A passenger ought not to be deemed guilty of contributory negligence when he takes such risk as *under the same circumstances* a prudent man would take, (Shear. & R. Neg. § 282;) and, when the circumstances are such as would deprive a person of ordinary prudence of his self-possession, it is not to be expected that he will have all his mental faculties perfectly at his command. Speaking of the position of the plaintiff in *Robinson v. Western Pac. R. Co.*, 48 Cal. 421, the court said: "Startled and alarmed, as she doubtless was, by the imminent peril of her position, it would be asking more than should be required of an ordinarily prudent and reasonable person to demand that she should exercise the soundest discretion in her efforts to escape."

If the case showed that the plaintiff encountered no danger from the overturning of the coach, and that an ordinarily prudent person must have known that there was no danger, but that she gave way to fright for which there was no real or apparent cause, it may be that her act in leaping from the coach would be held to be contributory negligence. The law, however, must select a standard by which to estimate the conduct of one in apparent danger, and selects as a standard the probable conduct of a person of ordinary prudence under the same circumstances. Applied to the facts of this case, the hypothesis concedes that the plaintiff was in some peril, and in such degree of peril that she may have acted in a manner which, in the light of "the wisdom which comes after the fact," was not the wisest. The jury, unenviored by the threatening circumstances which surrounded the plaintiff, may have believed that if she had remained in her place she would not have been seriously injured, or injured at all.

Would a person of ordinary prudence and courage have jumped from the coach? It may be claimed that this question was implied in the instructions given; that she was not guilty of a *fault* if she acted as a person of ordinary courage and prudence would have acted. The jury were told broadly that a coach proprietor is never responsible for the imprudence of his passengers. And they were also told, in effect, that if plaintiff was indiscreet; if she was not prudent,—sagacious in adapting means to the end,—her personal safety; if she was not circumspect and wisely cautious,—she could not recover. The real question was whether, assuming her to be ordinarily reasonable and prudent, the circumstances were so alarming as to deprive her in a degree of her ordinary reason and prudence, and to induce her instinctively to seek safety by an act which, although not such as the jury might believe to be prudent or *discreet*, was such as the generality of persons would have adopted in the dilemma in which she was placed.

Judgment reversed, and cause remanded.

We concur: ROSS, J.; MYRICK, J.

70 Cal. 437

WIGGINS v. BRIDGE and others. (No. 11,450.)

(*Supreme Court of California.* August 25, 1886.)

MECHANIC'S LIEN—BUILDING NOT COMPLETED—NOTHING DUE CONTRACTOR.

When a person gives notice of his claim of lien upon a building, and there is nothing due or owing to the contractor upon the contract, and the contractor does not afterwards contribute anything to the construction of the building, and never completed it, the lienor is not entitled to recover upon his lien.

Department 2.

Gardner & Stephenson and *Paris & Godcell*, for appellant, Wiggins. *Albert M. Stephens*, for respondents, Bridge and others.

MCKEE, J. This is an appeal from a judgment in an action to foreclose a mechanic's lien. The judgment was rendered upon a finding which shows that on the fifth of July, 1883, two of the defendants,—Bridge, as an original contractor, and Phillips, as tenant of the Southern Pacific Railroad Company,—in possession of the land described in the pleadings, entered into a building contract whereby Bridge agreed to construct upon the land a brick house, according to certain plans and specifications, which he was to complete within 50 working days from the date of the contract, or forfeit \$10 a day for every day beyond the stipulated time, for which Phillips agreed to pay him \$6,070, in part as work upon the building progressed, and in full upon performance of the work according to contract. The contractor commenced the work. During its progress the plaintiff sold and delivered to him, for the work, materials which were used in the building. The contractor failed to pay for them, and on the eighth of September, 1883, the plaintiff filed a claim of lien against the building.

It is alleged that, at the time of filing the claim, "there was due and unpaid to the contractor, as part of the contract price for the construction of the building, the sum of \$600," and that "the building was completed on or about the fifteenth of September, 1883." These allegations were denied, and upon the issues raised by the denial the court finds that, from time to time, as the work upon the building progressed, the owner of the building, without any notice of the claim of the plaintiff, paid to the contractor, and to the material-men and workmen on his orders, the sum of \$5,283 for the work which had been done under the contract; that the work itself had been done in an unworkman-like manner, and the contractor, after receiving payment for what had been done, failed and refused to finish the work; so that he did not complete the building on the fifteenth of September, 1883, according to the contract, or at all, in consequence of which, and of the unworkman-like manner of the work which he performed, the owner sustained \$2,000 damages, and at the time of the filing of the claim by the plaintiff "there was not due or unpaid from the defendant Phillips to defendant Bridge, as part of the contract price, or at all, for the construction of said building, the sum of \$600, or any sum whatever."

Such being the fact, no lien in favor of the plaintiff attached to the building under the provisions of the mechanic's lien law. As was said in *Blythe v. Poultney*, 31 Cal. 234, the right of a material-man to a lien on the land and building, as against the owner, for materials furnished the contractor, depends for its existence upon the fact of an indebtedness from the owner to the contractor at the time of or subsequent to the notice. See, also, *Dore v. Sellers*, 27 Cal. 595; *Dingley v. Greene*, 54 Cal. 333; *Whittier v. Hollister*, 64 Cal. 283; *Rosenkranz v. Wagner*, 62 Cal. 151; *O'Donnell v. Kramer*, 65 Cal. 353; S. C. 4 Pac. Rep. 204; *Latson v. Nelson*, 11 Pac. C. Law J. 589; *Turner v. Strenzel*, 11 Pac. Rep. 389.

Assuming, therefore, as the court finds, that, when the plaintiff gave notice of his claim of lien upon the building, there was nothing due and owing to the contractor upon the contract, as the contractor did not afterwards contribute anything to the construction of the building, and never completed it, he was not entitled to recover upon it; and, under the lien law, a subcontractor or material-man is not entitled to enforce a lien against the building, unless, after the owner has completed the building, there remains a balance of the contract price which may be applied to the satisfaction of such a claim. But there is no finding, and we must presume there was no evidence, as there is no allegation in the complaint that the owner of the building had the building completed for a less sum than what remained of the contract price after the contractor abandoned the work. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

70 Cal. 469

PEOPLE v. JUNG QUNG SING. (No. 20,192.)

(Supreme Court of California. August 26, 1886.)

1. CRIMINAL LAW—INFORMING DEFENDANT OF NATURE OF CRIME BEFORE SENTENCE.

To inform a defendant about to be sentenced for the crime of murder that information was presented against him for the crime of murder on the twenty-seventh day of October, 1885; of his arraignment and plea of not guilty; of his trial; of the verdict of the jury, on the twenty-seventh of January, 1886, "guilty of murder in the first degree;" and to ask him if he has anything to say why sentence should not be passed upon him,—is sufficient compliance with the law requiring that "when the defendant appears for judgment, he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any, thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

2. SAME—PRESENCE AT TRIAL—EVIDENCE TO SHOW.

Where the entry on the minutes of the court shows that after the verdict, as announced, was entered and read, the defendant was remanded to the custody of the sheriff; and where the amended record shows, moreover, that the defendant was present at all times during the trial,—it is conclusive evidence as to the fact of the defendant's presence when the verdict was rendered.

In bank.

The Attorney General, for the People. *C. L. Witten* and *M. E. Power*, for appellant, *Jung Qung Sing*.

MCKEE, J. This is an appeal from a judgment of conviction of murder in the first degree. It is assigned as error that the judgment pronounced against the defendant is not in conformity with section 1200 of the Penal Code, which reads: "When the defendant appears for judgment, he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any, thereon; and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." According to this law, a defendant under conviction in a criminal action, before judgment can be legally pronounced against him, is entitled to be informed of the nature of the charge against him, and of the verdict of conviction upon which the sentence of the law has to be pronounced, so that he may have an opportunity of exercising his right to show cause against pronouncing judgment. If the court should pronounce judgment without giving defendant the required information in the mode prescribed by the law, the judgment pronounced would be irregular and voidable. The right of a defendant, under conviction, to be informed, before judgment, of the proceedings against him which have resulted in his conviction, is therefore a substantial right.

But there was no denial of the right in this case. The judgment recites: "The district attorney, with the defendant and his counsel, M. E. Power and C. L. Witten, Esqs., came into court. The defendant was duly informed by the court of the information presented against him for the crime of murder on the twenty-seventh day of October, 1885; of his arraignment and plea of 'not guilty;' of his trial; and the verdict of the jury, on the twenty-seventh day of January, 1886, 'guilty of murder in the first degree.' The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And, no sufficient cause being shown, or appearing to the court, thereupon the court renders its judgment: That whereas, the said Jung Qung Sing having been duly convicted in this court of the crime of murder in the first degree, it is therefore ordered, adjudged, and decreed that judgment of death be, and is hereby, pronounced and entered against the said defendant, Jung Qung Sing, and that he be by the sheriff of Santa Clara county, at the place provided by law, hanged by the neck until he be dead. The defendant was then remanded to custody."

It is said these recitals are insufficient to show that the defendant was properly informed of the nature of the charge against him, or that he was asked if he had any cause to show why judgment should not be pronounced against him. But the statement by the court of the specific crime with which defendant was charged, and of which he had been convicted, was sufficiently explicit as to the nature of the charge and the conviction, as preliminary to the question by which the defendant was asked if he had any legal cause to show why judgment should not be pronounced. Unless there exist some legal cause against pronouncing judgment the court was bound to proceed. Sections 1201, 1202, Pen. Code. The question which the court asked of the defendant was in the exact form prescribed by the law, and the judgment pronounced is according to law.

The next assignment of error is that the record nowhere states that the defendant was present in court when the verdict was received. There is no doubt that in case of felony a verdict received in the absence of the defendant would be void. Section 1148, Pen. Code; *People v. Beauchamp*, 49 Cal. 41. The defendant must therefore be personally present when the jury render their verdict. But the record of the case shows that "the parties" and their attorneys appeared at every stage of the proceedings, from the day that the cause was called for trial until the verdict was received and the jury discharged; and as the "parties" to a criminal action are the people on the one hand, and the defendant on the other, it must be presumed that the defendant was personally present. Besides, the entry on the minutes of the court as to the return of the verdict shows that when the verdict, as announced, was entered and read to the jury, the court ordered the jury discharged, and the defendant remanded to the custody of the sheriff, which was done. It is not claimed that the trial was had in the absence of the defendant. No motion for a new trial was made on that ground under section 1181, Pen. Code. Moreover, the amended record, filed upon a suggestion of diminution of the record, shows conclusively that the defendant was personally present at all times during the trial of the cause. Therefore the assignment of error is not true.

The motion to strike from the files the amended record must be denied, and the judgment affirmed. It is so ordered.

We concur: MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MYRICK, J.

Ross, J. I concur in the judgment.

70 Cal. 458

COUNTY OF AMADOR v. KENNEDY. (No. 11,574.)

(*Supreme Court of California*. August 26, 1886.)

1. INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS—BOARD OF SUPERVISORS—APPOINTMENT OF LICENSE COLLECTOR.

The case of *People v. Ferguson*, 65 Cal. 288, S. C. 4 Pac. Rep. 4, settled the question of the power of the board of county supervisors to appoint a license collector under the ordinance referring to the selling of liquors at retail.

2. SAME—LAWS CONTROLLING RETAIL LIQUOR TRAFFIC, VALID.

The ordinance governing the selling of liquors at retail is not invalid because of a discrimination between cities and villages, and there is thereby no conflict with the constitution.

In bank.

McGee & Farnsworth and *Lindley & Spagnoli*, for respondent, County of Amador. *Eagon & Armstrong* and *Rust & Caminetti*, for appellant, Kennedy.

THORNTON, J. This action was brought to recover of defendant a license tax, amounting to \$30, and a penalty for not paying the same when demanded, under an ordinance passed by the board of supervisors of the county above named. The action was commenced in a justice's court. The answer of the defendant, duly verified, attacked the validity of the ordinance imposing the tax above mentioned, and on that account was transferred to the superior court of Amador county for trial. On that trial judgment passed for plaintiff. From this judgment defendant appealed.

It is contended that the board of supervisors had no authority to appoint an agent to collect the license taxes under the above ordinance. We consider this point settled by the judgment of this court in *People v. Ferguson*, 65 Cal. 288, S. C. 4 Pac. Rep. 4, adverse to the contention of appellant. We are satisfied of the ruling in the case referred to, and refuse to disturb it.

It is further contended that subdivision 5 of section 2 of this ordinance is illegal and void, because it discriminates between villages, towns, and wayside inns or watering places. The subdivision referred to is as follows: "For selling spirituous, malt, or fermented liquors or wines, at retail, in quantities less than one quart, thirty dollars per quarter; for selling spirituous, malt, or fermented liquors or wines, at wholesale, in quantities of one quart or more, ten dollars per quarter: provided, that any person or persons who sell at retail such liquors or wines at any way tavern or public watering place, on any thoroughfare outside the limits of any village, town, or city, shall pay seven and a half dollars per quarter: and provided, further, that any person or persons who take out a license for retailing such liquors or wines shall have the privilege of selling such liquors or wines at wholesale without any other license therefor."

We fail to see any unlawful discrimination in the portion of the section above quoted. The discrimination allowed here violates no provision of the constitution, and contravenes no rule of law of which we have any knowledge. What law or what provision of the constitution it violates is not pointed out by the appellant. The difference between the *quantum* of sales made and the prospective profit to be realized by persons retailing liquors in a village, town, or city, and persons retailing the same at a wayside inn or rural watering place, is manifest to every one. This difference amply justifies the discrimination made by the ordinance under consideration. Such legislation is sustained by numerous cases. See *People v. Thurber*, 13 Ill. 554; *City of East St. Louis v. Wehrung*, 46 Ill. 393; S. C. 50 Ill. 32; *Slaughter v. Com.*, 13 Grat. 767; *Texas B. & Ins. Co. v. State*, 42 Tex. 636; *State v. Rolle*, 30 La. Ann. 991.

There is nothing in the subdivision of the ordinance in question which is unreasonable, oppressive, or in restraint of trade.

It is urged that section 5 of the ordinance is illegal and void, because the board of supervisors has thereby fixed the compensation of the license collector, which can only be done by the legislature. Having already determined that the ordinance was valid so far as the appointment of license collector is regarded, we do not perceive the materiality of the above-stated question urged by defendant. Conceding that the appointment of license collector is valid, it is entirely immaterial, so far as defendant is concerned, whether the portion of the ordinance fixing the compensation is valid or not. We find no new rule of evidence created by the ordinance, nor do we find any double taxation authorized by it. The power conferred on the license collector to direct a civil action against a person failing to procure a license as required by the ordinance, is a means of collection which the board of supervisors may employ under the power to collect conferred on it by subdivision 27 of section 25 of the county government bill.

We see nothing in the other points urged on behalf of appellant that deserve consideration. Judgment affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MYRICK, J.

COUNTY OF AMADOR v. ISAACS and others. (No. 11,598.)

(Supreme Court of California. August 26, 1886.)

INTOXICATING LIQUORS—REGULATION—VALIDITY OF ORDINANCE.

Case decided upon authority of *County of Amador v. Kennedy*, ante, 757.

In bank.

McGee & Farnsworth and *Lindley & Spagnoli*, for respondent, County of Amador. *Lyon & Armstrong* and *Rust & Caminetti*, for appellants, B. Isaacs and others.

BY THE COURT. The judgment in this case is affirmed on the authority of *County of Amador v. Kennedy, ante, 757.*

So ordered.

(70 Cal. 461)

PEOPLE *ex rel.* BETTNER v. CITY OF RIVERSIDE. (No. 11,233.)

(*Supreme Court of California.* August 26, 1886.)

ELECTIONS—INCORPORATION OF CITIES—SUFFICIENCY OF NOTICE OF ELECTION—CALIFORNIA ACT OF MARCH 13, 1883.

A notice by the county supervisors of an election to decide upon the incorporation of a city to be called Riverside, on petition of proper parties, the notice stating that the "petition set forth the boundaries of the proposed corporation, and stated the number of inhabitants therein to be about 3,000," is a sufficient notice to enable the voters to classify the proposed municipal corporation under the law in cities of the sixth class, (Laws Cal.; Act of March 13, 1883,) and to vote intelligently upon the question of incorporation.

Commissioners' decision. In bank.

E. L. Marshall and Byron Waters, for the People. *Curtis & Otis and H. C. Rolfe*, for respondent, City of Riverside.

FOOTE, C. Department 2 of this court, in an opinion to be found in 9 Pac. Rep. 662, affirmed the judgment of the court below, which had been rendered in favor of the defendant. The only point advanced by the plaintiff on a rehearing, questioning the correctness of that opinion, is that the notice of election given by the board of supervisors is defective, in that there was nothing in it from which the voters could classify the proposed municipal corporation, or vote intelligently upon the question of incorporation. The part of the notice material to the question raised is as follows:

"ELECTION NOTICE TO INCORPORATE THE CITY OF RIVERSIDE.

"A petition having been duly presented to the board of supervisors of the county of San Bernardino, signed by at least one hundred qualified electors of the county, resident within the limits of the proposed corporation, *which petition particularly set forth the boundaries of this proposed corporation, and stated the number of inhabitants therein to be about three thousand,*" etc.

Before reading that petition the voter was charged with notice of the fact that, under the law of this state, a city of the sixth class must be one not exceeding 3,000 in population. Possessed of such knowledge, upon reading the notice under consideration, he would further perceive that he was to vote upon the question of incorporating or not a city to be called Riverside; that a petition had been presented to the board of supervisors, which declared to such board that the proposed limits of the municipal corporation would contain about 3,000 inhabitants. A reasonable interpretation of "about three thousand inhabitants" is 3,000 inhabitants, and no excess above that. Thus the voter would be notified that the board of supervisors had received that information, and as there is nothing in the notice which indicates that the said board doubted that such statement was true, or gave expression to anything which would negative the idea that they had ascertained that the proposed corporation limits would contain 3,000 inhabitants, the voter would come reasonably and naturally to the conclusion that he was to vote for or against the incorporation of a city to be called Riverside, the proposed limits of which would contain a population not exceeding 3,000, and so he already knew that such a city would, under the act of March 13, 1883, be of the sixth class. We do not perceive but what the notice contained all that was required to enable a voter to cast his ballot understandingly.

We perceive no reason why the judgment formerly rendered by department 2 should not be adhered to.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(70 Cal. 465)

ROSS v. BRUSIE. (No. 9,965.)

(Supreme Court of California. August 26, 1886.)

1. MORTGAGE—QUESTION FOR COURT—CHARACTER OF DEED.

Upon the question as to whether an instrument was a deed absolute or a mortgage deed, the evidence as to the same and the circumstances attending its execution being conflicting, the judgment of court was held final and conclusive.

2. EVIDENCE—BOOKS OF ACCOUNT.

A book of account is admissible in evidence to prove that defendant had performed his contract, and given plaintiff the credit promised him.

In bank.

L. J. Maddox and *Wright & Hazen*, for appellant, F. H. Ross. *W. E. Turner*, for respondent, James Brusie

MORRISON, C. J. This suit was brought in the county of Stanislaus by plaintiff and appellant against defendant and respondent, to compel a reconveyance of a certain lot of land in the town of Merced, in the county of Stanislaus. Defendant had judgment, from which, and the order of the court below denying a new trial, the plaintiff appeals to this court.

The record shows but one exception taken on the trial, and there is but one question for determination on this appeal. On the trial a controversy arose as to the character of a certain transaction between the parties relating to the lot of land in suit. Ross contended that it was only a mortgage from himself to Brusie, and the latter contended that it was a deed absolute. An inspection of the papers in the case shows that the conveyance from Ross to Brusie was an absolute deed, and the court finds "that, for the purpose of liquidating and paying said sum of \$250, plaintiff, on the twenty-fifth day of January, 1887, made, executed, and delivered to defendant a grant, bargain, and sale deed of the following described piece or parcel of land," (describing it.) The testimony being conflicting as to the character of the transaction, the finding of the court on it is final and conclusive. Presumptively, the instrument expressed the true nature of the transaction; and, as the court finds it to have been what on its face it appears to have been, the finding of the court in this regard will not be disturbed.

On the trial the defendant was permitted, against plaintiff's objection, to prove, by the introduction in evidence of certain books of account, that respondent had carried into the books a credit of \$250 to the account of plaintiff. The evidence was that defendant agreed to give the plaintiff a credit on his account for the sum of \$250 in payment for said lot; and, in order to prove that he had kept his contract and given the plaintiff the credit in question, he was permitted to prove the fact by his own books. This was not the case of a party making evidence for himself, as is claimed by plaintiff. The books were not offered for the purpose of establishing a claim against the plaintiff, but simply to show that defendant had performed his contract, and had given plaintiff the credit he promised him. Defendant promised to give plaintiff credit for \$250. That was the contract. To prove that he had done this he was allowed to introduce in evidence the books where the credit was entered. We see no objection to this. It was like proving any other act defendant had promised to perform as a condition on which his right to maintain or defend the suit depended.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 690

DOTY v. WHITTLE. (No. 11,093.)

(Supreme Court of California. August 26, 1886.)

NEW TRIAL—APPEAL—DISCRETION OF COURT.

When the discretion of the judge who presided at the hearing of the motion for a new trial appears to have been fairly exercised, the supreme court will not condemn his action.

Commissioners' decision. Department 2.

Eagon & Armstrong, for appellant, Doty. *A. C. Brown*, for respondent, Whittle.

FOOTE, C. This is an appeal from an order granting a new trial. Judge MOORE tried the cause, a jury being waived, and gave judgment for the plaintiff. A statement on motion for a new trial was settled by him, and afterwards the motion was duly heard and granted by Judge GRIFFITH. The order was clearly made on the ground that the evidence was insufficient to justify the decision.

The appellant contends that the statement on the motion for a new trial did not properly specify the particulars in which the evidence was alleged to be insufficient for such purpose. The action was for damages for an unlawful entry by the defendant on the plaintiff's land, and the digging thereon, without the latter's permission, of certain "post-holes." The main question of dispute on the trial was as to whether the land on which the holes were dug belonged to the former or the latter person, as their lands were adjoining, and the exact line which divided them was uncertain and in dispute. Such being the case, we think that the first specification of the insufficiency of the evidence to justify the decision unmistakably directed the attention of court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on such specification might be inserted in the statement, and considered by the judge. Such evidence was inserted in the statement, and it had direct pertinency to the issue raised by the pleadings. The discretion of the judge who presided on the hearing of the motion was, we think, fairly and properly exercised. When that appears to be the case, this court does not condemn such action. *Gerald v. Brunswick & B. Co.*, 7 Pac. Rep. 306, and cases there cited.

The order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

70 Cal. 473

PEOPLE v. PACHECO. (No. 20,162.)

(Supreme Court of California. August 26, 1886.)

RAPE—INDICTMENT—AVERMENTS—RESISTANCE.

In an information for the crime of rape, the statement that the act was committed by force and violence, and against the will and consent of the female, is substantially the same as a statement that she resisted, and her resistance was overcome by violence or threats, accompanied with apparent power to execute them.

In bank.

The Attorney General, for the People. *J. H. Campbell*, for appellant, Pacheco.

MYRICK, J. 1. The defendant was accused by information of the crime of rape, the act being charged to have been "committed by force and violence, and against the will and consent of the person named as the subject

of the act." Objection is made that the information did not contain an element of resistance on the part of the person; that subdivisions 3 and 4 of section 261, Pen. Code, have made resistance, or prevention of resistance, an element necessary to be alleged in order to state the offense. We are of opinion that when the information stated that the act was committed by force and violence, and against the will and consent of the female, it was substantially equivalent to stating that she resisted, but that her resistance was overcome by violence, or that she was prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution. Under the information, as it reads, it was competent to prove that the act was committed under the circumstances provided for in either of the subdivisions referred to.

2. There was some evidence before the jury as the acts of resistance, and some evidence as to prevention of further resistance; sufficient, at all events, for the consideration of the jury. The instructions to the jury upon this subject were as favorable to the defendant as he was entitled to. We see no error in the action of the court as to the instructions refused. All instructions to which the defendant was entitled were given, either in the instructions allowed, or in the general charge.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MCKEE, J.; MCKINSTRY, J.; ROSS, J.; SHARPSTEIN, J.

70 Cal. 467

PEOPLE v. GORDON. (No. 20,207.)

(Supreme Court of California. August 26, 1886.)

ASSAULT AND BATTERY—ASSAULT WITH INTENT TO COMMIT RAPE—CONSENT OF INFANT.

To convict of assault upon the person of a girl under 10 years of age with intent to commit rape, it is immaterial whether she consented or resisted.

In bank.

The Attorney General, for the People. Geo. A. Lamont and John M. Gregory, for appellant, Gordon.

MCKEE, J. The appeal in this case is from an order denying a new trial, and a judgment of conviction of assault with intent to commit rape. The contention made by the appellant is that the court below erred in refusing to instruct the jury:

"(1) To convict the defendant you must find beyond a reasonable doubt that the assault, if any was committed, was committed by force and against the will, wish, and consent of Annie Jensen.

"(2) An assault implies force on one side, and repulsion, or, at least, want of assent, upon the other.

"(3) An assault upon a party who consents thereto is a legal absurdity and impossibility.

"(4) There is no proof here that an assault was committed, and you must therefore acquit the defendant."

An assault, if actually made, with an intent to commit rape, is a felony *per se*; and this because of the mere intent with which it is made. The particular means resorted to in making such assault form no elements of the offense, (*People v. Murat*, 45 Cal. 283;) but there must be some evidence tending to show that an assault was actually made. An assault is defined as an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. Section 240, Pen. Code. Such an attempt must be made without the consent of the person against whom it is made. If it be made with her consent, it will not constitute an assault. It is a maxim of the law that one who consents to an act is not wronged by it. Section 3515,

Civil Code. Where, therefore, a person is charged with an assault upon the person of a woman to violate her person, the question of consent is material. There must be some evidence that the act was committed without her consent, and the fact is to be found by the jury upon the evidence of the circumstances in which the act was committed.

But this is not that case. The record shows that an assault was made by the defendant upon the person of a girl under 10 years of age. No evidence appears to have been given tending to show that the girl consented or resisted, but it is claimed for the defendant that she consented because she did not resist. It is, however, a presumption of law that a girl under 10 years of age is incapable of consenting to the offense of rape, (section 261, Pen. Code;) and as such an offense includes an attempt to commit it, accompanied by such force and violence upon the person as constitutes an assault, a girl under 10 years of age is incapable in law of consenting to the assault in connection with the attempt to commit the offense. Whether the girl, in fact, consented or resisted, was therefore immaterial. Being incapable of consenting to an act of carnal intercourse, it was criminal for the defendant to make an assault upon her to commit such an act; and the court did not err in giving its instructions to the jury, or in refusing to give those which were asked by the defendant.

The evidence was sufficient to support the verdict.

Judgment and order affirmed.

We concur: MORRISON, C. J.; ROSS, J.; MCKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.

70 Cal. 445

JOY v. MCKAY and Wife, Intervenor. (No. 11,355.)

(*Supreme Court of California.* August 26, 1886.)

1. EJECTMENT—DEMAND OF POSSESSION.

No notice to quit, nor any demand of possession, is necessary from an heir, before bringing an action of ejectment to recover the possession of lands against a person holding them without title, although he had a permissive occupancy of the premises during the life-time of the decedent from whom they were inherited.

2. SAME—GENERAL VERDICT—CONFLICTING EVIDENCE.

In ejectment, a general verdict is sufficient; and it will not be disturbed when founded upon substantially conflicting evidence.

Department 2.

Eagon & Armstrong, for respondent, Joy. *A. C. Brown*, for appellants, McKay and Wife, Intervenor.

MCKEE, J. This is an action to recover possession of certain land and premises, in Amador county, of which Jarius A. Joy died seized and possessed on the fourteenth of January, 1883. Plaintiff in the action is the sole heir and distributee of the estate of said decedent. The action was commenced on the seventeenth of January, 1884. At the commencement of the action the defendants, John McKay and his wife, were in possession, claiming their possession to be rightful, because of (1) a permissive occupancy of the premises under Jarius A. Joy in his life-time, and (2) of a deed from him to his sister, the defendant and intervenor, Clara A. McKay, the wife of the defendant John. At the trial evidence was given tending to show that, in the year 1881, Joy, being owner and in possession of the land, entered into a verbal agreement with McKay, his brother-in-law, to farm the land together for their mutual benefit; and that, under that arrangement, McKay entered upon the land, and farmed it with Joy until the latter died, in 1883.

After Joy's death McKay continued to occupy and farm the land for his own benefit. Neither the administrator of Joy's estate, nor the plaintiff as the heir and distributee thereof, demanded possession from him, and it is

contended that the plaintiff is not entitled to recover possession without proof of a demand. But the defendant had not entered into possession under any agreement to pay rent. He was therefore not in possession as a tenant from year to year, entitled to notice to quit under section 1162, Code Civil Proc.; and if the legal relation between him and Joy, in the life-time of the latter, had been that of a tenant at sufferance, or a tenant at will, that relation was terminated by the death of Joy. Thereafter it ceased to exist, and the possession of the defendant became wrongful against the plaintiff, who, as the sole heir and distributee of the estate of the original owner, became vested with the right of entry to the land. No notice to quit, nor any demand of possession, was necessary on the part of the plaintiff before bringing an action of ejectment. *Kilburn v. Ritchie*, 2 Cal. 145; *Hauwhurst v. Lobree*, 38 Cal. 563; *McCarthy v. Yale*, 39 Cal. 585; *Martin v. Spilcalo*, 56 Cal. 128; section 793, Civil Code.

The wife of the defendant derived no right or title to the land by the instrument in writing under which she asserted title. The instrument purported to have been executed on the twenty-second of May, 1876. Its execution was not attested by any subscribing witness. Joy, the party alleged to have executed it, was dead. In proof of its execution, Mrs. McKay testified that her brother delivered the instrument to her at the time it bears date, and told her he "would acknowledge it when convenient;" but he died without acknowledging it, and the deed, when offered in evidence, was attacked as a forgery. Upon that issue there was a substantial conflict in the evidence, and the jury that tried the case rendered a general verdict for the plaintiff. In ejectment a general verdict is sufficient, (*Cummings v. Peters*, 56 Cal. 597,) and it will not be disturbed when founded upon substantially conflicting evidence.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

70 Cal. 487

CHAPMAN v. POLACK and others. (No. 9,311.)

(Supreme Court of California. August 27, 1886.)

1. DEED—DESCRIPTION AND BOUNDARIES—MAP.

Where a map or plan of a tract of land, with lines drawn upon it marking the boundaries, and with the natural objects upon its surface laid down, is referred to in a deed containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it were expressly recited and marked down in the deed itself.

2. SURVEYS AND SURVEYORS—PRIVATE SURVEYS AND PLATS—EVIDENCE.

Parol testimony and private surveys and plats will not be admitted in evidence in contradiction of the plats of the surveys of the United States.¹

Commissioners' decision. Department 2.

George A. Nourse, for respondent, Chapman. *James F. Street, McClure & Dwinelle*, and *H. A. Powell*, for appellants, Polack and others.

SEARLS, C. This is an action of ejectment to recover the S. E. $\frac{1}{4}$ of section 13, in township 11 N., range 9 W., Mount Diablo base and meridian. The action was brought in the county of Sonoma, transferred to the county of Napa, and there tried by the court without a jury, and judgment rendered

¹ As to the admissibility of parol evidence to vary or explain a written instrument, see *Mellen v. Ford*, 28 Fed. Rep. —, and note; *Beason v. Kurz*, (Wis.) 29 N. W. Rep. 230, and note.

in favor of plaintiff, from which judgment, and from an order denying a new trial, defendants appeal.

The following are the facts and conclusions of law in the cause as found by the court:

"FINDINGS OF FACT.

"(1) At the commencement of this action, and ever since the sixteenth day of April, A. D. 1878, the plaintiff was and still is the owner in fee-simple absolute of the premises described in the complaint, being the south-east quarter of section 13, in township 11 north, range 9 west from the Mount Diablo base and meridian, according to the United States government survey.

"(2) At the commencement of this action, the defendants were and still are in possession of the Geyser Hotel, so called, and the cottages appurtenant thereto.

"(3) Said hotel and cottages are and then were situate and standing on said quarter section, and are and were a part thereof.

"I further find, as

"CONCLUSIONS OF LAW:

"(1) That plaintiff is, and was at the commencement of this action, entitled to the possession of the said quarter section of land described in the complaint, with its appurtenances, including said Geyser Hotel, and the cottages appurtenant thereto.

"(2) That plaintiff is entitled to a judgment against the defendants in this action for recovery of said quarter section of land, including said hotel and cottages, and for the costs of this action.

"Let judgment be entered accordingly.

"WM. C. WALLACE, Superior Judge."

The defendant Mary Polack is the owner of the N. E. $\frac{1}{4}$ of section 13, in township 11 N., of range 9 W., Mount Diablo base and meridian, according to the United States government survey. Upon this quarter section of land, as she contends, but on the S. E. $\frac{1}{4}$ of the same section, as plaintiff claims, defendant Polack had a hotel known as the "Geyser Hotel," with certain cottages appurtenant thereto.

The whole case turned at the trial, not upon the title to the respective quarter sections of land, for that was established beyond dispute, but upon the location of the dividing line between these quarter sections. If the line running through the center of section 13, from east to west, and dividing the N. E. $\frac{1}{4}$ from S. E. $\frac{1}{4}$, runs north of the hotel and cottages, then the judgment of the court below is correct; if, on the contrary, that line runs south of the buildings, defendants were entitled to judgment.

There was testimony (introduced under objection) tending to show that a line drawn east and west, midway between the north and south boundaries of the section, runs north of the buildings, and includes them in the S. E. $\frac{1}{4}$, and the court below adopted this testimony as true in its findings and judgment.

Defendants, however, at the trial and on the motion for a new trial, contended—*First*, that the theory of plaintiff is incorrect as a matter of fact; and, *second*, that the government survey has fixed the lines of demarkation and situation of the hotel and buildings, and that, as thus established under the approved survey, they are all in the N. E. $\frac{1}{4}$ of the section, and that such approved survey is conclusive and must prevail, whether right or wrong, and that to admit evidence to the contrary was error.

The defendant Forsyth was a tenant under his co-defendant Mary Polack, the genesis of whose title to the N. E. $\frac{1}{4}$ of section 13 was founded upon certain school land warrants, located in 1854 upon that and adjoining lands. The land being unsurveyed, the act of the legislature of the state of California

of May 3, 1852, gave to the purchaser and locator of such warrants the right to possession until surveyed by the United States. On the eighteenth of April, 1859, an act was passed under which parties holding school land warrants were permitted to procure title. On the first of September, 1862, Mary Polack procured a survey of the premises to be made, and relocated the school land warrants, which survey was approved by the surveyor general of California, and the warrants canceled in payment for the land, and a certificate of purchase issued to her. On the fourteenth day of January, 1868, the map of the official survey of said lands by the government of the United States was filed in the proper United States land-office, and thereafter such steps were taken that, the land having been listed to the state of California, a patent issued to Mary Polack under date of February 7, 1882, from said state of California.

Upon the official plat of the approved survey of township No. 11 N., of range No. 9 W., Mount Diablo base and meridian, a certified copy of which is in evidence, the Geyser Hotel is platted and located in the N. E. $\frac{1}{4}$ of section 13. In other words, the dividing or quarter-section line east and west, through section 13, runs south of the buildings in dispute, and, if conclusive, gives the demanded premises to defendants.

It appears from the official report of the deputy surveyor by whom the survey was made, that township No. 11 N., range 9 W., is of such a rough, broken, mountainous character that many of its lines could not be run and its corners established by actual and direct measurement, and that the points were in such cases established by triangulation. The north-east corner of section 13, which section contains the demanded premises, was thus established, as also the north-west and south-west corners of the same section, and the quarter-section corner on the west line of and between sections 13 and 14.

So far as we can determine from the field-notes, the south-east corner of the section and the quarter section on the east line of section 13, were not established, and the east line of section 13 was not run upon the ground.

The following are some of the principles for determining the boundaries and contents of the several sections, half sections, and quarter sections of the public lands under the laws of congress:

"First. All the corners marked in the surveys returned by the surveyor general shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate, and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from those two corners which stand on the same line. *Second.* The boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof, and the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be," etc. Rev. St. U. S. § 2396.

The official township plat shows the line of demarkation between the N. $\frac{1}{2}$ and S. $\frac{1}{2}$ of section 13; shows Pluton creek to run through the N. E. $\frac{1}{4}$ of the section, and Devil's canon to run in a southerly direction, and to enter Pluton creek within said quarter section; and locates the Geyser Hotel on the south bank of the creek, and nearly opposite the mouth of such canon, and in said N. E. $\frac{1}{4}$ of the section. It was under this survey and plat that defendant Polack purchased. Georgie McBride, the grantor of plaintiff, subsequently,

and on the ninth day of November, 1877, received a patent from the government of the United States for the S. E. $\frac{1}{4}$ of the same section "according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general."

The testimony is ample to show that all the parties, until a recent period, regarded the hotel as being on the N. E. $\frac{1}{4}$ of the section. Georgie McBride, the grantor of the plaintiff, in making proof of her residence as a pre-emptor, testified to having resided upon the S. E. $\frac{1}{4}$, except when at the Geyser Hotel, on the N. E. $\frac{1}{4}$ of the section.

Plaintiff, Chapman, was an applicant for the purchase of the N. E. $\frac{1}{4}$ of the section; and in a contest for such purchase, and in litigating between these parties and those in privity of estate with them, it is quite apparent that until a recent period the hotel property was regarded as being upon the N. E. $\frac{1}{4}$ of the section, as delineated upon the government plat. *Chapman v. Polack*, 58 Cal. 555; *Same v. Same*, 5 Pac. Rep. 232; 7 Pac. C. Law J. 426; *U. S. v. Chapman*, 5 Sawy. 528.

Under these circumstances, the question arises, can parol testimony and private surveys be received to show that the line laid down upon the approved official plat of the township under which, and with reference to which, the parties purchased, is erroneous, and that defendants' hotel, the mouth of Devil's canon, and Pluton creek are all not in the N. E. $\frac{1}{4}$, but in the S. E. $\frac{1}{4}$, of the section, and that the line should run north of the hotel and creek, as shown upon the plat of Von Leicht, a witness for the plaintiff?

The field-books of public surveys are required by law to be returned to the surveyor general, "who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers, who may superintend the sales. He shall also cause a fair plat to be made of the townships, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose, and a copy thereof shall be kept open at the surveyor general's office for public information, and other copies shall be sent to the places of the sale, and to the general land-office." Rev. St. U. S. § 2395.

By the second section of the act of congress of May 30, 1862, (Rev. St. U. S. § 2399,) the printed manual of instructions in relation to public surveys, prepared at the general land-office, February 22, 1855, the instructions of the commissioner of the general land-office, and the special instructions of the surveyor general, when not in conflict with the printed manual of instructions of the commissioner, are to be deemed a part of every contract for surveying the public lands. The manual referred to provides for quarter-section posts; for the division of townships into sections and quarter-sections; that the character of the surface, soil, and timber shall be noted; also all rivers, creeks, and smaller streams of water which the lines cross; all towns, villages, houses, cabins, and other improvements. These and a multitude of other objects are required to be noted. Lester, Land Laws, 703.

From the data furnished by the surveyor, the plats are prepared. One of the objects of the manual and law was to simplify the mode of disposing of the public lands, so that, without cumbering patents with descriptive field-notes, the plats of the surveys should afford all necessary information to purchasers, and at the same time afford a convenient and certain description by reference of the land conveyed, and these official plats are made the basis of all sales and selections of the public lands, and are solely referred to in the usual patents to show what lands are patented. *Bates v. Illinois Cent. R. Co.*, 1 Black, 207. By the plats of public surveys, lands must be identified and boundaries ascertained in all cases of the kind. *Brown's Lessee v. Clements*, 3 How. 671; *Gazzam v. Lessee of Phillips*, 20 How. 375.

It is true that the laws of the United States do not in terms provide for the location of quarter-section stakes, or for the survey of the interior lines

of the sections, but under the manual and instructions it may be done, and, in fact, is most usually done, as appears by the evidence furnished by the plats.

It is with reference to the lines so run, and the corners established, that section 2396 of the Revised Statutes, quoted *supra*, provides that "all the corners marked in the surveys * * * shall be established as the proper corners of sections, or subdivisions of sections," etc., and the boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions which they were intended to designate," etc. From these provisions, it appears that the lines of subdivisions, as well as of sections, are established by law.

The selection under which the defendant's purchase was made, was based upon the official township plat of the public survey, as required by the circular of instructions of the commissioner of the general land-office of August 6, 1847. 1 Lester, Land Laws, 508.

Where a map or plan of a tract of land, with lines drawn upon it marking the boundaries, and with the natural objects upon its surface laid down, is referred to in a deed containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself. *Vance v. Fore*, 24 Cal. 436; *Mayo v. Mazeaux*, 38 Cal. 442; *Serrano v. Rawson*, 47 Cal. 52; *Black v. Sprague*, 54 Cal. 266.

As was said in *Vance v. Fore*, *supra*: "The map may be regarded as a daguerreotype of the land which the grantor intended to convey." All the objects represented upon a plan are to have the same effect as they would if brought into the deed by verbal description. *Thomas v. Patten*, 13 Me. 333.

How, then, stands the case? Defendant was the owner of a house and outbuildings known as the "Geyser Hotel property." The approved official plat of the government of the United States showed this property to be upon the N. E. $\frac{1}{4}$ of section 13, with the line of demarkation between this and the S. E. $\frac{1}{4}$ of the section plainly laid down and running south of the premises owned by her. She purchased the N. E. $\frac{1}{4}$ of the section. Plaintiff's grantor subsequently purchased from the government the S. E. $\frac{1}{4}$, and the patent refers to the same plat, and surveys according to it, as hereinbefore mentioned.

Under such circumstances, we are of opinion the line as designated upon the plat, and running south of defendant's hotel, whether accurate or not, is to be deemed and taken as the true division line between the north and south-east quarters of section 13, and that neither a private survey nor parol evidence was admissible to show that the line should in fact run north of defendant's hotel. By the act of the government such line had been created as a dividing line between the quarters of the section, (*Robinson v. Forrest*, 29 Cal. 325;) and, as to persons who had purchased and acquired vested rights with reference to it, it is to be treated as correct, (3 Op. Attys. Gen. U. S. 431.)

It follows from this view (1) that as plaintiff introduced in evidence the plat which, together with the patent to the S. E. $\frac{1}{4}$, established this line and his northern boundary thereat, the motion for a nonsuit should have been granted; (2) that the evidence of the private survey and the plat of Von Leicht, in contradiction of the plats of the surveys of the United States, were erroneously admitted.

The plan resorted to for ascertaining the position of the quarter-section stake on the east line of the section was the true method of determining the point, in cases where the position of the quarter-section lines are not laid down, and their *locus* fixed; but when, as in this case, the position of the line has been fixed, and rights have vested with reference to it as established,

the position for the quarter-section post is also determined as being at the end of the established line.

The judgment and order denying the motion for a new trial should be reversed, and a new trial had.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

70 Cal. 484

SOUTHERN PAC. R. CO. v. TERRY. (No. 11,439.)

(*Supreme Court of California.* August 27, 1886.)

VENDOR AND VENDEE—RAILROAD COMPANIES—PRINTED CIRCULARS—PRE-EMPTION OF RAILWAY LANDS.

Where a settler upon railway lands was in possession by occupation and cultivation, under the provisions of a printed circular of the railway company giving him the first privilege to buy said lands, upon application to the land agent of the company, at prices based upon the value of the lands, when the company was ready to sell, *held*, that said company could not eject the defendant, deny his application, or refuse to sell to him, when he had complied with the terms of the circular, although the land agent had awarded the lands, in a contest about the right to purchase, to a person who had previously filed an application, but had never settled upon or cultivated them.

Department 2.

Curtis & Otis and Satterwhite & Curtis, for appellant, Southern Pac. R. Co. *Rowell & Rowell and H. W. Willis*, for respondent, Terry.

MCKEE, J. This is an action of ejectment. The demanded premises are a portion of the railroad lands of the Southern Pacific Railroad Company, the plaintiff in the action. Defendant settled upon the lands under the provisions of a printed circular, issued by the railroad company, inviting settlers to go upon its lands and occupy and use them until such times as it would be ready to sell, when, upon an application to buy, made to the land agent of the company, the company would sell, at prices based upon the value of the lands, "to such persons as were then in possession by occupation and cultivation or improvements." To such persons the circular declared: "If the settler desires to buy, the company gives him the first privilege of purchase at the fixed price, which, in every case, shall only be the value of the lands without regard to the improvements. It must be understood that the application of a speculator, or of a person who does not improve or occupy the lands, will not, although received first, take precedence or priority of that of the settler, whose application may, perhaps, be filed last of all. The actual settler, in good faith, will be preferred always, and the land will be sold to him as against every other applicant."

In due time, after the issuance of the circular, the company graded its lands, and fixed the price per acre at which it proposed to sell to settlers upon the lands. The defendant was notified of the fact, and on the twenty-second of June, 1883, he applied to the land agent of the company to purchase the demanded premises upon which he and his family were then residing, and which he had occupied, cultivated, and improved since 1882; and in connection with his application he tendered the 20 per cent. of the purchase price required by the circular of the company, and offered to comply in all other particulars with its terms and conditions. But the plaintiff denied his application, and refused to sell him the land "on any terms whatever." That the company could not legally do, because the offer which it made to sell its lands to actual settlers, having been accepted by the defendant, who settled upon a portion of the lands, constituted a contract of sale, and established the rela-

tion of vendor and vendee between the company and the defendant as a *bona fide* settler. *Boyd v. Brinckin*, 55 Cal. 427.

As vendee of the land, the defendant was therefore rightfully in the possession at the commencement of the action; and as he had offered to perform the contract between him and his vendor, and is ready and willing to perform it according to its terms, the company had no legal right to eject him. Nor could it refuse to sell the land to him, except for good cause. *Central Pac. R. Co. v. Mudd*, 59 Cal. 585; *Whittier v. Stege*, 61 Cal. 238.

The company based its refusal to sell upon the ground that there were two applications made to purchase the land, which raised a contest about the right to purchase, and that contest was heard and determined by the land agent of the company against the defendant, and in favor of one Randall, the contesting applicant, under the following provision of the company's circular: "When there are two or more applicants for the same tract, an adjudication of their respective claims will be made by the land agent, upon due notice (thirty days) given to the parties, and the right to buy at the appraised valuation will be awarded to the applicant who shall be deemed to have the most equitable claim." Randall had filed an application to purchase the land on the twenty-first of April, 1883, two months before the filing of the defendant's application; but he had never settled upon the land, or occupied and cultivated or improved it. He founded his application upon some conveyances of the land which he had obtained in the year 1883 from the grantees of one Cram, who, in the year 1882, had occupied and cultivated the land jointly with the defendant; but on or about the first of December, 1882, vacated and abandoned his possession in favor of the defendant, who has since exclusively occupied the land. Randall was therefore a mere applicant to purchase the land without the qualifications required by the circular of the company, and had no equitable claim to the land, or any right to purchase it. The circular itself declared: "The company also wishes it to be known that a mere application to buy land, unaccompanied by actual improvement or settlement, confers no right or privilege which should prevent any actual settler from taking it, if vacant, into possession, and cultivating and improving it." The land agent of the company had, therefore, no power to award to Randall the land of which the defendant was in possession as an actual settler.

We find no reversible error in the record. Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(2 Cal. Unrep. 675)

RICHARDS, Ex'r, v. DONNER. (No. 9,579.)

(Supreme Court of California. August 12, 1886.)

EQUITY—DEED OF GIFT—UNDUE INFLUENCE.

Where a deed of gift was executed upon consideration of love and affection, and afterwards suit was brought by the grantor to cancel the deed, charging the grantee with using undue influence over the grantor in procuring the execution of the deed, in the absence of proof of such undue influence, or of any degree of turpitude, on the part of the grantee in receiving and recording the deed, *held*, that the deed was valid.¹

Commissioners' decision. Department 2.

J. E. Richards, S. F. Leif, and Moore, Laine & Johnson, for respondent, Richards, Ex'r. *S. O. Houghton, J. T. Campbell, and Rutledge & McConnell*, for appellant, Donner.

FOOTE, C. This action was originally brought by A. W. Peck, in his lifetime, (for whom his executor, Richards, has been substituted,) for the pur-

¹See *Cleine v. Englebrecht*, (N. J.) 5 Atl. Rep. 718.

those of canceling a deed of gift made by said Peck to the defendant, M. E. Donner, while he was in such an enfeebled mental condition, and so circumstanced in his surroundings, as that he did not understand or appreciate the nature, effects, and consequences of the execution and delivery of that deed. A judgment was rendered for the plaintiff, and from that, and an order denying her a new trial, the defendant has appealed.

Several points are presented by appellant for consideration; but in the view we take of the case, as hereinafter set forth, it is unnecessary to pass upon them.

The court found, in substance, as grounds for rendering judgment for the plaintiff, that A. W. Peck, while a visitor at the house of the defendant's mother, where the defendant resided on the twelfth day of April, 1882, received a severe paralytic stroke, which greatly weakened his physical and mental faculties; that while in such condition, on the twentieth day of April, 1882, still sojourning in the house of defendant's mother, he proposed to make a will of the property in controversy to the defendant, towards whose family for many years he had entertained intimate and familiar friendship; that on the next day, by the advice of John Walker, a neighbor and friend of that family, and the acting executor of defendant's father, he was induced to consent that a deed, rather than a will, should be prepared,—Walker having assured him it would be more advantageous and less trouble and expense so to transfer the property to Mary E. Donner; that he had no other advice on the subject, and that Walker did not explain to him the difference between a will and a deed in their effects and consequences as to him, A. W. Peck; that on that day, and following immediately such advice, and without such explanation, a deed of grant, bargain, and sale, upon consideration of love and affection, was prepared and presented to him, which he there and then signed and acknowledged, and that it was the deed under consideration in the cause,—he believing, at the time he signed the deed, that he was in imminent danger of death, having informed the party witnessing the same that "he might not be living on the following day;" that, after the signing and acknowledging of said deed, it was, at his request, taken in charge by the notary taking the acknowledgment thereof; that he afterwards, on the third day of May, 1882, procured his old friend Beach to correct the description therein of the property conveyed, and gave it to the mother of the defendant for the latter; that there was no consideration moving him, in the execution of the deed, save love and affection; that at all those several times he stated that he was to have the control of the property conveyed, and its usufruct as long as he lived, and that he was assured that such should be the case by said defendant; that he not only relied on her statement as true, but believed that such advantages, uses, and right of property were assured to him by the deed he had executed and delivered, and had he been made to understand that such was not the case he would not have made such deed; that during all those times of his illness, up to the sixth day of July, 1882, he remained in the family and at the house of defendant's mother, and the greater part of that time was under treatment by a physician called by said mother, which said physician had drafted said deed, and, as a notary, taken the acknowledgment thereof; that no other solicitations or representations were made to him about the relative characteristics and legal force of a will or deed by any one except said John Walker, nor any fraud or misrepresentation practiced by any one, except so far as he was deceived with the belief that he had, by the terms of that deed, reserved to himself during his life the use and occupation of the premises conveyed, which was brought about by the silence of the defendant, and that of her mother and others present; that on the ninth day of August, 1882, Peck demanded of the defendant in writing that she reconvey his property to him, and that a proper deed for such purpose was tendered for her execution, as also the money necessary for her attention thereto and

proper acknowledgment thereof; that such demand and tender was made before suit brought, and the demand entirely refused; that at no time after the signing of said deed did Peck ratify or affirm it; that from the time he received the paralytic shock, on the twelfth day of April, before the signing of the deed, until his death, he continued in feeble health, and greatly impaired in mind and body; that Peck died on the tenth day of September, 1882, in Santa Clara county; that he left a will which was duly admitted to probate, of which John E. Richards, who has since his death been substituted for him as plaintiff, was constituted executor, and that he was duly qualified and acted as such.

As a conclusion of law from these facts it was found that the plaintiff was entitled to reconveyance of the property described in the complaint and the deed in controversy, and to recover his costs.

We do not think that the facts, as found by the court, show the least degree of turpitude on the part of Miss Donner in receiving and recording the deed which Peck made to her. He executed the deed after consultation with Walker, with whom no one is shown to have used any influence whatever. She was a young woman to whom Peck was strongly attached. He had often declared his intention to give, at his death, what he possessed to her or her mother. He was not solicited in any way by her or her mother to execute the deed; and some days after he had executed it he corrected the description of the property therein by the assistance of a good friend of his,—thus showing no disposition to revoke the deed, because it was not a will. The defendant sent him a power of attorney, as he requested; thus, at least, showing her good faith in fulfilling her promise to him that he should enjoy the rents and profits of the property he had given her.

The matter charged against her was undue influence over Peck in the execution of the deed of gift. She is never by the findings placed in any position whereby she either could or did influence Peck to make this deed; and if a mistake was made by him, and that which he intended to execute as a will he did make a deed, it was *his mistake*, with which, upon the issues in this cause, Miss Donner, so far as the record discloses, has nothing to do.

We are of opinion that the judgment and order should be reversed, and the court below directed to enter judgment in favor of Miss Donner on the findings in accordance with the views we have herein expressed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to enter judgment in favor of defendant.

(70 Cal. 497)

CENTRAL PAC. R. CO. v. CREED, Defendant, and another, Respondent.

(No. 11,211.)

(Supreme Court of California, August 27, 1886.)

1. JUDGMENT—IRREGULARITY IN PROCEEDINGS—RIGHTS OF THE PARTIES.

Mere defects or irregularities in the process or proceedings of a judgment against a party who does not object to them do not affect the validity of the judgment, or the rights of the parties to it, and a plaintiff in whose favor such a judgment is entered has no right to question it.

2. EXECUTION—SALE—VALIDITY—INADEQUACY OF PRICE.

Mere inadequacy of price is not sufficient to invalidate an execution sale.¹

3. SAME—LEGAL SURPRISE—NEGLIGENCE.

The surprise for which a court will set aside proceedings, fair and regular on their face, which have resulted in vesting rights to real property in a purchaser, must be

¹See *Weaver v. Lyon*, (Pa.) 5 Atl. Rep. 782, and note, 784.

a legal surprise without fault or negligence of the party who claims to have been surprised; and the party surprised must act promptly, and offer to return any purchase money he may have received.

Department 2.

J. D. Redding, for appellant, Central Pac. R. Co. *J. S. Harrington*, for respondent, A. D. Logan.

MCKEE, J. In this case the plaintiff in the action had appealed from a judgment in its favor, and from an order of refusal to set aside the judgment and an execution sale of land thereunder. The judgment appealed from was entered on the tenth of October, 1884, against the defendant, Creed, upon a default entered against him for not answering. By its terms the judgment provided for the sale of a tract of land containing 159 acres, to pay the sum of \$2,995, which the court found to be due and owing by the defendant to the plaintiff upon a contract for the purchase of the land. Under the judgment the land was sold at sheriff's sale on the twenty-second of December, 1884, to A. D. Logan. Seven months after the rendition of the judgment, and five months after the sale of the land, the plaintiff's attorney applied, upon notice to the purchaser, to set aside the judgment, upon the ground "that the summons in the action was defective and irregular," and to set aside the sale upon the ground "that it was made to the prejudice and exclusion of the plaintiff."

The court properly denied the application to set aside the judgment. Mere defects or irregularities in the process or proceedings of a judgment, against a party who does not object to them, do not affect the validity of the judgment, or the rights of the parties to it. A plaintiff in whose favor such a judgment is entered, has no right to question it. As to him, it is either valid or void. If valid, it is a final determination of his rights. If void, it does not affect his rights, and he may proceed to enforce them by any available remedy.

In the proceedings instituted by the plaintiff the court had jurisdiction of the subject-matter of the action and of the parties. The judgment pronounced in the action was therefore valid. Its validity is unquestioned by the defendants. As to him it stands in full force, unreversed and unappealed from. It is therefore final and conclusive as to the parties; and the plaintiff, at whose instance it was taken, has no right to appeal from it. One in whose favor a valid judgment has been rendered cannot be considered "a party aggrieved by it." *Ely v. Frisbie*, 17 Cal. 250; *Sleeper v. Kelly*, 22 Cal. 456.

The sale of the land took place in Colusa on the twenty-second of December, 1884. The plaintiff knew of the time and place of sale, and one of its agents, who resided in Colusa, on the twentieth of December, 1884, sent to the plaintiff's attorney a telegram as follows:

"COLUSA, CAL., December 20, 1884.

"*J. D. Redding*, 302 *Montgomery street*, San Francisco: Sheriff wants instructions about sale Creed land next Monday. J. W. GOAD."

The telegram was seasonably received, and on the same day the attorney at San Francisco, in answer, telegraphed:

"DECEMBER 20, 1884.

"*J. W. Goad*, Colusa, Colusa county, Cal.: If no bidders, company offers amount judgment and costs. JOSEPH D. REDDING."

At the same time the attorney wrote to the sheriff a letter, as follows:

"SAN FRANCISCO, December 20, 1884.

"*Sheriff of Colusa county, Colusa, Cal.*—DEAR SIR: I have received a dispatch from J. W. Goad, Esq., of Colusa, stating that the sheriff desires

instructions for the sale of Creed land next Monday. I have just telegraphed Mr. Goad that if there are no bidders at the sale, that the company offers the amount of judgment and costs, to-wit, \$2,995 judgment and \$115 costs. You are respectfully requested by the company to make the above-named bid; they being expressly allowed to do so by the terms of the decree herein.

"Yours respectfully,

JOSEPH D. REDDING,

"Attorney C. P. R. R. Company."

No representative of the plaintiff attended the sale; but there were bidders present, and the land was struck off to one of them, A. D. Logan, for \$1,092. As purchaser, Logan paid the money to the sheriff, and the sheriff forwarded the money to the attorney of plaintiff by letter, as follows:

"COLUSA, CAL., January 3, 1885.

"*Joseph D. Redding, Attorney at Law*—DEAR SIR: Inclosed find check for \$1,027.40, proceeds of sale in the case of *C. P. R. R. Company* against *Robert Creed*. Please acknowledge receipt, and forward the inclosed receipt to me. Your letter of advice was not received until after the sale was made to A. D. Logan. Mr. Goad says he did not receive the telegram you refer to in your letter.

"Yours truly,

M. DAVIS, Sheriff."

Upon receiving the money the attorney forwarded the following receipt:
"\$1,027.48. COLUSA, January 5, 1885.

"Received from M. Davis, sheriff of Colusa county, one thousand and twenty-seven 48-100 dollars, in United States gold coin, being the amount of sale of real estate in the case of *Central Pacific Railroad Co. vs. Robert Creed*, superior court, county of Colusa, after deducting sheriff's costs and disbursements amounting to \$64.52. JOSEPH D. REDDING,

"Plaintiff's Attorney."

The purchaser at the sale received from the sheriff a certificate of purchase. The sale was therefore complete. By the certificate the purchaser became vested with an inchoate right to the land, subject to be defeated by redemption according to law, and by the receipt of the purchase money the judgment became satisfied *pro tanto*.

For five months after the sale the plaintiff never questioned its validity, but at the end of that time, without offering to pay back the purchase money which was received in satisfaction of the judgment, the plaintiff moved to set aside the sale upon an affidavit which states (1) that the land which was sold at \$7 per acre was worth \$20 per acre; and (2) "that, at the time said letters and telegrams were sent, the means of communication between Williams, the point nearest Colusa on the railroad line, and Colusa, were very imperfect, and the roads nearly impassable; that the telegraph wires were down between San Francisco and Colusa; and hence the plaintiff, by the ordinary and customary means of communication between these points, was prevented from giving instructions to the sheriff and to J. W. Goad, the representative of the railroad (plaintiff) in Colusa."

Mere inadequacy of price is not sufficient to invalidate a foreclosure sale. *Smith v. Randall*, 6 Cal. 47; *McCormick v. Malin*, 5 Blackf. 509; 2 Perry, Trusts, 602. The fact of inadequacy has some significance in connection with proof of unfair practices at the sale, or of surprise, which prevented a party to the judgment, to be enforced by the sale, from attending, to his prejudice.

It is admitted that there were no unfair practices in connection with the sale. The sale was in all particulars regular and valid. The surprise for which a court will set aside proceedings, fair and regular on their face, which have resulted in vesting rights to real property in a purchaser, must be a legal

surprise, without fault or negligence of the party who claims to have been surprised. A court of equity does not assist a party who has lost his rights through his own negligence, (*Hendrickson v. Hinckley*, 17 How. 443;) and the party surprised must act promptly, and offer to return the purchase money. There would be no equity in allowing him to set aside the sale five months after it took place and keep the purchase money.

Besides, the circumstances stated in the affidavit of the plaintiff do not constitute legal surprise. The plaintiff knew of its own judgment, and of the legal means provided for its enforcement, and of the time and place of the sale of the property for its enforcement. Knowing these things, it was its duty to take such steps as were necessary to be represented at the sale. That it could have done at any time while the proceedings were *in fieri*, by sending instructions to its agent, who was on the ground ready to act. It was its own fault that it postponed doing that, or taking any other course, until the atmospheric condition of some 24 hours may have interfered with the communications between the plaintiff and its agent before the hour of sale. And when, with a full knowledge of all the facts connected with the sale, it received the purchase money, and elected to consider the sale valid, it ought not to be heard, five months afterwards, to say that it was surprised. *Dewey v. Frank*, 62 Cal. 343.

The court properly denied the motions made by the plaintiff. Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J

70 Cal. 504

PEOPLE v. CLUNIE. (No. 11,353.)

(Supreme Court of California. August 23, 1886.)

TAXATION—ASSESSMENT—CHARTER OF CITY OF SACRAMENTO—POL. CODE CAL. § 18.

The California act of May 17, 1861, relating to the mode of assessing, levying, and collecting taxes, was repealed by section 18 of the Political Code of California, in so far as its operation as a general law of the state is concerned, but was continued in force in so far as it was incorporated into and became a part of the charter of the city of Sacramento.

Department 1,

J. T. Carey and H. L. Buckley, for the People. R. T. Devlin, for appellant, Clunie.

ROSS, J. The main question argued in this case, and which we are urged to decide, is: What, if any, law is in existence authorizing the city of Sacramento to assess, levy, and collect municipal taxes? The charter of the city is found in the act of the legislature approved April 25, 1863. St. 1863, p. 415. In respect to city taxes, section 49 of that act provides: "The city taxes shall be levied, assessed, and collected under the provisions of an act entitled 'An act to provide revenue for the support of the government of this state,' approved May 17, 1861, except as herein otherwise provided. The board of trustees shall have, and are hereby possessed of, the same powers as the board of supervisors in said act, and the city assessor the same as county assessor, the city tax collector the same as county tax collector, the city auditor the same as county auditor, and the city attorney shall perform all the duties devolved by said act upon district attorneys, and shall be entitled to the same fees and compensation for his services."

The effect of this provision of the charter was to incorporate into it the provisions of the act of May 17, 1861, in so far as concerns the mode and manner of assessing, levying, and collecting taxes, except as by the charter otherwise specially provided. *Spring Valley Water-works v. San Francisco*, 22 Cal. 434. It is claimed, however, that the act of May 17, 1861, was re-

pealed upon the adoption of the Political Code, which established another and different system for the assessing, levying, and collection of state and county taxes. Sections 18 and 19 of that Code provide as follows:

"Sec. 18. No statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject, but in all cases provided for by this Code all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided; nor does it affect any private statute not expressly repealed.

"Sec. 19. Nothing in either of the four Codes affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws: 1. All acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts. 2. All acts consolidating cities and counties, and acts amending or supplementing such acts. * * *"

There is no doubt that section 18 of the Political Code repealed the act of May 17, 1861, in so far as its operation as a general law of the state is concerned, but it is equally clear that in so far as it was incorporated into and became a part of the charter of the city of Sacramento it was continued in force. *Spring Valley Water-works v. San Francisco*, *supra*; *Wood v. Hustis*, 17 Wis. 416. There is nothing in the case of *Savings & Loan Soc. v. Austin*, 46 Cal. 415, to the contrary. One of the points made in that case was to the effect that so much of the contested tax as was sought to be collected for city and county purposes was void, because not levied in accordance with what is known as the "Consolidation Act," and the amendments thereto; the argument being that the general revenue system provided in the Political Code was not applicable to the city and county of San Francisco. After quoting sections 18 and 19 of the Political Code, the court said that if they stood "alone and unexplained it would be difficult to escape the conclusion that it was intended to continue in force the consolidation act, and all the amendments thereto, including the machinery therein provided for the levying and collection of city and county taxes." But the court proceeded to point out that the legislature which adopted the Codes manifested its intention that the general revenue system therein provided should apply to San Francisco, by passing a special act entitled "An act to enable the city and county of San Francisco to conform to so much of the Political Code as relates to the public revenue," (St. 1871-72, p. 773;) and the court gave effect to that intention. But no such intention was manifested in respect to the city of Sacramento. So far as concerns that city, sections 18 and 19 of the Political Code stand "alone and unexplained." That being so, it is impossible to resist the conclusion that it was intended to continue in existence the charter of the city, including the machinery therein provided for the assessing, levying, and collection of municipal taxes. That machinery, as has been seen, is to be found in the act of May 17, 1861.

An examination of the record, however, shows that the assessment involved in this case was not made in accordance with the requirements of that statute. A similar assessment was held void in *Terrill v. Groves*, 18 Cal. 149, on the authority of which case the judgment and order must be reversed. A different state of facts existed in the case entitled *People v. Morse*, 43 Cal. 541.

Judgment and order reversed, and cause remanded.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 507

LOUVALL v. GRIDLEY and others. (No. 11,308.)

(Supreme Court of California. August 28, 1886.)

1. ACTION—PARTIES—COMPLAINT—AMENDMENT—JOINING NEW DEFENDANT.

When plaintiff obtains leave to amend generally, he has a right to join other parties as defendants.

2. EQUITY—ACTION TO QUIET TITLE AGAINST AN ESTATE—PROPER PARTIES—HEIRS AT LAW.

In an action against an estate to quiet title, the heirs at law are proper parties.

3. SAME—JOINDER OF ACTIONS.

A complaint which contains a prayer for relief asking that a deed be declared a mortgage, and the title to the land involved quieted, does not join two causes of action.

4. STATUTE OF LIMITATIONS—DECLARING DEED A MORTGAGE—CODE CIVIL PROC. CAL. § 337.

An action to have a deed declared a mortgage, and the title quieted in the grantor in the deed, is not an action upon a contract, obligation, or liability, founded upon an instrument in writing, that will bring it within the statute of limitations. Code Civil Proc. Cal. § 337.

5. TRIAL—FINDING OF FACT—IMMATERIAL ISSUE.

Failure to find upon an immaterial issue is not error.

Commissioners' decision. Department 2.

R. C. Long and Hundley & Gale, for respondent, Louvall. *H. V. Rear-don*, for appellants, Gridley and others.

BELCHER, C. C. It was alleged in the original complaint that the plaintiff's devisor was the owner of a quarter section of land, and conveyed the same by a deed absolute in form to George W. Gridley, in 1866; that the deed was intended as a mortgage to secure the sum of \$100, and that the debt was fully paid in 1868; that Gridley promised to reconvey the property, but died without having done so; and that the deed is now a cloud upon the plaintiff's title. The widow and children of Gridley were made parties defendant. By leave of the court the plaintiff filed an amended complaint, making the administratrix of the estate of Gridley also a defendant, and setting forth the facts constituting her cause of action somewhat more fully than they were set forth in the original complaint. Among other things, it was alleged that the plaintiff's devisor remained in the actual, open, notorious, uninterrupted, and exclusive possession of the land, claiming the same as his own, and adversely to every other right, from the time of the execution of the deed, in 1866, until his death, in 1883. And the prayer was that it be adjudged and decreed that the plaintiff was the owner of the property, and that the defendants had no right, title, or interest in, or claim upon, the same, or any part thereof; that the deed to Gridley was intended to be a mortgage only, and was fully paid and satisfied during his life; that a commissioner be appointed to enter and indorse upon the record of the deed "that said instrument was intended as a mortgage, and had been fully paid and satisfied;" and that plaintiff's title be quieted as against the defendants. The defendants moved to strike out the amended complaint upon the ground that the administratrix of the estate of Gridley was made a defendant without permission of the court having been obtained for that purpose; and upon the further ground that the nature of the action and the relief prayed for had been materially changed. They also demurred to the complaint upon the ground that there was a misjoinder of parties defendant, and upon the further ground that two causes of action—one to quiet title, and the other to declare a deed a mortgage—were improperly united, and not separately stated. The court denied the motion to strike out, and overruled the demurrer, and these rulings are assigned as error.

We think the rulings were right. The administratrix was a proper party to the action, and the plaintiff, having obtained leave to amend generally,

had a right to make her a party without any special permission to do so. The heirs at law were proper, if not necessary, parties, and there was no misjoinder when all were brought in. The nature of the action was not materially changed. In both the original and amended complaints the purpose was to remove a cloud cast upon the plaintiff's title by the deed of 1866, which was alleged to have been intended only as a mortgage. Some probative facts were unnecessarily stated in the amended complaint, but they served only, if established, to sustain the plaintiff's contention. They did not constitute a separate cause of action, and the complaint was not subject to demurrer, because two causes of action were improperly joined.

The defendants also insist that the evidence did not justify the decision. A sufficient answer to this is found in the fact that there was testimony tending strongly to support the decision, and the testimony the other way, at most, created only a conflict. In such a case, as is well settled, this court never interferes with the judgment of the court below.

The defendant pleaded, in bar of the action, section 337 of the Code of Civil Procedure. That section provides that "an action upon any contract, obligation, or liability, founded upon an instrument in writing, executed in this state, must be commenced within four years after the cause of action accrued. The court failed to find upon the issue presented by this plea, and this failure is assigned as error. The action was not brought to enforce a contract, obligation, or liability, founded upon an instrument in writing, and the issue sought to be presented was wholly irrelevant and immaterial. In *Chipman v. Morrill*, 20 Cal. 130, the court, by FIELD, C. J., said that "the statute, by the language in question, refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word "founded" was omitted, and the statute read "upon any contract, obligation, or liability upon an instrument of writing."

As the issue tendered was immaterial, a failure to find upon it was not an error. *Knowles v. Seale*, 64 Cal. 377; S. C. 1 Pac. Rep. 159; *McCourtney v. Fortune*, 57 Cal. 617.

The judgment and order should be affirmed.

We concur: SEARLS, C; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 511

GARABALDI v. SHATTUCK. (No. 11,307.)

(*Supreme Court of California.* August 28, 1886.)

STATUTE OF LIMITATIONS—ADVERSE POSSESSION—GRANTOR HOLDING AGAINST GRANTEE—PURCHASE OF OUTSTANDING TITLE BY GRANTOR.

Where a grantor holds lands adversely to his grantee for the statutory period, the title vests in him; and a subsequent conveyance to him of an outstanding title inures to his benefit, and not that of his grantee.

Commissioners' decision. Department 2.

Hundley & Gale, for respondent, Garabaldi. *H. V. Reardon*, for appellant, Shattuck.

BELCHER, C. C. This is an action to quiet title to certain land in Butte county. The plaintiff had judgment, and the defendant appealed.

It appears from the findings that on the twenty-sixth day of February, 1866, one Richard F. Floyd was in possession of the land in question,—it

being then public land of the United States,—and on that day, on his own motion, and without consideration of any kind, made a deed purporting to convey it in fee to the defendant. The deed was acknowledged and recorded, but the grantee did not take possession under it. On the contrary, Floyd remained in possession; and from that time until April, 1885, he held the actual, open, notorious, exclusive, peaceable, and adverse possession of the premises, and of every part thereof, claiming the same in his own right, and adversely to all the world, and especially as against the defendant. In May, 1881, Floyd obtained the title to a part of the land by patent from the United States, and in June, 1885, he obtained the title to the balance of it by deed from the Central Pacific Railroad Company. Floyd conveyed the land to the plaintiff, and the plaintiff thereupon commenced this action.

It is now claimed for the defendant, appellant here, that the titles acquired by Floyd in 1881 and 1885 immediately passed to and vested in the defendant by reason of his deed of 1866. We do not think this claim can be maintained. There can be no doubt that a grantor, even with a covenant of warranty, may, after his deed is delivered, take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee. *Franklin v. Dorland*, 28 Cal. 180; *Sherman v. Kane*, 86 N. Y. 57; *Traip v. Traip*, 57 Me. 268; *Smith v. Montes*, 11 Tex. 24.

An adverse possession of land for the period of time prescribed by the statute not only bars the remedy, but practically extinguishes the right of the party having the true, proper title, and vests a perfect title in the adverse holder. *Arrington v. Liscom*, 34 Cal. 365; *Cannon v. Stockmon*, 36 Cal. 535; *Leffingwell v. Warren*, 2 Black, 605.

When Floyd obtained his title, in 1881, he had been in the adverse possession of the premises for 15 years, and the title, whatever it was, conveyed by the deed of 1866, was extinguished. He had again, as against all the world, except the United States, become the owner of the property as completely as he would have been if the defendant had reconveyed it to him. But if the defendant had reconveyed it to him, would any one contend that the new title at once passed to the defendant notwithstanding his deed? We think not. The true rule is that an after-acquired title passes to a prior grantee only so long as the prior grantee has some estate, interest, or claim in or to the property granted. When he has ceased to have any estate in the property, he has nothing to be fed by the new title, and so cannot claim it.

Manley v. Howlett, 55 Cal. 94, is not in conflict with what has been said. In that case plaintiff sued in ejectment, and to establish his title relied upon a patent issued less than five years before the commencement of his action. The defendant pleaded the statute of limitations, but it was correctly held that the statute did not begin to run until the issuance of the patent.

The judgment should be affirmed.

We concur. SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 514

RENDELL v. SCOTT and others. (No. 11,095.)

(Supreme Court of California. August 28, 1886.)

FRAUD—SALE OF LAND—STATEMENT OF OPINION.

Representations made by a grantor as to the character of land, which are mere matters of opinion, do not constitute fraud.¹

¹As to the effect of false and fraudulent representations affecting the value of the property sold, and as to what does not amount to such misrepresentations, see McKinney v. Crady, (Ky.) 1 S. W. Rep. 402, and note, 404.

Cal. Rep. 9-11 P.—62

Department 1.

Armstrong & Hinkson, for respondent, Rendell. *W. H. Beatty, S. C. Denson*, and *H. A. Carter*, for appellants, Scott and others.

BY THE COURT. The defendants, by their cross-complaint, sought to have set aside, as obtained by fraud, a contract by which the defendants had agreed to purchase a tract of land from plaintiff. The alleged fraud consisted of certain representations by which the defendants were induced to enter into the contract for the purchase of land. The cross-complaint was demurred to, and the demurrer was sustained. It is apparent to us that the matters alleged as constituting the fraud were matters of opinion, rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in lone valley, and was very rich and productive, and would produce 50 bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits. And the other matters alleged may well be classed under the head of matters of opinion, rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchaser.

In such a case the purchaser should exercise his own judgment, and is not entitled to relief in equity. Judgment affirmed.

70 Cal. 502

HARRIS v. MORE and others. (No. 11,500.)

(Supreme Court of California. August 28, 1886.)

REWARD—DEPUTY-SHERIFF—FURNISHING EVIDENCE.

A deputy-sheriff may receive compensation for furnishing evidence which leads to the conviction of persons implicated in the commission of a crime, when he had no legal duty to perform by virtue of his office, and the offense was committed and the trial had out of his county.

Department 1.

W. T. Williams and *W. C. Stratton*, for respondent, Harris. *Thos. McNulta, A. A. Oglesby*, and *W. E. Shepherd*, for appellants, More and others.

MYRICK, J. The defendants executed an agreement in writing to pay moneys to any person furnishing evidence which would lead to the conviction of persons implicated in the commission of a crime. The agreement was delivered to the plaintiff. It contained a clause agreeing to pay plaintiff certain expenses in investigating the matter of the offense. The plaintiff rendered services in regard to discovering evidence, and causing the same to be produced at the trial. The plaintiff was deputy-sheriff of Los Angeles county, and the offense was committed and the trial had in another county. As the plaintiff had no legal duty to perform, by virtue of his office of deputy-sheriff, in regard to discovering the evidence and causing it to be produced, having no writ to execute, and the offense having been committed and the trial had out of his county, we do not think the policy of the law forbade his receiving the compensation. It was not compensation for the performance of any duty enjoined upon him by law.

No error appears in the transcript. Judgment and order affirmed.

We concur: MORRISON, C. J.; MCKINSTRY, J.

70 Cal. 548

WILLS v. KONG. (No. 11,244.)

(Supreme Court of California. August 31, 1886.)

NEW TRIAL—SETTLEMENT OF STATEMENT.

Where, prior to the refusal of a judge to settle a statement, amendments had been proposed to it by the plaintiff, and, after such refusal, defendant engrossed the state-

ment with the proposed amendments, and presented the engrossed statement to the judge for settlement when the time for the service of a statement had long passed, the judge was not authorized by the statute to settle and allow it.

Department 2.

H. M. Alberry, for respondent, Wills. *John C. Deuel*, for appellant, Kong.

BY THE COURT. In this cause the judge refused, on objections of plaintiff's counsel, to settle and allow the statement, on motion for a new trial, presented by defendant. The objections of the counsel for plaintiff were that the defendant had not complied with the statute in procuring the judge to settle the same. Prior to the refusal of the judge to settle the statement amendments had been proposed to it by the plaintiff. After such refusal defendant engrossed the statement with the proposed amendments, and presented the engrossed statement to the judge for settlement, and the judge, against the objections of plaintiff, settled and allowed the statement. The judge having once refused to settle the statement, the matter was ended so far as that officer was empowered to settle it. The engrossed statement was then a new statement, presented for allowance, and, the time for the service of a statement having long passed, the judge was not authorized by the statute to settle and allow it. The statement must, then, be disregarded.

There is no error in the record, and the judgment and order are affirmed.

2 Cal. Unrep. 699.

BUTTE CO. v. BOYDSTUN. (No. 11,523.)

(*Supreme Court of California.* August 31, 1886.)

WAYS—AUTHORITY OF SUPERVISORS—PROVINCE OF COURT.

Where the question of the necessity of taking land for a road was settled by a board of supervisors, it is not a question for the court to pass on.

Department 2.

J. C. Gray, *F. C. Lusk*, and *Hundley & Gale*, for respondent, Butte Co. *T. B. Reardon & Son*, for appellant, Boydston.

BY THE COURT. There was no misjoinder of parties defendant. The complaint was sufficient. There was no error in striking out that portion of defendant's, Boydston's, answer, which attempted to raise an issue as to the necessity of taking the land for the road. The question of necessity is settled by the board of supervisors, and, having so determined, it is not a question for the court to pass on. *Tehama Co. v. Bryan*, 8 Pac. Rep. 673.

Judgment affirmed.

2 Cal. Unrep. 700

CHIELOVICH v. KRAUSS. (No. 11,007.)

(*Supreme Court of California.* September 1, 1886.)

1. ACTION OR SUIT—PARTIES TO ACTION—INTERVENTION.

A plaintiff's demurrer to an intervention should have been sustained when the intervention did not allege facts showing that the judgment was unjust, or facts showing that the defendant in the case had a defense to that action.

2. TENDER AND OFFER—MORTGAGE—REDEMPTION—INTENT.

Under the California Civil Code, an offer to pay by one who seeks to redeem from a mortgage must be made with intent to extinguish the obligation.

MYRICK, J., dissenting.

In bank.

Charles L. Queer and *Ball & Craig*, for appellant, Chielovich. *W. B. Treadwell* and *Grove L. Johnson*, for respondent, Krauss.

BY THE COURT. Plaintiff's demurrer to the intervention should have been sustained. The intervention does not allege facts which show that the judg-

ment was unjust, or facts showing that the defendant in *Chielovich v. Roth* had a defense to that action. The statement that he pleaded a defense which he was advised by counsel was good, and which he believed to be good, was not sufficient.

The mode of offering to perform prescribed in the chapter of the Civil Code headed "Offer of Performance" (section 1485 *et seq.*) applies as well to offers of performance which operate a redemption (Civil Code, 2905) as to other offers to perform. Such offers must be made with "intent to extinguish the obligation;" since the lien can be extinguished only by extinguishing the obligation. Section 1500 provides that an obligation to pay money is extinguished by a *due offer* of payment "if the amount is immediately deposited in bank," etc. It follows that an offer to pay by one who seeks to redeem from a mortgage must be made in the same way.

When *Kortright v. Cady*, 21 N. Y. 343, was decided, there was no New York statute which prescribed the mode in which an offer to perform must be made.

Neither plaintiff nor intervenor was entitled to any relief in this action. Judgment reversed, and cause remanded.

MYRICK, J., dissenting.

70 Cal. 619

SETER v. SETER. (No. 8,352.)

(Supreme Court of California. September 13, 1886.)

HUSBAND AND WIFE—DIVORCE—DIVISION OF PROPERTY—FRAUD.

In the course of a suit for divorce, the parties having agreed upon a certain plan of division of the community property, if the wife, relying upon the false representations of the husband, was wronged in such division, the court will annul the division, and decree another, notwithstanding that the wife or her attorney had, in the first instance, the means of knowing the true state of the case.

Commissioners' decision. Department 2.

J. A. Yoell, (D. M. Delinas, of counsel,) for respondent. S. F. Leib and J. R. Lowe, for appellant.

SEARLS, C. The plaintiff herein, Catherine Seter, and William A. Seter were husband and wife. The former brought an action for a divorce, and for a division of the community property. Pending the action the parties agreed upon the manner in which the community property should be divided, by the terms of which, as plaintiff claims, she was to have a ranch upon which the parties had formerly resided, known as the "Home Place." The "Home Place" consisted of lot 4 of the Santa Teresa rancho, and also of a tract of land of about 20 acres inclosed therewith, and forming a part of said "Home Place." The decree of the court which awarded this property to plaintiff, and to which she assented, described the "Home Place" as lot 4, etc., thus omitting therefrom the 20-acre parcel thereof. The contention of plaintiff is that she was induced by the false and fraudulent representations of defendant to suppose, and did suppose, that lot 4 included the whole of "Home Place," and that her assent to the division of the property, as provided in the decree, was based on such belief.

This action is brought to amend and reform the decree so as to include and award to plaintiff the 20 acres of land, and to set aside as fraudulent a conveyance thereof by defendant to one Sophia L. Morey, who is also made a party defendant. The cause was tried by the court without a jury, written findings filed, and judgment rendered thereon in favor of plaintiff as prayed for in her complaint. The appeal is from the judgment, and from an order denying a new trial.

It is contended by appellant that the facts, as found by the court, show that, in the divorce case, counsel for plaintiff was possessed and had at hand or

within reach the means of information by which to determine accurately the extent and boundaries of the "Home Place," so called, and that the plaintiff cannot, therefore, recover. The answer to this position is that, conceding plaintiff to be bound by the knowledge of her attorney, it appears that *in fact* the attorney believed lot 4 to include the whole of the "Home Place;" and while he might have learned of his mistake by reference to maps and information in his own office, and in the records of the county, that he applied to the defendant for information on the subject, and the latter, seeing and knowing that plaintiff's attorney was mistaken, knowingly and fraudulently misled him by falsely stating that lot 4 did cover the whole of the "Home Place."

Had defendant remained silent when asked by the attorney if lot 4 included the whole of the "Home Place," it may well be doubted if he could be held, as it would then have been the duty of the attorney of plaintiff to use the information at hand, or means within his reach, for obtaining correct information; but when he suppressed inquiry, and misled plaintiff's attorney by a false statement as to a material fact, which the latter believed and acted upon, the case is somewhat different. Whatever the means of knowledge of the attorney may have been, it is patent that he was not correctly informed, and, as to facts not within his knowledge, he had a right to rely upon the information of the defendant, and the latter cannot escape responsibility by showing that plaintiff's attorney might have ascertained that such representations were untrue. *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Smith v. Richards*, 13 Pet. 36; *Bench v. Sheldon*, 14 Barb. 67; *Mead v. Bunn*, 32 N. Y. 275; 2 Kent, Comm. 484; *Perry, Trusts*, §§ 179, 180.

This view does not conflict with the doctrine that the seller is at liberty to avail himself of his superior knowledge, in dealing with the purchaser, without rendering himself liable. To gainsay that doctrine would tend to retard trade, and to place the men of superior knowledge, judgment, skill, and acumen on the same plane with the most ignorant and negligent; and, by depriving the former of the fruits of his energy and skill, would so hamper legitimate trade as to make it scarcely worth pursuing. It maintains that doctrine, but at the same time holds that the seller must not resort to artifice, fraud, or falsehood in misleading the buyer as to facts of which the latter is ignorant, and which are material for him to know. If A. is the owner of a ship, absent on a perilous voyage, long overdue at her destined port, under circumstances raising a presumption that she may be lost by perils of the sea, and B., who has learned that such ship has sought safety in another and distant port, which fact is unknown to A., purchases the vessel from A. at a reduced price, he has availed himself of his superior knowledge, has practiced no deception, and is not liable; but, in the same case, suppose B. had represented to A. that the vessel was wrecked, the latter believing the statement to be true, and the former knowing it to be false, and that he had then purchased her for a trifle, can it be doubted that he would be liable to A.? We think not. He was not bound to speak, and might have maintained silence, but, when he elected to speak, he was bound to utter the truth, and, having failed to do so, to the damage of A., he is liable.

The case of *Board Com'rs v. Younger*, 29 Cal. 172, cited by appellant, was one in which the defendant had made no representations of any kind to the plaintiff, except that in a petition for the purchase of the land, and in a deed prepared by his agent and presented for execution, the land was described by courses and distances, and by metes and bounds, and concluding with these words, "containing about seventy-two acres of land," and the court held—"First, that with the means at hand furnished by the courses and distances and metes and bounds of the deed, and by the opportunities which the plaintiff had in common with the defendant for ascertaining the quantity of the land, and in view of the fact that quantity is, as a rule, mere matter of description which must give way to courses and distances, which in turn

must yield to metes and bounds, there was no such misrepresentation of a material fact as entitled plaintiff to recover; and, *second*, that a failure by defendant to state that another was in possession of a portion of the premises conveyed, with knowledge that plaintiff had adopted a rule not to sell occupied land except to the occupant, was not such a fraudulent suppression of a material fact as entitled plaintiff to recover.

Hawkins v. Hawkins, 50 Cal. 558, was a case in which the plaintiff signed a written contract without reading it; and this court held, in affirming the judgment of the court below sustaining a demurrer to the complaint, that where no relation of confidence or trust existed between the parties to the contract, and where the means of knowledge were equally open and accessible to both, it was the duty of plaintiff to have read the contract, or to have it read to him, before signing, and, having failed to do so, he could not recover.

The substance of a long line of authorities upon what we may, for convenience sake, term this side of the case, is to be found at page 484, 2 Kent, Comm., where he says: "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of information."

This doctrine is entirely compatible with that class of cases in which a party is held liable for having, by false and fraudulent representations as to material facts, prevented the opposite party from seeking the information which he did not possess, and which, but for such representations, he might have obtained. Such seems to have been the effect of defendant's representations in this instance, and we are of opinion the court below did not in this respect err in its conclusion as to defendant's liability upon the facts. The testimony in support of the findings was ample, and we see no error for which the cause should be reversed, unless it be found in a failure of the court to find upon one of the material issues presented by the pleadings.

The facts necessary to a comprehension of the question involved are as follows:

Plaintiff in her complaint avers that, prior to the entry of the decree in the divorce case, she and the defendant, Senter, agreed to compromise all property questions, and the division thereof, in said action for divorce, and to withdraw the same from the consideration of the court, *in case a divorce should be granted*; and then proceeds to show how, under such agreement, the property was to be divided. The answer in response to such allegations is as follows: "Defendants deny that said defendant, Senter, and plaintiff ever made any agreement whatever which was in terms dependent upon a judgment or decree divorcing them being obtained; but, on the contrary, defendants allege that, while the action for divorce mentioned in said complaint was pending, said defendant, Senter, and plaintiff agreed that a judgment divorcing them should be obtained in such action, and that said defendant, Senter, should and would make no contest or opposition to such action, or to the plaintiff's obtaining a decree of divorce in said action, and such agreement was made a part of and was the consideration of each and every agreement or compromise ever entered into between said defendant, Senter, and plaintiff concerning or relating to the division or segregation of their community property."

The court finds "that while said action was pending, and before any appearance therein by said William A., to-wit., on or about the —— day of January, 1881, said William A. proposed to the plaintiff, Catherine, through her attorney, J. A. Yoell, to divide their said common property between them, and to withdraw from the consideration of the court in said action for a divorce all questions relating to or affecting the division of said common property; that pursuant to said proposition it was then and there agreed, between

said William A. and said Catherine, that the personal property should be and was divided in a certain manner, and that said real estate known and called the 'Home Place' should be allotted to and taken by the plaintiff, Catherine, as and for her separate estate." The finding further proceeds to show what property defendant was, under the agreement, to have, and that the agreement was carried out by the decree, and this is the only finding responsive to the issue there made.

In *Beard v. Beard*, 65 Cal. 354, the plaintiff had transferred certain property to the defendant, his wife, in consideration of her executing to him four notes, and securing the same by a mortgage, "*and abandoning her defense in an action for divorce then pending between them, and doing nothing to resist or prevent or delay him in obtaining a decree of divorce therein;*" and this court held that the agreement of the wife with respect to the divorce proceeding was a fraud upon the court, and, as it constituted an essential and inseparable part of the consideration, the entire transaction became tainted by fraud, and no action would lie to enforce the payment of the notes.

From the doctrine of *Beard v. Beard*, and many other cases which might be cited of the same tenor, and to the same effect, we think the issue made by the answer was essential to the disposition of the cause, and should have been passed upon by the court. We understand counsel for respondent to tacitly, at least, concede this proposition; but his position is that the finding by the court of a specific contract in fact negatives the existence of any other or different contract. It is true that the substance only of the issue need be found, and that, in many instances, the finding that an alleged contract contained certain terms and conditions, and showing directly or by fair intendment that the whole contract is given, the presumption will not only be indulged that it contained no other terms and conditions, but also, in the absence of a showing to the contrary, that no other and different contract existed. The averments of the complaint and answer do not differ materially as to the manner in which the property of the spouses was, under their agreement, to be divided. Indeed, except as to the alleged fraud of the defendant in the description of the "Home Place," whereby 20 acres of the land, parcel thereof, was omitted, there is no question made. The real defense is founded upon the *consideration* of the agreement. Defendant alleges that a part of the consideration was that a judgment divorcing them should be obtained in the action then pending and undetermined, and that he (the defendant) should and would make no contest or opposition to such action, or to the plaintiff's obtaining her decree of divorce. Under these circumstances, the vital question is not what was the contract, but what was the consideration upon which it was founded?

Suppose A. and B. enter into a contract for an immoral purpose, or to perform an act in contravention of public policy, or to defraud a third party: in all these cases the contract may be admitted or proven, and yet the law cannot pronounce upon its validity until the purpose, or the fraudulent intent, is determined. The intent will sometimes appear from the contract itself. When it does, it is sufficient; but more frequently such is not the case, and then it is necessary to go beyond its mere terms in determining its validity. A. brings suit against B., and avers that the latter agreed in writing to pay him \$500. B. answers, and sets up that the only consideration for the agreement was a promise on the part of A. that he would assassinate C. The parties admit, or, what is the same thing, the proofs show, that the contract was made, and the court is asked to pronounce judgment. Manifestly it could not do so without first passing upon the fact of the consideration. That issue has become the chief factor in the problem. In such a case the fact that a contract was entered into, standing as a special verdict, would not warrant a judgment; and under our system of requiring written findings by

the court, (unless waived,) in causes tried without a jury, it is considered that the findings of fact should cover all the issues, and be so far reaching that, if turned into a special verdict, they would support a judgment.

The system of implied findings which prevailed under the act of 1861 has no place under the Code of Civil Procedure. To this rule there is the exception that when a defense is tendered by a party upon which no evidence is offered at the trial, and upon which there is no finding, the issue will be deemed immaterial, and the cause will not be reversed for want of such finding. This exception is based upon the idea that a cause will not be reversed for want of a finding, which, had it been made, must have been adverse to appellant.

We have scanned the record carefully, and find no testimony whatever in support of the defense indicated. We are therefore of opinion the judgment and order appealed from should be affirmed.

WE CONCUR. BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 632

Ex parte SHOBERT. (No. 20,219.)

(*Supreme Court of California.* September 14, 1886.)

LOTTERIES—SELLING BOND, PAYMENT OF WHICH DEPENDS ON A "DRAWING."

A bond issued by the city of Brussels, being one of a number of such, the priority in the payment of which is to be determined by an annual drawing until all are paid, does not render the seller of it liable to prosecution under the Penal Code for selling a lottery ticket.

Commissioners' decision. In bank.

On habeas corpus.

Charles B. Darwin, for petitioner. *Lloyd & Wood*, for respondent.

BELCHER, C. C. The petitioner was accused of selling a lottery ticket in the city of San Francisco, and was tried and convicted. The complaint against him contained a copy of the supposed lottery ticket; and it appears therefrom to have been one of 70,000 bonds or obligations, for 100 francs each, which were issued by the city of Brussels in 1853. The bond in question is numbered 387, and provides that the holder shall be entitled to the repayment of his capital, and interest thereon at the rate of 3 percent., payable annually. It further provides, in effect, that 200 of the bonds or obligations shall become due and payable at the end of the first year, 206 at the end of the second year, and 212 at the end of the third year, etc., all of them payable in 66 years.

To ascertain what particular bonds are payable in any one year, a drawing is to be had on the thirty-first day of December of each year, or, if that day be a Sunday or holiday, on the evening before; and the bonds bearing the number drawn are then to be paid on the thirty-first day of March following. It is further provided that the holders of the bonds, bearing the first 40 numbers drawn, shall be paid premiums ranging from 25,000 francs for the first, down to 200 francs for the last.

Is the instrument above described a "ticket, chance, share, or interest in or depending upon the event of any lottery," the sale of which in this state is prohibited by sections 319 and 321 of the Penal Code?

In *Kohn v. Koehler*, 96 N. Y. 362, a similar question was before the court of appeals of New York. In that case the bond in question was one of certain bonds issued by authority of the government of Austria, and by which that government obligated itself to pay the principal of the bonds, with interest and a premium named, and also any additional sum which the holder

might become entitled to in case the number of his bond drew a prize in a drawing to be had as specified. The court said:

"The evident object and purpose of the government in issuing the bonds was to obtain money for its own use and benefit. According to the true interpretation of the instrument, the government, upon receiving the money, promises to pay the principal, interest, and premium named, and, in addition, any sum which may be drawn by the holder of the bond, in accordance with the rules and regulations indorsed thereon. This additional sum depends upon a contingency which is to be decided by lot or chance. Independent of this, the amount and the terms are fixed by conditions of the bond. The substance of the transaction relates to a loan of money to the government and the provision made for its payment. This is the main object and purpose for which authority was given to issue the bonds, and they were disposed of, evidently having this in view. The provision by which, upon a certain contingency, the holder of the bond might receive an additional sum was no doubt an inducement held out for the purpose of obtaining money on the same, but it did not constitute the main feature and the substance of the transaction between the government and the purchaser of the bond. It was a mere appendage and an incident to its main purpose, by means of which the holder might by chance receive a larger sum than the principal and interest which the bond itself provided for.

"In loaning money upon these bonds the holder thereof ran no risk of loss if the principal and interest were paid, and he took the chances which might arise in case it should be determined by lot that his bond was entitled to a larger sum than the principal, interest, and premium, which he was sure to get in any event. While this latter privilege depended upon chance, it cannot, we think, be held, upon any sound theory, that it converted the bonds into lottery tickets, and imparted to the loan which was made thereon the character, object, and accompaniments of a mere lottery scheme. * * *

"A government bond of the character of the one involved in this action does not come within the mischief intended to be remedied, or within the scope and purpose of the enactments against lotteries. Such an instrument is not named, nor is it within the purview of the statute or the intention of the law-makers. These bonds have been issued by several of the governments of other countries, and in no sense can they be regarded as being within the inhibition of the statutes of this state, which were intended to suppress lotteries, and to prevent citizens from indulging in this species of gambling. The bond in question was an evidence of debt, and a public security of a foreign government, exposed for sale the same as other securities upon which money is loaned, and its sale did not violate the provisions of the statute already cited. It was not raffled for or distributed by lot or chance, and it cannot be said that the purchase of the same by the plaintiff was within the provisions of section 22 of 1 Revised Statutes, 665."

It is apparent that the reasoning in that case exactly covers this case, and the conclusions reached, we think, are correct. It follows that the petitioner should be discharged from custody.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion it is ordered the petitioner be discharged.

MYRICK, J., dissents.

70 Cal. 628)

CARLSON v. SUPERIOR COURT. (No. 11,628.)

(Supreme Court of California. September 14, 1886.)

APPEAL—APPEAL FROM JUSTICE'S COURT—QUESTION TO BE CONSIDERED.

When the question heard and determined in the justice's court is made the subject of appeal, the appeal gave the court jurisdiction of the case, and, upon a sufficient showing in the statement, it must be considered, and not dismissed on the ground that "the appeal ought to have been taken on questions of law and fact."

Department 2.

Wall & Collins, for petitioner.

McKEE, J. The writ of review in this case was granted to determine whether the superior court of Alameda county pursued its jurisdiction in a case before it, on appeal from the judgment of a justice's court. The case appealed was an action of claim and delivery brought by E. F. Herbert against C. F. Carlson—a constable—for the return of a buzz-planer, which the constable had seized on the twenty-third of February, 1886, as the property of A. M. Stoddard, to satisfy an attachment issued against Stoddard in favor of one Higgins. In the action the plaintiff recovered judgment for the return of the buzz-planer, or its value if a return could not be had, and costs. From the judgment Carlson appealed to the superior court on a question of law. The question was whether the transfer by which the plaintiff claimed title to the attached property was void against the attaching creditor, upon the ground that it was not accompanied by an immediate delivery, and followed by an actual change of possession of the buzz-planer. It was contended that the transfer was void upon that ground, and that the judgment appealed from was erroneous and reversible.

The superior court, however, held that the statement on appeal was insufficient to raise the question. Upon the hearing of the case it made the following order: " * * * That the statement of the case did not contain sufficient evidence to enable the court to decide whether the ground of appeal was well taken; and for the reason that the appeal should be on questions of law and fact, this court dismisses the appeal."

But the law allowed an appeal to be taken on questions of law alone. The appeal taken upon that ground was therefore taken according to law. There was no question that the appeal was not properly taken, and the question whether it ought to have been taken on questions of *law* and *fact* was not a question within the appellate jurisdiction of the court. There was but one question before the court as the ground of appeal; and upon that the appellant was entitled, as a matter of right, to be heard if the statement of the case contained the evidence upon which the question was raised and decided in the justice's court. All the evidence necessary for the determination of the question was contained in the statement.

The statement shows that Herbert, the plaintiff in the action, claimed the property which was attached as a portion of the machinery of a planing-mill known as the "Enterprise Mill," which consisted of a two-story building, and its land and appurtenances, together with the machinery, including the buzz-planer. The basis of the claim was a conveyance of the mill property, executed and delivered on the first of January, 1886, by A. M. Stoddard, the attachment debtor. At the date and delivery of the conveyance, A. M. Stoddard was, by himself and his tenant, his brother A. C. Stoddard, in possession of the property; he occupying the upper story of the building for the manufacture of furniture, and his tenant the lower story, in which he carried on the business of the planing-mill. The delivery of the deed was accompanied by a delivery of the keys of the upper story of the building; but except as to the legal effect of the delivery of the deed and keys there was no actual exchange of the possession of any of the property described in the con-

veyance. The original owner and attachment debtor, by himself and tenant, continued in possession of all the property, and conducted their business in the same way and under the same arrangements as before the conveyance, except that the attachment debtor took a lease of the property, which he held from about the first of January until about the first of February, 1886, when he surrendered it, and a new lease of the property was made to his tenant, under whom the attachment debtor, without any change of possession of the property, continued to act as engineer of the planing-mill, and had ostensible possession and use of the buzz-planer on the twenty-third of February, 1886, when the constable, Carlson, levied upon it as his property to satisfy the attachment against him.

This showing was sufficient to raise the particular point of law upon which the appeal was taken. It was the question which was raised and decided at the trial of the case in the justice's court; and, the appeal having been taken from the judgment upon that alone, it was *the* question or point of law to be decided upon the appeal.

The appeal vested the superior court with jurisdiction to hear and determine the question. In the exercise of that jurisdiction the court could not decline to determine the only question brought by the statement on appeal within its jurisdiction, by arbitrarily ordering a dismissal of the appeal upon the ground that the appeal ought to have been taken on questions of law and fact. Such a disposition of the case was in excess of the jurisdiction of the court with reference to the matter on appeal. *Hall v. Superior Court*, 8 Pac. Rep. 509; *Matthews v. Superior Court*, 10 Pac. Rep. 128.

Let the order dismissing the appeal for the reason assigned be reversed, and the cause remanded for hearing and determination of the question of law upon which the appeal was taken.

I concur: SHARPSTEIN, J.

I concur in the judgment: THORNTON, J.

70 Cal. 635

HOWELL v. THOMPSON. (No. 9,818.)

(*Supreme Court of California*. September 15, 1886.)

1. APPEAL—ORDER DENYING CHANGE OF VENUE—SUBSEQUENT REVERSAL OF ORDER.

A judgment rendered in an action after an order denying defendant's motion for a change of venue must, after a reversal of such order upon appeal, be reversed without inquiring whether there is error.

2. SAME—STAY OF PROCEEDINGS.

An appeal from an order denying a change of venue does not work a stay.

In bank.

Charles F. Wilcox, for respondent, Howell. *D. L. Smoot*, for appellant, Thompson.

MCKINSTRY, J. On the twenty-ninth day of March, 1886, it was adjudged by this court, (department 2,) on appeal from an order of the superior court of Santa Clara denying a motion of the defendant that the action be moved for trial to San Francisco, that the said order be reversed, and the superior court of Santa Clara was, by the judgment of this court, directed to make and enter an order granting the defendant's motion for a change of the place of trial. After denying the motion for a change of the place of trial to San Francisco county the superior court of Santa Clara proceeded to try the action, and on the fifteenth day of January, 1884, made and entered a judgment therein in favor of the plaintiff and against the defendant, from which judgment the defendant has appealed. The defendant now moves this court that the judgment be reversed or set aside.

In *Pierson v. McCahill*, 23 Cal. 249, it was held, under the provisions of the former practice act, that an appeal from an order refusing to change the place of trial stayed all further proceedings in the court below till the appeal was decided. But the Code of Civil Procedure (section 949) provides that such an appeal shall not of itself operate a stay.

In *People v. Whitney*, 47 Cal. 584, it was held that an appeal from an order denying a change of venue did not deprive the district court of jurisdiction to proceed and try the action, in such sense that prohibition would lie.

This court has jurisdiction of an appeal from an order denying a motion to change the place of trial; and there can be no doubt that when this court reverses such an order, and directs that the court below shall make and enter an order transferring a cause for trial to another county, its jurisdiction includes full power and authority to make all orders or judgments necessary to render effectual its judgment on appeal from the order denying the change of the place of trial. Unless the judgment can be set aside by this or the superior court, "the party appealing," as was said in *Pierson v. McCahill*, "might be forced to a trial in the wrong county, before the appeal was determined, and thus he would lose all benefit from his appeal in case the order should be reversed."

It is said that defendant here waived his right to rely on his motion to change the place of trial, by appearing at the trial in Santa Clara, and contesting the plaintiff's right to recover. We think he was not bound to rely upon his own opinion that the order was erroneous; and, as we have seen, section 949 of the Code of Civil Procedure provides that such an appeal does not stay the trial in the court below. It may be suggested that the motion to set aside the judgment should be made in the court below. Such a course might or might not be regular; but as the judgment of the superior court has been brought here by an appeal, and the judgment of this court reversing the order denying the motion to change the place of trial also constitutes a portion of our records, we have before us all the existing evidence bearing on the question involved. If the fact that a final judgment had been entered by the superior court had been made to appear to this court when the appeal from the order refusing a change of the place of trial was heard, this court could have provided, in its judgment reversing the order, for setting aside the judgment of the court below. This, without inquiring whether any error occurred at the trial of the cause below, but simply because the order of this court would be of no avail if the judgment below was allowed to stand.

The proceedings of the court below with respect to the motion for a change do not appear, and could not appear, in the transcript on appeal from the judgment, since the Code gives a direct appeal from such an order, and it cannot be properly reviewed on an appeal from the judgment. The judgment is a fact, and whenever the fact is made to appear, either to this court or to the superior court, in connection with a previous order that the cause be transferred to another county for trial, the judgment should be set aside, because it is an apparent, if not a real, obstacle to the operative effect of an order changing the trial to another county. Judgment reversed.

We concur: MORRISON, C. J.; ROSS, J.; THORNTON, J.; MCKEE, J.; SHARPSTEIN, J.; MYRICK, J.

70 Cal. 639

BIVEN v. BOSTWICK. (No. 11,205.)

(Supreme Court of California. September 16, 1886.)

ASSUMPSIT—INSTRUCTIONS—TIME OF PROMISE TO PAY MONEY.

A request to instruct the jury that the plaintiff cannot recover unless it has been proved that, at or about the time charged in the complaint, the defendant made

certain promises charged in the complaint, held properly refused; the plaintiff being entitled to recover if the promise was made any time before the commencement of the action.

Department 2.

J. H. Budd and *J. A. Louthit*, for plaintiff and respondent. *W. L. Dudley*, for defendant and appellant.

THORNTON, J. This action is brought on a promise by the defendant to pay over a sum of money in his hands to the plaintiff. The questions presented relate mainly to the sufficiency of the evidence to sustain the verdict of the jury on certain special issues submitted to it. The evidence, in our judgment, was sufficient for that purpose. The defendant requested the court to instruct the jury as follows: "This action is brought to enforce a special promise alleged to have been made by the defendant to Jesse A. Mitchell, to pay a certain indebtedness from said Mitchell to the plaintiff in this action; and, before the plaintiff can recover, you must be satisfied from the evidence that the defendant, at or about the time charged in the complaint, promised the said Mitchell to pay to the plaintiff the amount or residue left in the hands of Bostwick after paying to himself the amount secured by the mortgage of Mitchell to Bostwick." The instruction was refused, and defendant excepted. The plaintiff was entitled to recover if the promise was made at any time before the commencement of the action. It need not have been made at or about the time charged in the complaint. The court did not, therefore, err in refusing the instruction as asked. There is no error in the record.

Judgment and order affirmed.

We concur: **McKEE, J.; SHARPSTEIN, J**

2 Cal. Unrep. 708, 712

LOCEY v. AMERICAN CENT. INS. CO. (No. 11,548.)

SAME v. PACIFIC FIRE INS. CO. (No. 11,548.)

SAME v. HARTFORD FIRE INS. CO. (No. 11,548.)

(*Supreme Court of California*. September 16, 1886.)

FIRE INSURANCE—OTHER INSURANCE—WAIVER OF NOTICE—EVIDENCE.

Evidence held to fail to show a waiver of notice of other insurance, or any act working an estoppel from asserting want of such notice, on defendants' part.

Department 1.

These were actions brought by the appellant to recover on certain fire insurance policies issued by the respondents. The respondents set up as a defense that the plaintiff had, in violation of the terms of his policies, insured his premises in more than one company, without consent.

Grove L. Johnson and *Freeman, Johnson & Bates*, for plaintiff and appellant. *T. C. Van Ness* and *Gray & Haven*, for defendants and respondents.

BY THE COURT. These three cases are embraced within one appeal. The court below was justified in granting the nonsuits. The evidence failed to show a waiver by the defendants of notice of other insurance, and failed to show any act by which the defendants would be estopped from asserting want of such notice.

The orders denying motions for new trial are affirmed.

73 Cal. 317

CHANDLER v. PEOPLE'S SAV. BANK and others. (No. 11,524.)

(*Supreme Court of California*. September 17, 1886.)

APPEAL—PROCEEDINGS AFTER REMAND—TESTIMONY RESTRICTED TO SINGLE ISSUE.

Where an appeal was taken from a judgment reversed on the ground that the finding as to the interest on certain monthly balances was not supported by the

testimony, and was erroneous, and it appeared from the record that offers of the plaintiff to show that the balances were interest bearing had been ruled out, *held*, that it was not the duty of the court to try the entire case anew, but it might confine the testimony to the issue erroneously decided, and exclude testimony relating to other portions of the case.

Commissioners' decision. Department 1.

H. O. Beatty, A. L. Hart, and Beatty & Denson, for appellant, Chandler. *Joseph M. Kenna and Freeman & Bates*, for respondents, People's Sav. Bank and others.

SEARLS, C. This cause was here in 1882, upon two appeals,—one by the plaintiff from part of a judgment in favor of the intervenor, and the other by the intervenor from a part of the judgment in her favor, and from an order denying a new trial, in the superior court of Sacramento county. Upon the plaintiff's appeal, and as to him, the judgment was affirmed. 61 Cal. 896. Upon the appeal of the intervenor it was held that a finding of the court below as to the interest on certain monthly balances in favor of Chandler, from December, 1865, until October, 1878, amounting to \$2,710, was not supported by the testimony, and therefore that the finding was erroneous, and the judgment as to the intervenor was reversed, and the cause remanded for further proceedings, according to the views therein expressed. 61 Cal. 401. The cause was brought up again in 1884, upon an appeal by the plaintiff; and from the record it appeared that certain evidence offered by the plaintiff, and tending to show that the balances in his favor were of a kind which entitled him to interest thereon, was ruled out, and this court said, in speaking of its former decision: "As we understand the judgment in the case, a reversal was ordered because the finding was not sustained by the evidence, and the cause was remanded for further proceedings according to the views expressed in the opinion. Certainly, this order of the court left the inquiry as to interest open, as if no trial had been had on it. The plaintiff was at liberty, in a new trial, if in his power, to show that the balances were of the kind which bore interest. The offers of the plaintiff, which were ruled out, were made with this view; that is, to show that the balances were of the character which entitled him to have interest on them. Civil Code, § 1917. The court should have allowed these offers. In our view, the case was open for a new trial, subject to the views expressed by the court," etc.; and the judgment was reversed, and the cause remanded for a new trial, subject to the views expressed by this court. 65 Cal. 498; S. C. 4 Pac. Rep. 502.

Upon the cause again coming up in the court below, the sense of the court was taken as to the extent of the new trial granted by this court under the decision last above referred to, and the court held "that a new trial was only granted as to the character of the balances mentioned in the opinion of the court on intervenor's appeal (61 Cal. 401) as to their being interest bearing, and that the burden of the proof was on the plaintiff." Counsel for plaintiff excepted to said decision, and asked that intervenor introduce her proof in support of her complaint of intervention, which she declined to do; whereupon plaintiff moved for a nonsuit as against the intervenor, upon the ground that she had introduced no evidence, etc. The motion was overruled, and plaintiff excepted. The court then heard testimony in reference to the character of the balances mentioned in the decisions, and excluded testimony relating to other portions of the case. Written findings were filed, covering the whole case, upon which judgment was entered in favor of intervenor, ordering a sale of the mortgaged premises, and that the proceeds, to the extent of \$8,435.81 and costs, be paid to her, etc.

The question presented is this: Was it the duty of the court below to proceed to try the entire case anew, or could it confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the testimony already before it, or adopt the facts already found upon such

testimony? Under the former decision in this cause we are of opinion it was not incumbent on the court below to try the entire cause anew, and that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 1

PEOPLE v. KNAPP. (No. 20,178.)

(*Supreme Court of California.* September 18, 1886.)

1. HOMICIDE—MURDER—MALICE.

Malice is implied when no considerable provocation appears, and a killing with malice is an "unlawful" killing.

2. SAME—EVIDENCE—RES GESTÆ.

Clothing worn by the deceased at the time of the homicide may sometimes be important evidence as part of the *res gestæ*.

3. SAME—MALICE.

Unless express malice is affirmatively proved, a defendant cannot be convicted of murder in the first degree, even though the commission of the homicide is proved, and there is no evidence that it is manslaughter, or that the killing was justifiable or excusable.

4. SAME—PREPONDERANCE OF EVIDENCE.

Where the commission of the homicide by the defendant is proved on the part of the people, and the evidence of the prosecution does not tend to prove the offense manslaughter, or that the homicide was excusable or justifiable, the defendant, under the California Code, must prove by a preponderance of evidence that the crime was only manslaughter, or that he was excusable or justifiable.

5. WITNESS—CREDIBILITY—INSTRUCTION TO JURY.

An instruction which asked the jury to consider whether his position and interest might not affect the credibility and color the testimony of a witness on his own behalf, and which instructed them to weigh it fairly and give it such credit as they thought it ought to receive, was held good.

Department 1.

The Attorney General, for the People. *E. W. Wilson* and *P. F. Hart*, for appellant.

MCKINSTRY, J. This is an appeal by the defendant, who was found guilty in the superior court of murder of the second degree. Appellant contends the court below erred in refusing to instruct the jury to acquit the defendant of murder, because the evidence on the part of the people failed to show an "unlawful" killing, or a killing "with malice aforethought." It is admitted that the deceased was stabbed with a knife by defendant, and that he died from the wound so inflicted. Malice is implied "when no considerable provocation appears." Pen. Code, 188. No provocation appeared from the evidence given by the prosecution. If the killing was with malice, it was unlawful.

We cannot say the court erred in permitting the prosecution to introduce the clothing worn by the deceased when he was slain. The fact that the coat, brace, or suspender, and other covering of the region of the body where the wound was inflicted, were cut through, tended to prove the violence of the blow, and also, perhaps, tended to prove the course or direction of the incision. In *People v. Hong Ah Duck*, 61 Cal. 391, this court said that the clothing worn by the deceased at the time of the homicide may sometimes be important evidence as part of the *res gestæ*.

It is urged that a certain instruction given at the request of the people, and an instruction given at the request of the defendant, are contradictory. The instruction referred to as given at the request of the prosecution is in

the language of section 1105 of the Penal Code, with an addition of the words "and this he may show by a preponderance of evidence merely;" and is as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances in mitigation, or that justify or excuse it, devolves upon him unless the proof on the part of the prosecution tends to show that the crime amounts only to manslaughter, or that the defendant was justified or excusable; and this he may show by preponderance of evidence merely."

The instruction referred to, as given at the request of the defendant, reads: "Under this definition [murder] you will at once observe that, before any killing of a human being can be murder, it must be shown—*First*, that the killing was unlawful; *second*, that the killing was with malice aforethought. And in this connection I charge you that it devolves upon the people to establish the affirmative of each of these elements to a moral certainty and beyond a reasonable doubt."

If it be true that when there is no evidence on the part of the prosecution tending to mitigate the offense, or to show that the killing was excusable or justifiable, the case of the people, made out by proof of the commission of the homicide by the defendant, can only be overcome by a preponderance of evidence that the crime was manslaughter only, or that the killing was justifiable or excusable, there is no conflict in the two instructions. In that case proof of the homicide by the defendant establishes the malice aforethought beyond a reasonable doubt, and the reasonable doubt cannot be defeated by an attempted affirmative defense,—unsuccessful because not established by a preponderance of evidence.

It seems to be intimated by the learned chief justice in *People v. Smith*, 59 Cal. 607, that the evidence on the part of defendant need not preponderate. But there the judgment only was concurred in by SHARPSTEIN, J., and THORNTON, J.

In *People v. Flanagan*, the judge of the superior court charged the jury: "To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear, by a preponderance of testimony, that the person killed was manifestly endeavoring and intending by violence and surprise to commit a felony." This court (60 Cal. 3) held the instruction erroneous,—apparently on the ground that in the instruction the word "and" was substituted for the word "or" of the statute; that the instruction tended to deprive the defendant of the benefit of the doctrine of "appearances;" and that it also tended to deprive him of the benefit of the doctrine of reasonable doubt.

In the opinions in *People v. Smith* and *People v. Flanagan* reference is made to language used by RAPALLO, J., who delivered a concurring opinion in *Stokes v. People*, 53 N. Y. 181. In that case the plaintiff in error had been convicted of murder in the first degree. The court referred to the statute which provided, in effect, that an unlawful killing, unless it be manslaughter, should be excusable or justifiable homicide, should be murder in the first degree "when perpetrated from a premeditated design to effect the death of the person killed, or of any human being." GROVER, J., said: "It was under this provision that the prosecution sought to convict the prisoner. To justify such conviction it was necessary for the prosecution to prove all the facts bringing the case of the prisoner within it." Page 179. In the oyer and terminer the judge had charged the jury: "The fact of killing being conceded, and the law implying *motive* from the circumstances of the case, the prosecutor's case is fully and entirely made out, and therefore you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the case." Commenting on the charge in the court of appeals, GROVER, J., said: "The instruction was, and the jury must have so understood it, that the law implied motive, and con-

sequently the crime of murder *in the first degree*, from the proof of killing by the prisoner," etc. Page 178.

To be murder of the first degree, the killing (under our statute) must be premeditated, except, at least, when done in the perpetration of certain felonies. Pen. Code, 189. There must be manifested express malice, proved by circumstances independent of the killing,—a deliberate intention "to take away the life of a fellow-creature." Pen. Code, 188. Where such intention to kill is proved by the circumstances preceding or connected with the homicide, there is no question of "implied" malice; and, unless the express malice is affirmatively proved, a defendant cannot be convicted of murder of the first degree, even though his commission of the homicide is proved, and there is no evidence that it is manslaughter, or that the killing was justifiable or excusable; but, in such case, the verdict should be guilty of murder of the second degree.

A former New York statute provided that a homicide, unless it were manslaughter, or excusable or justifiable, should be murder "when perpetrated from a deliberate design to effect the death of a person killed, or of any human being." In *Wilson v. People*, 4 Park. Crim. Rep. 619, cited in *Stokes v. People*, it was held that, to constitute murder under the statute, "an actual intention to kill" must in all cases be proved. The court said: "It is now well settled that, [to constitute murder,] under our statutes, there must be a premeditated design to effect the death of the person killed, or, in other words, an intention to kill. The design may be long meditated, or it may be conceived at the moment the fatal blow is given; but it must be found to exist, else it is not murder. There must be,—what the common law did not require,—an actual intention to kill." Page 642. And the court added: "The effect of our statute is to explode the whole common-law doctrine of implied malice, and the power of recent provocation to reduce the act from murder to manslaughter." Page 643. The court held that, in every case of murder under the New York statutes, (as in cases of murder of the first degree under our Code,) the intent to kill must be affirmatively established by the circumstances of the killing; and, as a consequence, that the mere fact of the killing, without evidence of provocation, did not imply malice.

The New York cases turn on the peculiar language of the statutes defining murder. None of them refer to a statutory provision like section 1105 of Penal Code; and, if it should be conceded that the section is but declaratory of the common-law rule, the rule had no existence in New York, because, by the statute defining murder, it was required that the express malice—the actual intent to kill—should in every case be affirmatively made out, in the first instance, in order to prove a murder. It is apparent that the New York decisions have no bearing on the question of the *quantum* of evidence sufficient to overcome the *prima facie* case of murder proved by the homicide by the defendant, without evidence tending to prove manslaughter, or excuse or justification, because there such proof did not establish murder *prima facie*.

In *Com. v. York*, 9 Metc. 93, the doctrine is laid down that when the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder. *Com. v. Hawkins*, 3 Gray, 465. Such we understand to be substantially the effect of section 1105 of our Penal Code; but in such case, by our law, the verdict should be murder of the second degree, and not murder of the first degree, since the actual intent to take life is not expressly proved, nor proved by evidence of the homicide only.

We must consider it as settled in this state that where the commission of the homicide by the defendant is proved on the part of the people, and the evidence of the prosecution does not tend to prove the offense manslaughter, or that the homicide was excusable or justifiable, the defendant must prove by a preponderance of evidence that the crime was only manslaughter, or

that he was excusable or justifiable. In *People v. Hong Ah Duck*, 61 Cal. 387, this court decided that section 1105 of the Penal Code, which casts on the defendant the burden of proving circumstances of mitigation, or that justify or excuse a homicide, unless the proof on the part of the prosecution tends, etc., requires that the evidence on the part of the defendant shall preponderate. That case was decided in bank. The opinion was concurred in by four justices, and is sustained by cases therein cited. And *People v. Hong Ah Duck* was followed in *People v. Ratén*, 63 Cal. 422.

Sections 1096 and 1097 of the Penal Code are as follows:

"Sec. 1096. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

"Sec. 1097. When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

In *People v. Rodrigo*, (filed May 25, 1886,) 11 Pac. Rep. 483, this court (in bank) said: "Even in cases of homicide, however, the burden of proving beyond a reasonable doubt that a killing is criminal is upon the prosecution. This does not mean that the prosecution must anticipate a defense, and affirmatively establish [by evidence other than that of the killing] that the homicide was *not* justifiable. When the people have proved the killing, and no evidence has been given tending to prove justification, they have performed the task imposed upon them, and proved *prima facie* the guilt of the defendant beyond a reasonable doubt. By reason of statutory rule of evidence the *prima facie* case of the prosecution can be overcome only by proof of justification established by a preponderance of evidence. In case the prosecution has given evidence tending to prove self-defense, the defendant is entitled to the benefit of it. If not sufficient of itself to establish self-defense, the defendant is entitled to connect it with evidence which *he* may introduce; and if all the evidence bearing on the subject, taken together, preponderates in his favor as to the issue of justification, he should be acquitted. Section 38 of the act of 1850, 'concerning crimes and punishments,' and section 1105 of the Penal Code, do not change the rule which casts on the prosecution the burden of proving (beyond a reasonable doubt) the act of a defendant to be a crime. They fix the *quantum* of evidence which is necessary to overcome the proof on the part of the prosecution, which, until overcome, establishes beyond a reasonable doubt the guilt of the defendant. Nothing was decided in the *Cases of Milgate, Stonecipher, Arnold, or Hong Ah Duck* (5 Cal. 127; 6 Cal. 405; 15 Cal. 476; 61 Cal. 387) which conflicts with these views. That a rule at least as broad as that laid down in the instruction asked and refused is correct, in cases other than homicides, seems decided in *People v. Cheong Foon Ark*, 61 Cal. 528."

The decision in *People v. Hong Ah Duck* necessarily determines that the sections of the Code last cited are controlled and limited by section 1105 when the conditions spoken of in that section exist; that the burden of proof is then shifted to the defendant, (see head-note, section 1105, to chapter 2, tit. 7, pt. 2, of the Penal Code,) and that, the burden of establishing an affirmative defense being thus transferred, the rule as to reasonable doubt, with respect to the case of the prosecution, is not applicable.

This seems to have been the idea of Mr. Justice BALDWIN in *People v. Arnold*, 15 Cal. 482, where that learned judge, commenting on a charge that, where the fact of a homicide is shown, etc., then it is for the defendant to show by a preponderance of the testimony that the killing was justifiable, said: "The authorities seem to hold this as a general proposition; but this proposition is subject to the qualification that, where the testimony of the prosecution leaves a doubt as to the character of the homicide, then the benefit of the doubt is to be given to the prisoner."

At the request of the prosecution, the judge below instructed the jury: "The defendant has been examined as a witness on his own behalf. This it is his right to be, and the jury will consider his testimony as they will that of any other witness examined before you. It is proper, however, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility, and color his testimony, but you are to weigh it fairly, and give it such credit as you think it ought to receive."

It is insisted that the instruction is "contradictory and incomprehensible in itself." The defendant was on trial for a capital offense, and, if convicted, was to be subjected to punishment. The jurymen could not and ought not to close their eyes and minds to these incontrovertible facts. They were not instructed to discredit his testimony because of such facts, but to inquire whether they induced him to "color" his statements. They were not instructed to treat the defendant's testimony differently from that of any other witness, but were told it was their duty to consider it fairly, and to give it such credit as it deserved; and, in weighing it, to consider undisputed circumstances which might tend to affect his credibility as they should consider circumstances, proved or uncontroverted, which might affect the credibility of any other witness.

Judgment and order affirmed.

We concur: ROSS, J; MYRICK, J.

70 Cal. 641

PEOPLE v. FRANKLIN. (No. 20,216.)

(*Supreme Court of California.* September 18, 1886.)

ASSAULT AND BATTERY—CRIMINAL PROSECUTION—INSTRUCTIONS TO JURY—INTENT.

Where the court instructed the jury that, if they entertained a reasonable doubt of the guilt of the defendant upon the charge of an assault with intent to commit murder, it would be their duty to inquire as to whether he might be guilty of any lesser offense necessarily included therein, and specified one, viz., assault with a deadly weapon with intent to do great bodily injury, it was held not error on the part of the court that they did not inform the jury they might find defendant guilty of a simple assault, when the defendant did not request the court to do so, and the evidence would not have sustained such conviction.

Department 1.

The Attorney General, for the People. *Pinney Gesford* and *F. L. Coombs*, for appellant, Franklin.

Ross, J. The defendant was charged by information with the crime of assault with a deadly weapon with intent to murder one Hemmenway, and was convicted of assault with a deadly weapon with intent to do great bodily harm. The case shows that defendant, while very drunk, assaulted and cut with a knife the said Hemmenway, who was a stranger to him, and whom he casually met on a railroad track.

It is objected on the part of the appellant that the court below erred in its eighth instruction, in that it omitted to inform the jury that they might find defendant guilty of a simple assault. The instruction reads: "If, after due and careful consideration of all the evidence, you entertain a reasonable doubt of the guilt of the defendant upon the charge of an assault with intent to commit murder, it will be your duty then to inquire as to whether he may be guilty of any lesser offense necessarily included therein. There is one, as follows: Assault with a deadly weapon, which is an assault committed upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury."

The objection is not well taken for two reasons: In the first place, because

upon the evidence defendant could not have been properly convicted of a simple assault, and the court was therefore right in omitting to instruct in respect to that offense; and, secondly, if defendant wanted the attention of the jury specifically called to each of the lesser crimes necessarily included in the charge set out in the information, he should have requested the court to do so, which he does not appear to have done.

The sixth instruction, in respect to the intoxication of the defendant, was substantially correct. *People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 344; *People v. Ferris*, 55 Cal. 588; *People v. Turner*, 65 Cal. 540; S. C. 4 Pac. Rep. 553.

The ninth instruction was in accordance with the ruling of this court in *People v. Fuqua*, 58 Cal. 247, and was correct.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

70 Cal. 646

KERN VALLEY WATER CO. v. McCORD. (No. 11,461.)

LUX v. STINE CANAL CO. (No. 11,462.)

MILLER v. McCORD. (No. 11,463.)

(Supreme Court of California. September 18, 1886.)

ACTION—CHANGE OF VENUE—JUDGE FORMERLY OF COUNSEL.

It is competent for a judge to order a transfer of the place of trial upon the ground that he has been under a general retainer from one of the parties in the case.

Department 1.

Stetson & Houghton, for respondent. *Louis T. Haggin*, for appellant.

ROSS, J. These cases have been argued and submitted together. They are appeals from orders changing the place of trial; the motion in that behalf in each case being based upon the alleged disqualification of the presiding judge. It is urged for the appellants that the affidavits did not show, or tend to show, that the judge was disqualified; and, further, that it was not competent for him to pass upon the question of his own disqualification.

In respect to two of the cases, Nos. 11,462 and 11,463, the judge stated from the bench that he had received a general retainer from one of the parties defendant, and therefore considered himself disqualified to sit in judgment in the cases, and accordingly made the order of transfer. Although the cases may not, perhaps, come within the strict letter of the statute, which provides, among other things, that no judge shall sit or act as such in any action or proceeding "when he has been attorney or counsel for either party in the action or proceeding," we do not think an order of transfer made upon the ground that the judge had been under a general retainer from one of the parties should be reversed; but, on the contrary, should meet with approval.

In respect to the other case, however, No. 11,461, no such ground existed, nor, indeed, any ground, for its transfer. The county of Kern being the proper county, and the judge of that county not being in any way disqualified, the order changing the place of trial should not have been made.

In cases numbered, respectively, 11,462 and 11,463, order affirmed, and in case numbered 11,461 the order is reversed.

We concur: MYRICK, J.; MCKINSTRY, J.

71 Cal. 11

CALIFORNIA STATE BANK v. HAMBURG-BREMEN INS. CO. (No. 11,445.)

(Supreme Court of California. September 18, 1886.)

FIRE INSURANCE—POLICY—FORFEITURE—SALE OF PROPERTY.

Where a policy of insurance contained a clause that if the property insured should be sold or otherwise disposed of, so that all interest or liability on the part of the

assured ceased, the insurance should immediately terminate, and the property was subsequently sold, *held*, that the equitable lien of the vendor would not avail to keep the policy alive for the benefit of the vendee.

Department 1.

Freeman, Johnson & Bates, for respondent, California State Bank. *Lloyd Woods, W. H. Bealy, and S. C. Denson*, for appellant, Hamburg-Bremen Ins. Co.

BY THE COURT. Action on a policy of insurance. The policy contained a clause that if the property insured should be sold or otherwise disposed of, so that all interest or liability on the part of the assured ceased, the insurance should immediately terminate. There was no evidence that the defendant had notice of the sale from Lachman to Nevis, or such notice as would put it on inquiry. When Lachman sold, the policy, as to him, was at an end. His equitable lien as vendor would not avail to keep the policy alive for the benefit of the plaintiff. The company made no contract by which the plaintiff could recover for the benefit of Nevis.

Judgment and order reversed, and cause remanded for a new trial.

2 Cal. Unrep. 711

COOK v. MCKINNEY. (No. 11,242.)

(*Supreme Court of California.* September, 1886.)

STATUTE OF LIMITATIONS—ADVERSE POSSESSION—PAROL EVIDENCE.

A defendant in an action of ejectment, who had been for some 20 years in continued adverse possession of a strip of land adjoining his lot, successfully pleaded the statute of limitations against one who held the paper title to said strip; the defendant being permitted to prove by parol the continued occupation of the land in controversy by himself and the grantors of his lot.

Department 1.

Grove L. Johnson, for appellant, Cook. *Young, Young & Dunn*, for respondent, McKinney.

BY THE COURT. Ejectment. The defendant pleaded the statute of limitations. The land in controversy is a strip of land, about two and one-half feet wide, of lot 8, adjoining the W. $\frac{1}{2}$ of lot 7. The plaintiff proved paper title to lot 8. The defendant proved paper title to the W. $\frac{1}{2}$ of lot 7, and gave evidence tending to show that he and his grantors of the said W. $\frac{1}{2}$ of lot 7 had been in the continued adverse possession of the strip for some 20 years. The court below found in favor of defendant. It was competent for the defendant to prove by parol the continued occupation of the strip by himself and his grantors of the W. $\frac{1}{2}$ of lot 7. Sedg. & W. Trial Title Land, 537. There is evidence to sustain the findings as to adverse possession.

Judgment and order affirmed.

71 Cal. 17

PEOPLE v. BOLLINGER. (No. 20,223.)

(*Supreme Court of California.* September 20, 1886.)

1. LARCENY—EVIDENCE OF SIMILAR OFFENSES—ADMISSIBILITY.

A question asked by a district attorney in regard to other similar offenses committed in the neighborhood was held admissible in a prosecution, when it could not have prejudiced the person accused as tending to prove him guilty of larcenies other than that with which he was charged.

2. WITNESS—PARTICEPS CRIMINIS—LARCENY—QUESTION FOR JURY.

Where a witness stated that he did not intend to commit larceny, but had feigned complicity for the purpose of detecting the thieves, from the facts proved it is for the jury to determine whether he was or was not *particeps criminis*.

3. SAME—CORROBORATION—FEIGNED ACCOMPLICE—SECTION 1111, PEN. CODE CAL.

Section 1111 of the Penal Code of California, which requires the testimony of an accomplice to be corroborated, does not apply to a feigned accomplice.

4. LARCENY—EVIDENCE—ADMISSIBILITY—EAR-MARK ON HOGS.

An ear-mark used by the alleged owners of hogs is admissible in evidence as tending to show ownership.

Department 1.

The Attorney General, for the People. Brown & Daggett and Oregon Sanders, for appellant, Bollinger.

BY THE COURT. The defendant (jointly indicted with William Bacon and Fielding Bacon for the larceny of certain hogs) was tried separately. He has appealed from a judgment of conviction, and from an order denying his motion for a new trial.

1. Appellant excepted to a ruling of the superior court, overruling his objection to a question asked by the district attorney of the witness F. M. Bell. The question was: "You and other parties living in that vicinity have been troubled a good deal by parties stealing your hogs, have you not?" The answer of the witness, with other testimony given by him, tended to explain why he had feigned complicity in the offense as asserted by him, and taken part in the acts constituting the alleged larceny for which defendant was indicted. We think it could not have prejudiced the defendant as tending to prove him guilty of larcenies other than that with which he was charged. No particular act of larceny was referred to in the question, and general evidence that other similar offenses had been committed in the neighborhood could not have been regarded by the jury as tending to prove the defendant guilty of the particular crime described in the indictment.

2. Appellant complains of the ruling of the court below, sustaining the prosecution's objection to the question asked by defendant of the witness Morgan Crawford: "You did not steal the hogs of Coughran that were driven out of the mountains to the Bacon barn, did you?" The witness had stated that he did not intend to commit larceny, but had feigned complicity for the purpose of detecting the thieves. He distinctly stated what he did and said in connection with the transaction. From the facts proved it was for the jury to determine whether he was or was not *particeps criminis*.

3. It is contended the court below erred in sustaining an objection to the question asked by defendant of the witness Brown. The question was as follows: "Do you know of any agreement entered into between Bell (the witness F. M. Bell, hereinbefore mentioned) and any other parties that are alleged in this indictment to be owners of the hogs charged to have been stolen, by which it was agreed that they might bring down the hogs, and, if they brought any belonging to the parties, the meat should be preserved,—not allowed to spoil?" The witness was one of the alleged owners. He had already testified: "There was no understanding between Bell and Crawford and myself that if any of my hogs were driven down they were to cure the meat and not let it spoil. Of my own knowledge I don't know that there was any such agreement with the other owners of the hogs." The ruling of the court could not have injured the defendant. But the question was irrelevant and immaterial. The question called for no statement as to any such agreement by the defendant; and, if he appropriated the property *lucri causa*, such an agreement by Bell did not relieve the defendant of his criminal intent.

Appellant also complains that the court did not permit an answer to the question to Bowen: "Were you told by any of the parties that claimed to own the hogs that there was such an agreement?" This was also immaterial. Besides, it called for hearsay testimony.

4. The judge below, in the course of his charge to the jury, after reading section 1111 of the Penal Code, which requires the testimony of an accomplice to be corroborated, said: "But this rule of law does not apply to a feigned accomplice. A feigned accomplice does not require that corroboration that

is required in this section when the party is an actual accomplice, etc. The charge is sustained by *People v. Farrell*, 30 Cal. 316. The discredit of an accomplice does not attach to a detective who joins a criminal organization for the purpose of exposing it, even though in order to aid in such exposure he unites in and apparently approves its counsels. Whart. Crim. Ev. 440. An accomplice is one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. *Id.*

It is urged, however, that the witness Bell admitted that he was guilty of the larceny, and therefore the instruction was improper. Reference is made to expressions (separated from the context) used by him in his testimony. It was for the jury, however, to determine whether he was an actual accomplice, from all his testimony and the other evidence before them.

5. Appellant's next point is that the court erred in refusing to give the third and eighth instructions asked by defendant. The instructions requested were:

"(3) An unrecorded ear-mark placed upon a hog is neither *prima facie* evidence, nor any evidence at all, of ownership.

"(8) If you are satisfied from the evidence that the only proof that the witness Coughran or Thomas Bowen, or either of them, was the owner of any of the hogs charged to have been stolen, is that said hogs were marked with an ear-mark which has never been recorded in the office of the county recorder of any county in this state, such proof is not sufficient to establish the ownership of any such hogs either in Coughran or Bowen."

An ear-mark used by the alleged owners of the hogs was *some* evidence of ownership. And the witness Bowen testified: "I owned one of those hogs. * * * My hog was alive. It was marked with a crop and under half crop in the right; swallow fork and under bit in the left." It is true, he said on cross-examination: "If I had seen a hog that didn't have my marks on, I wouldn't consider it mine." But his testimony was evidence tending to show his ownership, as was that of other alleged owners. Moreover, there was other evidence tending to identify the property—as to which there was evidence that it was asported by the defendant—as being the property described in the indictment. "When an offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material." Pen. Code, 956. There was no evidence, or pretense of evidence, that the defendant here had any right of property, or possession in the property, alleged to have been stolen.

Judgment and order affirmed.

71 Cal. 15

PEOPLE v SALVADOR. (No. 20,210.)

(*Supreme Court of California*, September 20, 1886.)

STATUTES—CONSTRUCTION OF CALIFORNIA ACT OF MARCH 20, 1872—CRIMINAL LAW.

The act approved March 20, 1872, (St. Cal. 1871-72,) entitled "An act supplementary to 'An act concerning crimes and punishments,' passed April 16, 1850," is not amendatory of the act of 1850, but an independent statute, and, by virtue of sections 4478 and 4479 of the Political Code, must be construed as having been passed subsequent to the passage of the Penal Code, and to be a valid enactment.

Department 1.

The Attorney General, for the People. *Chas. W. Kitts*, for appellant, Salvador.

ROSS, J. Under and by virtue of an act approved March 20, 1872, (St. 1871-72, p. 435,) entitled "An act supplementary to 'An act concerning crimes and punishments,' passed April 16, 1850," the defendant was charged by information with the crime of grand larceny committed on the fourteenth day of March, 1886, in the county of Nevada, by feloniously stealing, taking,
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and carrying away from a certain described mining claim, and the ground sluices thereof, a certain quantity of gold-dust.

For the defendant it is contended that the law in question was not in force at the time of the commission of the alleged offense. As has been said, it was approved and it went into effect March 20, 1872. At the same session of the legislature the Codes were adopted, and by sections 4478 and 4479 of the Political Code it was provided as follows:

"Sec. 4478. With relation to the laws passed at the present session of the legislature, the Political Code, Civil Code, Code of Civil Procedure, and Penal Code must be construed as though each had been passed on the first day of the present session.

"Sec. 4479. If the provisions of any law passed at the present session of the legislature contravene or are inconsistent with the provisions of either of the four Codes, the provisions of such law must prevail."

The taking effect of the Penal Code on the first day of January, 1873, operated a repeal at that time of the old crimes and punishments act of April 16, 1850. *Hemstreet v. Wassum*, 49 Cal. 273. But the act of March 20, 1872, under which the present prosecution was had, was not an amendment of that act. If it had been, it would have fallen with the act of which it was amendatory. *Hemstreet v. Wassum*, *supra*. But the act of March 20, 1872, was an independent statute, making that grand larceny which before had not been such, and, by virtue of sections 4478 and 4479 of the Political Code, must be construed as having been passed subsequent to the passage of the Penal Code, and to be a valid enactment.

The information was sufficient. Judgment affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

71 Cal. 38

BERNIAUD v. BEECHER. (No. 11,428.)

(*Supreme Court of California*. September 21, 1886.)

1. STATUTE OF LIMITATIONS—PLEADING—BY WHOM AVAILABLE.

In an action to quiet the title to land, one who was never in the actual possession of the property, nor has paid any taxes assessed against it, cannot set up that he has acquired title to it under the statute of limitations.

2. EVIDENCE—PRESUMPTION FROM USE OF MASCULINE PERSONAL PRONOUN IN A WRITTEN INSTRUMENT.

The use of the pronouns "he" and "his" in a note, mortgage, or certificate of sale can have little, if any, greater effect than to raise a suspicion that the person referred to was a male, and not a female, and is not sufficient to create any substantial conflict in evidence tending to show that such person was a female.

Commissioners' decision. Department 2.

L. W. Elliott and *John C. Byers*, for appellant, Rosina Berniaud. *Jas. A. Louttit*, for respondent, J. L. Beecher.

BEECHER, C. C. This is an action to quiet the plaintiff's title to the W. $\frac{1}{2}$ of a block of land in the city of Stockton. The plaintiff is an insane woman, and sues by her duly-appointed guardian *ad litem*. The answer denies that the plaintiff is the owner of the premises described in the complaint, or of any part thereof, or has or ever had any interest therein; and it alleges, among other things, that the plaintiff died many years before the commencement of the action, and that the cause of action is barred by the provisions of section 319 of the Code of Civil Procedure.

To establish her title the plaintiff offered in evidence a decree of foreclosure of mortgage, and a sheriff's deed of the land to R. Berniaud, made in pursuance of a sale under the decree.

The note, to secure the payment of which the mortgage was given, was made payable to R. Berniaud, or his duly-appointed agent. The mortgage

granted and conveyed the property "unto the said R. Berniaud, and unto his heirs and assigns, forever." The sheriff's return of sale showed that the property so sold was struck off to R. Berniaud, and he, the said R. Berniaud, was then and there declared the purchaser thereof. It further showed that a certificate of sale was issued to the purchaser, "in consideration of which certificate, so given, the said R. Berniaud, by his agent, A. C. Bradford, has given and executed to the undersigned his receipt, which is hereto attached, for the amount of said purchase money," etc. The receipt referred to was signed "R. BERNIAUD. By A. C. BRADFORD, Attorney in Fact."

The complaint in the foreclosure proceeding alleged that the plaintiff was a resident of Philadelphia, Pennsylvania, and was verified by the partner of the attorney who filed it. The verification, among other things, stated "that the reason that this affidavit is not made by the plaintiff is that she is not a resident of the county of San Joaquin, but resides in the city of Philadelphia."

A. C. Bradford was called as a witness for plaintiff and testified: "I was the agent for Mrs. Berniaud. Her first name was Rosina. I was appointed her agent in 1858. I employed J. B. Hall to foreclose this mortgage held by Mrs. Berniaud against one Ward. I corresponded with her husband. He said she had become insane, and was in an asylum. He said she owned the property. * * * In 1858, Mr. Berniaud employed me. He said he had been authorized to act for her. I think he sent me his power of attorney as such guardian." This testimony was objected to by the defendant, though upon what ground is not stated, and his objection was overruled. Plaintiff then proved by the witness Cutting, without objection, that he knew R. Berniaud by reputation, and that she was the same party that owned other property conveyed by the sheriff's deed, and that he had heard she was a woman and insane. Plaintiff then offered to prove that it was a matter of general notoriety that R. Berniaud, named as purchaser in the sheriff's deed, was an insane woman living in Philadelphia. The defendant objected to this testimony on the ground of incompetency, and the court sustained the objection; the plaintiff reserving an exception.

The plaintiff then rested, and the defendant moved for a nonsuit upon the ground that it did not appear that the plaintiff was the R. Berniaud to whom the property in controversy was sold. The motion was taken under advisement by the court, to be decided after hearing all the evidence.

The defendant was called as a witness in his own behalf, and testified that the premises in controversy had never been occupied by any one since he claimed them; that they had never been fenced, and no improvements had been placed upon them; that he was never in the actual possession of the property, and that he only claimed the title. He did not testify or show that he had ever paid any taxes or assessments levied against the property. The defendant then offered and read in evidence an agreement by R. Berniaud, of Philadelphia, by her attorney in fact, A. C. Bradford, dated in 1859, to sell the premises in controversy. This agreement was objected to by plaintiff as irrelevant and immaterial, and the objection was overruled. The defendant offered no testimony to show that the plaintiff was not the R. Berniaud to whom the property was sold and conveyed, but, to sustain his contention, relied solely upon the fact that the masculine personal pronoun was used in the note, mortgage, and certificate of sale.

The court found: "That the said R. Berniaud, grantee in said deed named, is not and was not the person who is plaintiff in this action; and that plaintiff herein is not, and was not at the date of filing of the complaint herein, the owner of or entitled to the possession of the land and premises described in said complaint. The court further finds that the defendant herein, J. L. Beecher, at the date of the filing of the complaint herein, was in possession of block 229, east of Center street; that he has been in possession thereof

since January, 1877; that he had paid upon said property all taxes, state, municipal, and county, that had been assessed upon said property from January, 1877, to the present time; that the premises described in the complaint in this action is the west half of block 229; that all the allegations of the defendant's answer are true." Judgment was then entered in favor of defendant, from which, and from an order denying a new trial, plaintiff appeals.

1. It is obvious that the defense of the statute of limitations cannot be maintained. As the defendant was never in the actual possession of the property, and, so far as appears, never paid any taxes assessed against it, no reasonable pretense can be set up that he had acquired title to it under the statute.

2. Was the plaintiff the owner of the property? We think the testimony was quite sufficient to show that she was. Judge Bradford had charge of her business in 1858 and 1859, and knew that the first name of the Mrs. Berniaud, whose mortgage he caused to be foreclosed in the name of R. Berniaud, was Rosina. How he acquired this knowledge does not appear, but probably it was by hearsay, as that is the way in which we ordinarily learn the names of other persons. His testimony was admissible, and was supported by the agreement to sell the property, dated in 1859, and signed "R. Berniaud," by him as her attorney in fact, and which was introduced in evidence by the defendant. It is said the plaintiff could not avail herself of this agreement, because she objected to its introduction; but we think, it having been admitted in evidence, she could use it to prove any fact which it legitimately tended to prove.

The use of the pronouns "he" and "his" in the note, mortgage, and certificate of sale can have little, if any, greater effect than to raise a suspicion that the person referred to was a male, and not a female. It was not sufficient to create any substantial conflict in the evidence.

3. It is unnecessary to consider the sales made for street assessments and taxes, as only a small part of the property was included in those sales. It is true, the court finds that the whole property was sold for taxes, but the record shows that only the west 19½ feet were so sold.

Upon the whole case, as presented, we think the judgment and order should be reversed, and cause remanded for a new trial.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

71 Cal. 34

BAILEY v. DALE and others. (No. 11,587.)

(Supreme Court of California. September 21, 1886.)

1. WAYS—OBSTRUCTION OF PUBLIC HIGHWAY—ACTION BY ROAD OVERSEER—POL. CODE CAL. § 2734.

An action to abate a nuisance caused by the obstruction of a public highway, and to recover the sum of \$10 for every day the nuisance remains after notice to remove it, is properly brought in the name of the road overseer, under section 2734 of the Political Code, as amended in 1883.

2. SAME—JOINDER OF ACTIONS—NUISANCE, AND STATUTORY PENALTY THEREFOR.

An action to recover the statutory penalty of \$10 for not removing the obstruction in a road is properly united with an action to abate said nuisance.

Commissioners' decision. Department 2.

Schell & Bond, for appellant, Bailey. Wright & Hazen, for respondent, Dale and others.

BELCHER, C. C. This action was brought by the plaintiff, as road overseer of a road-district in Stanislaus county, to abate a nuisance caused by the

obstruction of a public highway in his district, and to recover the sum of \$10 for every day the nuisance remained after notice to remove it. The defendants demurred to the complaint, upon the ground—*First*, that the action was improperly brought in the name of the road overseer; *second*, that the complaint was ambiguous and uncertain in the description of the alleged highway; and, *third*, that several causes of action were improperly united and not separately stated, viz.: one to abate a nuisance, another to recover a statutory penalty, and another to recover damages for a willful and malicious injury. The court below sustained the demurrer, and, the plaintiff declining to amend, judgment was entered in favor of the defendants, from which the plaintiff appealed.

The action was brought under the supposed authority of section 2734 of the Political Code, as amended in 1883, which reads as follows: "If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment, refuses either to remove or permit the removal thereof, the road overseer must commence in the proper court an action to abate the same as a nuisance; and, if he recovers judgment, he may, in addition to having the same abated, recover \$10 for every day such nuisance remained after notice, and also his costs in said action."

The respondents insist that said action should have been in the name of the county, and in support of this position cite section 2743 of the same Code. That section reads: "All penalties or forfeitures given in this chapter, and not otherwise provided for, must be recovered by the road overseer or commissioners of the respective road-districts by suit in the name of the county in which said road-district is situated, and be paid into the road fund of his district."

In *San Benito Co. v. Whitesides*, 51 Cal. 416, the same question was involved, and the court there said: "The action is by the county to abate a nuisance, caused by the obstruction of a public highway, and was commenced in March, 1875. We have been referred to no provision of the statute, nor to any rule of law, which authorizes an action of this character in the name of or on behalf of a county. On the contrary, it would appear from section 2746 of the Political Code, as amended in 1873-74, that the action must be in the name of the road overseer. We think the action in the name of the county cannot be supported."

Section 2746, upon which the decision is rested, read then precisely as section 2734, above quoted, now reads. It is true, the case did not involve the \$10 penalty; but it is clear that, if the plaintiff here can maintain the action to abate the nuisance in his own name, he may, if he recovers judgment, also "recover \$10 for every day such nuisance remained after notice." Section 2743 relates to penalties and forfeitures "not otherwise provided for," and does not affect the question.

The point that the highway is not described in the complaint with sufficient certainty is not well taken. There can be no difficulty in locating the road, and in determining the exact position of the alleged obstruction.

So the objection that three causes of action are improperly united cannot, we think, be maintained. The complaint prays for a judgment "for exemplary damages in the sum of five thousand dollars for the unlawful and malicious maintenance of said nuisance;" but no facts are stated showing that the plaintiff is entitled to recover that sum, or any sum, for the cause named. The prayer is bad, but a demurrer does not lie to that. *Rollins v. Forbes*, 10 Cal. 299; *Althof v. Conheim*, 38 Cal. 234.

The facts showing that the defendants have become liable to pay the 10-dollar penalty for not removing the obstruction are separately stated, and that cause of action is properly united with the one to abate the nuisance.

There is nothing in the suggestion that, if the plaintiff recovers, the money collected will belong to him. As he sues in the performance of his official

duties, any money collected on the judgment will belong to the road-district of which he is overseer.

It follows that the judgment should be reversed, and cause remanded, with directions to the court below to overrule the demurrer.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer.

73 Cal. 325

BROUGHTON, Assignee, etc., v. VASQUEZ. (No. 11,317.)

(*Supreme Court of California.* September 21, 1886.)

INSOLVENCY—FRAUDULENT CONVEYANCE—EVIDENCE.

Upon a verbal agreement made more than four months previous, a deed of conveyance of certain lots of land was executed and delivered as security for the payment of a promissory note. A few days before the deed was delivered, the buildings upon the lots were consumed by fire. The grantor of the deed was subsequently shown to have been insolvent at the date of the delivery, and was legally adjudged so within 30 days after. *Held*, that the deed in question was a mortgage given to secure the promissory note, and was not a conveyance made in contemplation of insolvency, but should be treated as delivered at the time it was agreed to be made, —nothing in the evidence showing a fraudulent intent in either party to the deed; also that it was proper to receive testimony concerning the previous business relations between the parties.

Commissioners' decision. Department 2.

C. A. Stonesifer, for appellant, Broughton, Assignee, etc. *Schell & Bond* and W. E. Turner, for respondent, Vasquez.

SEARLS, C. This action is brought by the plaintiff, as assignee in insolvency of Felix Anaya, to set aside a deed of conveyance executed by the latter to defendant on the ninth day of July, 1884, of certain lots of land in the town of Modesto, Stanislaus county. Defendant had judgment, from which, and from an order denying a motion for a new trial, the plaintiff appeals.

Prior to February 27, 1884, there had been business transactions between the insolvent, Anaya, and defendant, Vasquez, on account of which there was a balance of several thousand dollars due and owing from the former to the latter, and which was secured by a conveyance from the former to the wife of the latter, of the lots of land here in question, and of other property. On the last-mentioned day the parties had a settlement, and Anaya paid to Vasquez \$1,400, leaving a balance due the latter of \$1,500, for which sum Anaya gave him his promissory note.

The wife of Vasquez at the same time conveyed to Anaya all the property theretofore standing in her name as aforesaid, upon a verbal agreement that Anaya, upon going home to Modesto, would execute and deliver to Vasquez, as security for the payment of the promissory note, a deed of conveyance of the two lots of land, the subject-matter of this action. Anaya neglected to execute and deliver the deed until the ninth day of July, 1884, when he executed and delivered it to Vasquez, pursuant to his agreement, and as security for the payment of the promissory note. A few days before the deed was delivered the buildings upon the lots were consumed by fire, and Anaya, at the date of the delivery of such deed, was insolvent and unable to pay his debts.

On the fifth day of August, 1884, and within 30 days after the execution and delivery of the last-mentioned deed, Anaya filed in the superior court in and for the county of Stanislaus, his petition in insolvency, and thereupon such proceedings were had that he was duly adjudged an insolvent, and the plaintiff herein was duly appointed his assignee.

The cause was tried by the court, and the findings, among other things, established the insolvency of Anaya at the date of the delivery of the deed to Vasquez, but negatived the charge that such conveyance was made in contemplation of insolvency, or to give Vasquez a preference over other creditors, or to prevent the property from passing to his assignee, or from being distributed to his creditors, or to defeat, hinder, or delay creditors, or to evade the insolvent laws, and that Vasquez had no knowledge or cause to believe Anaya insolvent at the date of or prior to the delivery to him of the deed, and generally the findings negative all idea of fraud. The deed in question is found to be a mortgage given to secure the payment of the promissory note for \$1,500.

We think the findings are supported by the evidence. Equitably considered, the deed should be treated as though delivered at the time it was agreed to be made, and as a part of the general transaction by which Anaya procured a conveyance of the whole property, with the understanding that he would convey back, by way of security, the lots in question. The fact that such agreement to convey existed, though but verbal, independent of all question as to its being enforceable, was a strong circumstance to rebut the presumption of fraud arising from the subsequent failing circumstances of Anaya.

In determining the questions of fraud presented by the pleadings, it was proper for the court to receive testimony touching the relation existing between the parties, the nature of their business transactions, the existence of the prior debt of the insolvent to defendant, and any other facts tending to elucidate the good faith or fraudulent intention of the parties. For this purpose the testimony to which objection was made was admissible.

Upon a review of the whole case we are of opinion the findings are supported by the evidence, that they cover all the issues material to the case, and that the conclusions of law are in consonance therewith; that no error intervened at the trial prejudicial to the appellant; and that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 28

SCHENK v. HARTFORD FIRE INS. CO. (No. 11,278.)

(*Supreme Court of California.* September 21, 1886.)

PLEADING—AID BY AVERMENTS OF ANSWER.

Where, by the choice of the defendant, a fact which is essential to the plaintiff's recovery, which has been omitted to be pleaded in his complaint, is so pleaded in the defendant's answer, with a view to defeat the plaintiff's recovery, that a jury is enabled, upon evidence before it, to pass upon the issue raised and tendered by the defendant, the defect in the complaint is cured by the averments of the answer, and the judgment will not be reversed on account of said defect.

Commissioners' decision. Department 2.

G. G. Blanchard and Irwin & Irwin, for respondent, Schenk. *May & Haven*, for appellant, Hartford Fire Ins. Co.

FOOTE, C. This was an action upon a fire insurance policy. A demurrer was interposed to the complaint, and overruled. The defendant then filed an answer, and went to trial before a jury, who found a verdict for the plaintiff. From the judgment thereupon rendered the defendant has appealed.

The cause comes here upon the judgment roll alone, in which the defendant contends that a reversible error appears, in this: that the complaint did not have attached thereto as an exhibit, or otherwise made a part thereof,

the application for insurance, which it has been declared should be done in *Gilmore v. Lycoming Ins. Co.*, 55 Cal. 124.

It is true that the plaintiff did not follow in his pleading the rule as laid down in that case, and the demurrer on that account should have been sustained; but the defendant in its answer set out the tenor and effect of that application so far as was deemed necessary to its defense, and pleaded that by reason of a breach of that contract so set out the plaintiff should not be permitted to recover. Thus there was presented to the jury for trial, by the pleading of defendant, an issue of fact which has been decided against it by a jury; and, as there is nothing in the judgment roll to show to the contrary, we must presume that the evidence warranted the verdict. The defect in the complaint was cured by the averments of the answer. Pom. Rem. § 579.

By the choice of the defendant, the fact, which was essential to the plaintiff's recovery, which had been omitted to be pleaded in his complaint, was so pleaded in the defendant's answer, with a view to defeat the plaintiff's recovery, that a jury was enabled, upon evidence before it, to pass upon the issue raised and tendered by the defendant. If the defendant has been beaten upon its own chosen ground of battle, which but for its pleading could not have been there fought, we cannot see any good reason to reverse the judgment here in order that the plaintiff may plead in his complaint, and tender as an issue to the defendant to be retried, that which, of its own choice, the defendant, in its answer, has already tendered to the plaintiff, upon which the controversy has been tried before a jury, and by it determined, as we must suppose, properly.

We perceive no error prejudicial to the defendant, and the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 21

WATKINS v. LYNCH. (No. 11,514.)

(Supreme Court of California. September 21, 1886.)

1. SCHOOLS AND SCHOOL-DISTRICTS—LANDS—SUBSEQUENTLY ACQUIRED TITLE.

Where one claims, by mesne conveyances, under a certificate of sale of school lands, a subsequent patent issued to his grantor inures to his benefit, and not that of his grantor.

2. DEED—BOUNDARY—ROAD.

Where a road is given as the boundary of land in a deed, the land is conveyed up to the middle of the road, subject to the public user.¹

3. SCHOOLS AND SCHOOL-DISTRICTS—LANDS—DEDICATION—CERTIFICATE OF SALE.

One holding school lands by certificate of sale from the state has a *prima facie* legal title, which makes it within his power to dedicate them to a public use.

4. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—ABANDONED HIGHWAY.

Sowing grass-seed in a highway, and staking cattle there to graze, is not such an adverse possession, even though the road had been abandoned by the public, as to create title through the statute of limitations.

Commissioners' decision. Department 2.

John B. Hall, for appellant, *Watkins*. *J. H. & J. E. Budd*, for respondent, *Lynch*.

FOOTE, C. This is an action in ejectment, for a part of what was once used as a public highway, and, as alleged, had been abandoned by the public for more than five years. The parties to the suit had, through their several

¹See *Kohler v. Kleppinger*, (Pa.) 5 Atl. Rep. 750, and note, 751.

grantors, become purchasers, by deed, of the land lying on each side of the road-bed. The plaintiff claimed the whole of the road-bed; the defendant, that he owns up to the center or thread of the road, and is entitled to its possession if it is abandoned, but argues that it had not been abandoned as a public road.

One Berry had obtained, on or about the twenty-sixth of October, 1858, from the state a certificate of purchase of school lands, which included the land in dispute, and had paid 20 per cent. of the purchase money required by law. On the seventeenth day of May, 1861, he assigned that certificate to one Showers, and on the eighteenth of that month made a bargain and sale deed of the land it embraced to the same party. In the year 1862, as we think the evidence tends to show, Showers by deed of quitclaim, carrying whatever title he then had, which appears to have been lost, conveyed to one Drais a tract of land, a part of that before conveyed to the former by Berry, containing about four or four and a half acres, more or less. The plaintiff, by mesne conveyances, claims under a patent issued to Showers on the twenty-fourth day of May, 1873.

In all the conveyances through which the plaintiff claims, there was excepted therefrom the land conveyed by Showers to Drais, a part of which, as the defendant alleges, is the land in dispute. The court, trying the case without a jury, gave judgment in favor of the defendant, and from that, and an order denying a new trial, the plaintiff appeals.

The most important claim of the plaintiff to the right of recovery in the action was that he became the owner in fee of the land in suit, after the receipt from Showers of the deed of June 23, 1873, and after the patent was issued. The court below seems to have been of the opposite opinion; basing its decision upon its belief that in law the patent title inured to the support of that conveyed in the deed from Showers to Drais, and included the land in the road, up to the center thereof, opposite to the land mentioned in that deed, and this would carry the title to the southern 40 feet of that road; and because it appeared to the court that the land sued for still remained a part of the public road or highway called the "Mokelumne Hill road."

The plaintiff claims that he was the owner of the land, by virtue of this patent, by another title than that which passed by the quitclaim deed of Showers to Drais, and from Drais by a conveyance to the defendant; and that, at the time he obtained title under that patent, the land in dispute had been abandoned by the public as a road, had never been in the possession of Lynch up to the time of the alleged ouster, and did not pass to him by his deed from Drais, and therefore that, when the road was abandoned by the public, the title to it reverted to him, under his deeds from his grantor and the patent of 1873; that he had title to it by five years' adverse possession; and that the land was never legally dedicated as a public road.

What is commonly called the 500,000 acre land grant has been held by this court to have been a present grant by the United States to the state of California; and, when a due selection of and location of such lands had taken place under the laws of this state, a perfect title therein vested in the state. *Bludworth v. Lake*, 33 Cal. 255.

By sections 3 and 6 of the act of April 23, 1858, (Sess. Laws 1858, pp. 248, 249,) it is provided that the certificate of purchase is not to be issued until after a location is permitted, in accordance with the laws of the United States, by their proper land-officers; that the state locating agent shall not issue the certificate of purchase for such lands until after a location has been properly and legally made. It will always be presumed, in the absence of proof to the contrary, that a public officer has regularly performed his duty. Section 1963, sub. 15, Code Civil Proc. Hence the fact that Berry had issued to him a certificate of purchase of the land in question is presumptive evidence of the fact that all had been done by the proper officers which was

required in order to vest the legal title of such land, at the time of the issuance of the certificate of purchase, in the state of California.

The question then arises, what title, if any, did Berry and his assignee of the certificate of purchase acquire, as against the state, so as that a valid dedication of the land for a public road could be made? By the act of 1859 (Sess. Laws 1859, p. 227) and the act on page 332, same laws, it appears that such a certificate was declared to vest a *prima facie* title to the holder thereof, and his assigns, subject to the right of the state to have a forfeiture thereof on non-payment of the whole amount of the purchase money, and not affecting the right of any party in adverse possession of the land.

In the present case there was no one in adverse possession of the land at the time Showers was in possession of it, and the certificate of purchase was never forfeited; the state having been paid for the land in full. It must therefore be apparent that when the patent was issued to Showers, the assignee of the certificate of purchase from Berry, that such patent did not confer any different or distinct title upon Showers, or his assigns, than that which had been conferred by the certificate of purchase, viz., a *prima facie* legal title, which might under some conditions be forfeited or contested, and which by the patent was made an absolute legal title; it being strengthened, but not altered, by the issuance of the patent to Showers. The reasoning upon a similar point in *Neil v. McNear*, 57 Cal. 426, is of force in this case.

We must therefore conclude that the title which passed by the deed to Drais from Showers was fed by the patent, and that Lynch, Drais' grantee, held the legal title to the land in dispute, and he was not divested of it by the issuance to Showers of the patent of 1873, or the deeds from Showers or his grantee Watkins, provided the original deed from Showers to Drais conveyed to him the land in the road up to its center or thread, subject to the public user.

The *prima facie* legal title to the land was in Showers, as it appears to us, when the Mokelumne Hill road was dedicated by him to the use of the public. Having such a title, it was within his power to make such a dedication as we think he did make; and the acceptance of it by the public was made evident by the record. The plaintiff, then, had no title paramount to that of the defendant by reason of the patent of 1873.

The largest portion of the land in controversy was never in the possession of either of the parties to the action. It had, while it remained a part of the public road, been overflowed, and occupied as a permanent channel, by the Mormon slough. The road had been widened by an additional dedication of land by Church, the plaintiff's grantor, in order to replace the land occupied by the waters of the slough. The small portion of high ground which remained was, as it appears to us, susceptible of use by the traveling public, to some extent at least. It had never been fenced in by the plaintiff or any one. It appears to have been treated pretty much as one side of some roads are, where the center of the road-bed is most used by those traveling it. The fact that on the land thus lying in the highway, as it always had since its first dedication to the public use, the plaintiff had sowed some grass-seed, and staked out some of his cattle to graze on it, did not give him such an adverse possession thereof, even if the road had been abandoned by the public, as would enable him to obtain title to it through the statute of limitations as against the defendant, whose deed from Drais, and that from Showers to Drais, gave title to the land to him, provided, as we have before said, the road up to its center, as it lay opposite to and adjoining the land described in his deed, passed to him by such deed.

Any ordinary observer traveling upon the public roads of the more thickly-populated portions of this state will often perceive the land on one or both sides of a road-bed that is fenced out, sowed in grain and pastured by the proprietors of the adjoining land, while all the travel for many years has been

confined to the center of the road-bed; and yet we do not see that such acts should of themselves be held to show either an abandonment of the use of the road by the public, or its adverse possession by the person who has thus sowed, reaped, and pastured his stock thereon.

We think the evidence, taking in all the circumstances surrounding the sale of the land, and the deed made of it by Showers to Drais, indicates that there was no intention entertained by the grantor, or expressed in the deed, to limit the title of Drais to the land by the southern boundary of the Mokelumne Hill road. That road, it appears to us, was described in the lost deed as a boundary to the land conveyed therein, and therefore carried with it the right and title to that part of the road, up to its center or thread, which lay opposite to and adjoining "the four or four acres and a half, more or less," of land which the deed purported to convey, subject to the public user. *Moody v. Palmer*, 50 Cal. 36.

Inasmuch as the cause was tried by the court, and it was agreed upon all sides that the width of the road, as originally used by the public, was 80 feet, we do not perceive in what way the admission in evidence of the road survey objected to could have had any influence prejudicial to the plaintiff.

The findings were warranted by the evidence. We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 30

WATROUS v. CUNNINGHAM and others. (No. 11,517.)

(Supreme Court of California. September 21, 1886.)

1. WITNESS—EVIDENCE AS TO WHAT WITNESS SAID.

When a witness has stated anything that he said at a certain time and place, it is competent to have him state *all* he said on that occasion.

2. EVIDENCE—DOCUMENTARY—ACCOUNT-BOOKS—LAYING FOUNDATION FOR ADMISSION.

Where the preliminary foundation for the admission of an account-book in evidence, either as a book of original entries or as a part of the *res gestæ*, has not been laid, it is properly excluded.

3. SAME—RECORD—JUDGMENT ROLL IN ANOTHER ACTION—WHEN ADMISSIBLE.

Where issue is taken on an allegation in the answer that possession of certain goods was taken by virtue of a writ of attachment in another action, the judgment roll in that action is admissible to prove the allegation, even though the plaintiff was not a party to it.

4. REPLEVIN—PAROL—WHEN ADMISSIBLE—CONVERSATION SHOWING TO WHOM PROPERTY WAS SOLD.

In an action of claim and delivery, a conversation which took place at a sale of property is admissible to show to whom it was sold.

5. WITNESS—REFRESHING MEMORY—REPORTER'S NOTES.

When a reporter is called to testify to evidence given by a witness in another trial, it is proper to allow him to read his notes taken at that trial, to refresh his memory.

Commissioners' decision. Department 2.

J. A. Louttit, for appellant, Watrous. *J. C. Campbell*, for respondents, Cunningham and others.

FOOTE, C. This was an action of claim and delivery for certain hogs. The cause was tried by a jury, and a verdict and judgment were had in favor of the defendant. From that judgment, and an order denying a new trial, the plaintiff has appealed.

The question asked the plaintiff, when a witness upon the stand, "What did you say in the office of Campbell & Muenter, at that time?" was objected to by counsel, the objection overruled, and he assigns that for error. This wit-

ness, in his examination in chief, said: "As soon as I found that the hogs were attached, I went to Mr. Campbell's office to explain to them that the hogs were mine, and not to have any trouble about them, and that they had made a mistake." Upon his cross-examination he stated, without objection: "I remember being in Mr. Campbell's office after the hogs were attached by Mr. McDougald. I didn't state then, in that office, in the presence of Mr. J. C. Campbell, W. D. Campbell, McDougald, and Judge A. V. Scanlan, that I had furnished the money for the Chinaman to buy the hogs, and that he was to give me one-fourth of the increase," etc.

When a witness has related anything which he said at a certain time and place, and under a given state of facts, it is competent to have him state *all* that he uttered on such occasion. It is evident that the witness had made a statement at the time he was present in the office of Campbell & Muentner, and, unless he had been made to relate all that he then said, it would have appeared to the jury that he went there in good faith, and claimed the property as his own, and that it had been attached by mistake; that he had never made any other statement; and that such was *all* that he spoke upon that occasion. Had the court not allowed that question to be put and answered, the defendant would have been deprived of his right to have the jury hear *all* that had been said upon a certain occasion, and would have permitted him to be bound by a part only of such statement or conversation. And, the witness being a party to the suit, we think the question was a proper one, and that the court did not abuse its discretion in allowing it. *Neal v. Neal*, 58 Cal. 287; *Jackson v. Feather River Water Co.*, 14 Cal. 18; *Thornton v. Hook*, 36 Cal. 228; *Harper v. Lamping*, 33 Cal. 647.

And, if the question was not allowable upon the ground last mentioned, it was admissible for the reason that the counsel putting it, when it was objected to as improper, on cross-examination, stated that he claimed the right to ask it for the purpose of impeaching the witness, and no objection was then urged against that view of the matter. Hence any objection for that cause cannot now be urged here for the first time. *Stoddard v. Treadwell*, 29 Cal. 281.

It does not sufficiently appear from the record that the account-book of the plaintiff offered in evidence was a book of original entries, in which the party offering it kept his accounts in the regular course of his business, or that the entries therein were made by him at the times they purport to have been so made, and contemporaneous with the transactions which they chronicled; nor did it appear that no other books of account were kept by him, and that he had no clerk or book-keeper, or that he kept fair and honest accounts. Neither does it appear that the plaintiff was present, and made any entry in that account-book, at the time the alleged sale of the hogs took place, the title to which is in dispute. Therefore the account-book was properly held not to be admissible in evidence, as the necessary preliminary foundation for such admission, either as a book of original entries or as part of the *res geste*, had not been laid.

The judgment roll in the case of *McDougald v. Ho Yuck* was admissible in evidence, because Cunningham, the officer who was sued in this action, had set up, by way of defense, in his answer, the fact that he held possession of the hogs in dispute by virtue of a writ of attachment, etc., issued in that action, and those allegations must be taken as denied by the plaintiff. Therefore, in support of the issue thus made, such proof was proper, even although the plaintiff may not have been a party to that suit; as it was not pretended that it settled any question of ownership of the hogs as against him, but was simply in support of the officer's plea of a justifiable taking into his possession of said property. Had this evidence been introduced and admitted, for the purpose of proving title to the hogs as conclusive against the plaintiff, the objection he makes would have been good.

The conversation that took place between the seller of the hogs and the Chinaman and McDougald, when the sale was being made, was competent, as tending to show *to whom* the hogs were actually sold, and did not prejudice the plaintiff in any of his rights, as it is not claimed that he had anything to do with that transaction; and the identity of that Chinaman with Ho Yuck was afterwards shown by the witness McDougald.

It is also assigned for error that the court "allowed the witness Hood to read the testimony of W. D. Campbell from the short-hand notes of W. D. Campbell's testimony, taken in the former trial of this cause." Hood had previously testified that he was the official reporter at that trial, and had heard the witness Campbell testify, and had made the short-hand notes in question; and that, if permitted to refresh his memory by reading them, he could then, from his *recollection* of Campbell's former evidence, state what he had then sworn to. This the court permitted to be done, allowing Hood to read the testimony of Campbell by question and answer. That was not allowing the testimony of Campbell in short-hand to be read as a *deposition*, but was permitting Hood, who could recollect the testimony given on a former trial of the same cause, to state from such recollection, refreshed by the reading of his short-hand notes, what Campbell (who at the time of the present trial was without the jurisdiction of the court) had formerly sworn to in the reporter's hearing. And such action of the court was proper.

We perceive no error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 46

TAYLOR v. TERRY. (No. 11,405.)

(Supreme Court of California. September 21, 1886.)

LANDLORD AND TENANT—INTERVAL BETWEEN OLD AND NEW TERM—POSSESSION BELONGS TO LANDLORD.

Where there is a period of time between the expiration of a tenant's lease and the beginning of his new term, the landlord is entitled to the possession at the end of the first term.

Commissioners' decision. Department 2.

Stonesifer & Minor, for respondent, Taylor. *Budd & Scanlan and Kirtrell & Maddux*, for appellant, Terry.

BELCHER, C. C. This is an action for unlawful detainer. The plaintiff recovered judgment, from which the defendant appealed, and the case comes here on the judgment roll.

It appears from the findings that on the first day of October, 1884, the plaintiff leased to the defendant, by verbal lease, the land in question, for the term of one year, commencing on the first day of October, 1884, and ending on the first day of October, 1885; that on the sixth day of August, 1885, the plaintiff again, by verbal lease, leased the land to the defendant for the term of one year, to commence the first day of December, 1885, and end on the first day of December, 1886; that the plaintiff promised and agreed to reduce the last-mentioned lease to writing, but failed and refused to do so; that the defendant continued in possession of the property after the expiration of the term for which it was first let to him, without the permission of the plaintiff; that on the fifth day of October, 1885, the plaintiff made demand in writing that the defendant deliver up and surrender the possession of the premises, but the defendant then refused, and still refuses, to do so; that after such

demand more than three days elapsed before the commencement of the action; and that the value of the rents and profits of the premises is the sum of \$30 per month. It further appears from the record that the action was commenced on the twentieth day of October, 1885, and on the twentieth day of November following judgment was rendered that the plaintiff recover possession of the property, and the sum of \$50 damages, which were trebled.

It is argued by the appellant that the verbal lease of the sixth of August was a valid lease, though the term was not to commence till the first of December; and in support of this he cites *Young v. Dake*, 5 N. Y. 463; *Becar v. Flues*, 64 N. Y. 518; and section 1624, subd. 5, Civil Code. On the other hand, it is contended by the respondent that the lease of the sixth of August was within the statute of frauds, and void; and in support of his contention he cites *Pulse v. Hamer*, 8 Or. 251; *White v. Holland*, 3 Pac. Rep. 575; *Wolf v. Dozer*, 22 Kan. 436; *Atwood v. Norton*, 31 Ga. 507; *Delano v. Montague*, 4 Cush. 42; and section 1624, sub. 1, Civil Code.

The question thus presented does not arise in the case, and we shall therefore not attempt to decide it.

Conceding that a parol lease for a year, where the term is to commence at a subsequent time, is valid and binding, still, as the defendant's first lease expired on the first day of October, and the term of the second did not commence till the first day of December, it is clear that the plaintiff was entitled to the possession of the property during the intervening term, and the defendant had no right to detain it from him. As said in *Young v. Dake*, *supra*: "The time between the making of the lease and its commencement in possession is no part of the term granted by it. The term is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself, by virtue of the lease, from the time it vests in possession." As the defendant had no right to the land when the plaintiff demanded its possession, and when the action was commenced and determined, it is evidently altogether immaterial whether he had a valid lease to take effect on some future day or not. The notice to vacate and give up the property was proper and sufficient.

The damages awarded were not excessive. The defendant admitted by his answer, and the court found, the value of the rents and profits to be \$30 per month. As the defendant wrongfully detained the property 50 days, it was proper to estimate the damages at \$50.

The judgment should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 43

In re Application of COLNON v. ORR, Treasurer, etc. (No. 11,467.)

(Supreme Court of California. September 21, 1886.)

1. RECORDS—CHARGES FILED IN PUBLIC OFFICE—PUBLIC RECORD.

A writing filed in a public office, making charges against a public officer, is not always a public record, to which every citizen may have access at pleasure.

2. SAME—MANDAMUS—INSPECTION OF PUBLIC RECORDS—REMEDY AT LAW.

All citizens of a state have a right to inspect its public records; but a citizen cannot enforce the right by a writ of mandate, unless he shows that he is beneficially interested, and that there is no plain, speedy, and adequate remedy at law.

Commissioners' decision. Department 2.

Louittit, Woods & Levinsky, for appellant. *F. T. Baldwin* and *J. C. Campbell*, for respondent, *N. M. Orr*, Treasurer, etc.

FOOTE, C. E. L. Colnon preferred his petition, and made affidavit thereto, to the superior court of San Joaquin county, for a writ of mandate to compel defendant to allow him to inspect a document which it is alleged is a part of the records of the defendant's public office as treasurer and secretary of the Stockton Insane Asylum. A demurrer was interposed, stating as grounds therefor that, upon the face of his petition, it does not appear that Colnon was "beneficially interested in the matters set forth therein, or that the party making the application was the person beneficially interested therein." From the statement of facts in the petition it appears that the document sought to be inspected was a writing filed by one Miss L. M. Jones with the board of directors of the Stockton Insane Asylum, in which the character and conduct of one W. T. Browne, the medical superintendent of the asylum, was assailed.

It is not every written charge made to a board of supervisors, a board of directors or trustees of a college, or other state institution, which, upon being filed in the office of their secretary or treasurer, or custodian of their records, becomes thereby a public record, to which any citizen may have access at pleasure. To declare such to be the law would be to say that any communication aspersing the character of a public officer, being received by the board of directors, to which he is amenable, and filed with the custodian of their records, would thereby become a public record, and be open to the idle curiosity of any and all persons. In this way the most honorable of men might be attacked, and each individual of the whole public be permitted to inspect the document containing such attack without having the slightest beneficial interest in the matter, and actuated by no other motive than to repeat what might or might not be a slander, all over a community. Such a paper, in the absence of a positive statute making it a part of the public records, and as such to be examined by all persons whatsoever at their pleasure, within the office hours of the officer to whose charge it has been confided by a board of directors of a public institution, should not be declared a part of the public records.

While it is a right of a citizen of this state to inspect the public records at such times as the statute provides, nevertheless a writ of mandate to enforce that right cannot always be invoked. It must be issued upon affidavit, on the application of the party *beneficially interested*, in all cases where there is not a plain, speedy, and adequate remedy given by law, and not otherwise. Section 1086, Code Civil Proc. What beneficial interest in the examination of this document, even conceding that it was a part of the public records, Mr. Colnon can have, simply for the reason that he *is a citizen of California*, we cannot perceive from the record, nor has he sought to allege any such interest in his petition; and therefore he has not brought himself within the purview of the law which grants to citizens, in certain cases, this special writ.

The demurrer to the petition was properly sustained, and the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 100

CORCORAN and others v. DESMOND and others. (SULLIVAN, Intervenor.)
(No. 11,060.)

(Supreme Court of California. September 24, 1886.)

APPEAL—UNDERTAKING—TWO APPEALS.

One undertaking on appeal is not sufficient, where there is one appeal from a judgment, and another from an order denying a motion to vacate and set aside the judgment. The undertaking is insufficient to support either of the appeals.

Commissioners' decision. In bank.

Reddick & Solinsky and *A. E. Ball*, for plaintiffs. *W. K. Boucher* and *Eagon & Armstrong*, for appellants.

SEARLS, C. This is a motion to dismiss an appeal from a final judgment, and from an order denying a motion, made after judgment, to vacate and set aside the judgment aforesaid. The motion to dismiss is based upon the insufficiency of the undertaking on appeal, and upon the further ground that no sufficient transcript has been filed, as required by rule 2 of this court.

The judgment was in the ordinary form of a decree to foreclose under the mechanic's lien law of this state. The notice of appeal specifies that the defendants "appeal * * * from the judgment * * * in favor of said plaintiffs, * * * and also from the order made and entered * * * denying defendants' motion to vacate and set aside the judgment aforesaid."

There is but one undertaking on the appeal, which recites the fact that defendants have appealed from the judgment, which is described, and the date of its rendition set out, and that they have also appealed from the order of the court denying defendants' motion to vacate the judgment, and gives the date of the entry of such order. The undertaking then proceeds, in the usual form, to provide that the appellants will pay all damages and costs which may be awarded against appellants, etc., not exceeding \$300, and then recites that appellants are desirous of staying the execution of the judgment appealed from in so far as relates to the sale and delivery of possession of the land, etc., described in the judgment, in consideration of which the sureties bind themselves in the further sum of \$1,000 that appellants will not commit waste; and that if the judgment be affirmed, or the appeal dismissed, appellants will pay the value of the use and occupation, etc., not exceeding the said sum of \$1,000, which is recited as the amount fixed by the judge as an undertaking to stay proceedings, as provided by section 945 of the Code of Civil Procedure.

The undertaking is one that would be held sufficient if the appeal was taken from the judgment alone. Under these circumstances, the question presented is, (1) is the undertaking sufficient to cover both appeals? and, if not, then, (2) does the undertaking show, with sufficient certainty, the appeal on account of which it was given, to warrant us in holding that one only of the appeals should be dismissed?

The practice of filing a single undertaking of \$300 to cover costs in cases of appeals from a final judgment, and from an order denying a motion for a new trial, was adopted in this state at an early day, and, having been acquiesced in for many years, was at length, when challenged, upheld as sufficient. *Chester v. Bakersfield Town Hall Ass'n*, 64 Cal. 42; *Sharon v. Sharon*, 9 Pac. Rep. 187.

In discussing this last case, THORNTON, J. remarks: "Where there are several appeals in the same transcript, there should, no doubt, be an undertaking on appeal for each one of the appeals, and each appeal should be recited in the undertaking. So held in *Horn v. Volcano Water Co.*, 18 Cal. 142, and *Bornheimer v. Baldwin*, 38 Cal. 671. The only exception to the rule that on each appeal there should be a three hundred dollar undertaking is where there is in the same notice and transcript an appeal from a judgment, with an appeal from an order denying a new trial. In such a case one undertaking on appeal was held sufficient in *Chester v. Bakersfield Town Hall Ass'n*, 64 Cal. 42. This was so held in consequence of the long and well-settled practice, which this court very properly declined to disturb."

In *People v. Center*, 61 Cal. 191, there were two groups of appeal. In the first, the undertaking recited the taking of three several appeals, and concluded with the promises of the sureties that, in consideration of the premises "and of such appeal," they would pay all damages and costs which might be

awarded, etc., "on said appeal, or on a dismissal thereof, not exceeding \$300," etc., and it was held insufficient.

The present case is on all fours with *People v. Center, supra*. The undertaking recites the taking of two appeals, and then, in consideration of the premises "and of such appeal," the sureties promise that the "appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding \$300," etc. This is a single undertaking of \$300, to cover the costs of two separate appeals, which is not admissible except in the single case of an appeal from a judgment and an order denying a motion for a new trial. *Sharon v. Sharon, supra*.

2. Appellants contend that, if the undertaking is insufficient to support the two appeals, then the appeal from the order made after judgment should be dismissed, and the other allowed to stand. In support of this position we are pointed to the fact that the undertaking contains a further provision and promise for a stay of proceedings under the judgment, as provided by section 945, Code Civil Proc. In this respect appellants are correct, and there can be no doubt but that the undertaking, so far as it relates to a stay of proceedings, refers to the appeal from the final judgment; and, in case of an affirmance of the judgment or dismissal of the appeal, the sureties would become liable on the undertaking.

But the undertaking for a stay of proceedings under the judgment is entirely distinct from the bond for \$300 to cover costs on appeal, and the fact that it is found in the same paper with the latter does not change its character as a separate and independent undertaking. An appeal to this court is ineffectual for any purpose, unless an undertaking in the sum of \$300 is filed to cover the costs of such appeal. Appellants took two appeals, requiring two undertakings of \$300 each. They filed a single undertaking for \$300, in which they in nowise designate the appeal to which it refers; but, after reciting the two appeals, promise to pay, etc., *if the appeal shall be dismissed*, and to pay all damages and costs awarded against them *on the appeal*. In all this there is nothing whatever to indicate to which of the appeals the \$300 undertaking refers.

We think the undertaking fatally defective in this respect, and insufficient to support either of the appeals. The motion to dismiss the two appeals should be granted.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the motion to dismiss the appeals is granted.

71 Cal. 89

JONES v. JONES. (No. 11,187.)

(Supreme Court of California. September 24, 1886.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL.

Where one swears out a warrant against another upon facts which he believes to be true, and which, under the advice of counsel, he believes to constitute a crime, he is not liable in an action for malicious prosecution.

Commissioners' decision. Department 2.

W. D. Grady and Byers & Elliott, for respondent, Richard Jones. *J. C. Campbell*, for appellant, John W. Jones.

SEARLS, C. This is an action for malicious prosecution. Plaintiff had a verdict for \$6,500, upon which judgment was entered. The appeal is by defendant from the judgment, and from an order denying a new trial.

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Plaintiff and defendant are brothers. Mary Jones, their mother, was an incompetent person, and one Levi Nicewonger was guardian of her estate, and, as such guardian, had procured an order of court authorizing him to sell certain of the personal property belonging to his ward, and had advertised it for sale.

The plaintiff and one Calvin Jones, another brother, (or perhaps Calvin Jones alone,) came to the county of San Joaquin from the county of Fresno, and stated to said guardian that they desired to take the personal property of said Mary Jones to Fresno. They were told by the guardian that they could not take the horses, wagon, or cows, as that property was to be sold in a short time. The plaintiff and Calvin Jones then went to the Jones ranch with their mother, and requested of the man who was in charge thereof, for said guardian, the privilege of using the horses and wagon to convey the household furniture of said Mary Jones to the nearest railroad station, at Ripon; they offering to return the team to the ranch in the afternoon of the same day. The agent in charge of the property for the guardian agreed that he would allow them to take the team to Ripon to convey such household furniture, and that he would go to Ripon and bring the team back. Under such representations they got possession of the team, and started on the road apparently towards Ripon. They did not go to Ripon, but took the first road in a southern direction, going directly away from Ripon. Moll, the agent of the guardian of Mary Jones, after making the arrangements with plaintiff and Calvin Jones concerning the team, started for Ripon for the purpose of bringing it back, and after he left the ranch plaintiff and Calvin Jones drove the cows away from the Jones ranch. When Moll arrived at Ripon, he found that the team was not there, and upon inquiry ascertained that the plaintiff had been seen driving it up the road leading south. Moll then started for Stockton to inform the district attorney of San Joaquin county; and, when he arrived in Stockton, he met the defendant, who was interested in the estate of his mother, Mary Jones. Moll then informed the defendant what had been done by the plaintiff and Calvin Jones, and requested the defendant to see about the matter; at the same time informing him that the guardian (Nicewonger) was absent in San Francisco. The defendant went to the office of the district attorney, and informed him of what had been told him by Moll, and asked what should be done in the matter. The defendant was advised by the district attorney that the crime of grand larceny had been committed, and to have the plaintiff arrested. The district attorney prepared the complaint, and the defendant swore to it, and upon that complaint a warrant was issued, and plaintiff was arrested in the county of Fresno, and brought to Stockton, a distance of say 113 miles, where, upon the following day, he had an examination before a justice, and was discharged. He was not confined in jail, or subjected to any indignity beyond that implied by being deprived of his liberty upon the charge of larceny.

In addition to the general verdict for plaintiff, the following question was submitted to the jury: "*Question.* Did the defendant, John W. Jones, at the time he instituted the criminal proceeding against Calvin Jones and Richard Jones, believe, in good faith, that this plaintiff, Richard Jones, was guilty of the crime charged, to-wit, grand larceny? (By 'good faith' is meant acting honestly and fairly on his knowledge and information of the circumstances and advice of counsel, and acting as an ordinarily prudent man would act under all the circumstances.)" To which the jury returned for answer, "No."

To maintain an action for malicious prosecution, *malice and want of probable cause* must concur. If either of these be wanting, the action must fail. *Anderson v. Coleman*, 53 Cal. 188. The primary question to be considered in this class of cases, as was said in *Grant v. Moore*, 29 Cal. 644, is the want of probable cause for the prosecution complained of, and this must be estab-

lished before plaintiff can recover; and the burden of proof is upon the plaintiff.

Nicewonger, as the guardian of Mrs. Jones, was in possession of the property, and had such a special property therein as would support larceny against one taking with felonious intent. A man may steal his own property, if, by taking it, his intent be to charge a bailee with the property. *People v. Thompson*, 34 Cal. 671; *People v. Stone*, 16 Cal. 369.

1. It seems to us that the facts as detailed in the record, founded upon plaintiff's testimony, and upon which the defendant acted in procuring the warrant for the arrest of plaintiff, showed probable cause for the course he pursued, and negative the idea of malice. We may well suppose, in the light of the present, that the felonious intent on the part of plaintiff, necessary to constitute larceny, was entirely wanting. We must, however, determine the question of *probable cause* from the facts as they existed and appeared to defendant at the time he made the complaint. He had a right to act upon the facts as they were apparent by the acts of plaintiff, independent of any secret intention on the part of the latter to return the property, which was not and could not be known to him. Had the plaintiff been an entire stranger to the parties and to the property, his acts were of such a character that they would have supported a verdict of guilty upon a charge for larceny. If, in the performance of an unlawful act, the plaintiff surrounded the transaction with circumstances of his own creation, real and adventitious, indicating guilt, he should not be heard to complain that others acted upon the hypotheses thus supported by his conduct.

2. There can be no reasonable doubt from the evidence but that Moll, the agent of the guardian, correctly narrated the facts as they had transpired at the ranch, and that defendant with equal fidelity detailed them to Campbell, the district attorney, and Gibson, his deputy; and that when asked what he should do, or what ought to be done, they, as the law officers of the county, advised him that the acts of plaintiff and his brother constituted grand larceny, and advised their arrest for crime. They then went before the magistrate with a complaint which the district attorney had prepared, and defendant had verified; and upon a statement of the facts to that officer, and on the advice of the district attorney, a warrant issued.

In *Leigh v. Webb*, 3 Esp. 165, Lord ELDON held that if a party makes a complaint before a justice, which the justice conceives amounts to a felony, and issues his warrant against the party complained against, and the facts do not amount to felony, no action for malicious prosecution will lie against the party who made the complaint. This doctrine is upheld by this court in *Hahn v. Schmidt*, 64 Cal. 284, where authorities bearing upon the question are cited and approved.

In *Levy v. Brannan*, 39 Cal. 485, it was said: "The *onus* is upon the plaintiff to prove his allegation of the want of probable cause. The defendant may rebut the evidence of the plaintiff on this point by showing that he acted in good faith, under the advice of counsel, after a full and fair statement to his counsel of the facts of the case;" citing *Potter v. Seale*, 8 Cal. 224.

In this case the testimony of the district attorney and of defendant was introduced by plaintiff, and showed, not only the truthful and full statement made by the defendant, the advice of the district attorney thereon, but also that the defendant in good faith believed the statement to be what in fact it was,—the truth. We think, upon the showing made by plaintiff, there was no want of probable cause for his arrest, and therefore that the motion for a nonsuit should have been granted. The evidence subsequently introduced by defendant strengthened the case in his behalf, and the verdict was contrary to the evidence, and should have been set aside.

The judgment and order denying a new trial should be reversed, and a new trial had.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(70 Cal. 296)

FRINK v. ROE and others. (No. 8.879.)

(Supreme Court of California, July 30, 1886.)

1. EXECUTION—EXEMPTION—SELECTION OF PROPERTY—REAL PROPERTY.

The defendant in an execution under the statute (section 189, practice act 1850) giving him the right of designating the property to be levied on, cannot defeat a levy by neglect or refusal to exercise his statutory right; and in the absence of a showing that such right was exercised by defendant, and disregarded by the officer, the former cannot be heard to complain; nor can a stranger to the writ, having no interest in nor lien upon the property seized, be permitted to question the regularity of the levy for such cause.¹

2. SAME—SALE—FAILURE TO GIVE NOTICE.

A failure to give the proper notice of a sale of real estate under execution does not invalidate the sale, nor does it afford sufficient cause for setting it aside.²

3. SAME—WHAT INTEREST PASSES.

Upon a sale under execution the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution.

4. EVIDENCE—PAROL—POWER OF ATTORNEY.

Parol evidence may be received to interpret the powers conferred by a written authority to sell real estate for another, but not for the purpose of enlarging them, or confirming others not enumerated.³

5. FRAUDULENT CONVEYANCE—BINDING BETWEEN PARTIES.

A conveyance for the purpose of defrauding creditors is valid and binding as between the parties, and as to all other persons except creditors of the grantor.

6. PRINCIPAL AND AGENT—POWER OF ATTORNEY—REVOCATION.

Although the principal has expressly stipulated that a power of attorney shall be irrevocable, still, if the agent has no interest in its execution, and there is no valid consideration for the execution of such power, it is revocable at the will of the constituent; and also, unless coupled with an interest in the thing actually vested in the agent, the death of the principal works a revocation by operation of law.

7. SAME—POWER "COUPLED WITH AN INTEREST."

"A power coupled with an interest" means an interest in the subject-matter over or concerning which the power is to be executed, and it is not sufficient that the "interest" is in that which is to be produced by the exercise of the power.

8. SAME—SALE UNDER POWER—AGENT VIOLATING AUTHORITY.

Where a sale is made by an agent under a power authorizing him to sell and convey, and it appears upon the face of his deed, when compared with the power, that he has complied with the requirements of the latter, the legal title will pass to the grantee, and remain in him, and those holding under him, until set aside by a court of equity, notwithstanding the agent may have violated his duty to the principal by fraudulent practices which do not appear in the deed.⁴

9. SAME—WHEN VOID.

If an agent acts without and in excess of the authority conferred upon him, and such want of authority is apparent upon the face of the record, his attempted action is void, and a conveyance under such circumstances is not simply voidable, but absolutely void, and advantage may be taken of it, by objection, in whatever court or proceedings it may be preferred as a basis of title.⁴

EVIDENCE—ADMISSIONS OF FORMER OWNER—CODE CIVIL PROC. CAL. § 1849.

Section 1849 of the Code of Civil Procedure, providing that the declaration, acts, or omissions of former owner, while holding the title, in relation to the property, are evidence, is not to be construed as enlarging the class of cases in which such declarations, acts, or omissions are admissible against himself, but as permitting them to be introduced as though he had retained the title, and were a party to the action.

¹ See note at end of case, part 1.

² See note at end of case, part 3.

³ See note at end of case, part 2.

⁴ See note at end of case, part 4.

11. SAME—PAROL—DEED.

A deed cannot be absolutely defeated by parol evidence; and, if parol evidence to this end be introduced, even without objection, at a trial, it cannot be allowed such effect.¹

Commissioners' decision. In bank.

E. A. & G. E. Lawrence, for appellant, Frink. *McAllister & Berger* and *T. B. Bishop*, for respondents, Roe and others.

SEARLS, C. This is an action of ejectment to recover a portion of South Beach block No. 25 of the city and county of San Francisco. Defendants had judgment, from which, and from an order denying a new trial, plaintiff appeals. The appeal was heard by department 2 of this court, and a judgment of reversal rendered June 29, 1885. 7 Pac. Rep. 481. Upon petition a hearing in bank was ordered, and after oral argument and filing of additional briefs, the cause is again presented for decision.

At the trial, the plaintiff, for the purpose of proving title in himself, introduced in evidence the judgment roll, etc., in case of *Peter Smith v. City of San Francisco*, from which it appears judgment in favor of plaintiff was entered March 4, 1851. Plaintiff also offered in evidence a sheriff's deed from the city of San Francisco, by J. C. Hayes, sheriff, to John McHenry, dated June 17, 1851, and recorded June 21, 1851, which deed was executed pursuant to a sale of the demanded property, made June 14, 1851, under an execution issued upon said Peter Smith judgment, March 10, 1851, and levied on said property.

It appears that, after notice of sale under the execution, an injunction issued, whereby the proceedings were stayed until May 10, 1851, when a *venditioni exponas* issued, under which the sale was made on the date above mentioned. Plaintiff deraigns title under the sheriff's deed through sundry mesne conveyances.

In the former opinion it was said: "The sale under the execution issued on the judgment in *Smith v. City of San Francisco et al.* was regular, and passed all the title which the city had on the day of sale. The sheriff's deed passed such title to the purchaser, and such title came regularly, by proper conveyances, to and vested in D. B. Rising, under whom both of the parties to this action claim."

Counsel for respondents challenge this conclusion, and contend that no title passed under the sheriff's deed to McHenry, and in support of their contention call attention to the facts: *First*. That the premises in question constitute a part of what is known as the "Beach and Water Lot Property," the title to which vested in the city under the act of March 26, 1851. St. 1851, p. 327. *Second*. That, under the law in force in 1851, a judgment created no lien on real estate, unless a transcript of it were filed in the office of the recorder of deeds. St. 1851, p. 443, § 172. *Third*. That under section 184 of the practice act of 1850 "the following property shall be liable to be seized and sold on execution: * * * All the real estate not exempt by law, whereof the defendant, or any person for his use, was seized on the day of the rendition of the judgment, or at any time thereafter." That under section 189 "the person against whom an execution for money is issued, shall have the right to designate the property to be levied upon;" and that 20 days' notice, either printed or in writing, was required to be posted prior to sale.

From the facts hereinbefore stated it will appear that title to the demanded premises vested in the city subsequent to the issue and levy of the execution, and subsequent to the notice of sale, but before the sale took place.

The right of a defendant in an execution to designate the property to be levied upon, is personal to himself, and may be waived. An officer may not

¹See note at end of case, part 3.

deny the right if claimed. *Ashby v. Dillon*, 19 Mo. 619; *State v. Willis*, 33 Ind. 118. If the debtor is absent, the officer need not hunt him up, or wait for his return. *Cook v. De la Giza*, 13 Tex. 431; *People v. Palmer*, 46 Ill. 398. Clearly, the defendant in an execution, under a statute giving him the right of designating the property to be levied upon, cannot defeat a levy by neglect or refusal to exercise his statutory right; and in the absence of a showing that such right was exercised by defendant, and disregarded by the officer, the former cannot be heard to complain; nor can a stranger to the writ, having no interest in or lien upon the property seized, be permitted to question the regularity of the levy for such cause.

A failure to give the proper notice of a sale of real estate under execution does not invalidate the sale; and in *Smith v. Randall*, 6 Cal. 47, it was held not to afford sufficient cause for setting it aside. *Harvey v. Fisk*, 9 Cal. 94; *Cloud v. El Dorado Co.*, 12 Cal. 128; *Shores v. Scott Riv. W. Co.*, 17 Cal. 628; *Simson v. Eckstein*, 22 Cal. 590; *Blood v. Light*, 38 Cal. 649. These preliminary questions disposed of, it only remains to inquire whether the title acquired by the city subsequent to the levy of the execution, and before the sale, passed to the purchaser.

The purchaser at an execution sale acquires the real interest of the defendant, and nothing more. It is not like a sale in market overt, in which the apparent interest of the seller passes to the purchaser; but, as a rule, (to which there are a few exceptions,) the latter takes the precise interest of the defendant. An after-acquired title by the judgment debtor does not pass to the purchaser. The sheriff, as the enforced agent of the defendant, can give no warranty or covenant to bind or affect any after-acquired title. The judgment and execution constitutes the charter,—the warrant of authority to the officer. They are evidence of his authority, and, taken together, indicate his duty; nothing more.

The sale itself is measured by the deed; and, the authority to make it being in the officer, the purchaser may, as was said in *Blood v. Light*, 38 Cal. 649, rely upon the legal presumption that the acts of the officer preceding the sale have been duly performed; "that the officer has found no personal property; that he has seized upon the land which he is about to sell; and that he has advertised the sale as required by law." *Cloud v. El Dorado Co.*, 12 Cal. 133; *Clark v. Lockwood*, 21 Cal. 224.

The statute is directory so far as it deals with the manner in which the writ is to be executed. *Smith v. Randall*, 6 Cal. 47; *Webber v. Cox*, 6 T. B. Mon. 110; *Hayden v. Dunlap*, 3 Bibb, 216. If the officer fails to comply with these merely directory provisions, it is sufficient cause to set aside the sale on application of the parties, but such failure does not render the sale void. *San Francisco v. Pixley*, 21 Cal. 59. In the case at bar, so far as appears from the record, the judgment was not filed with the recorder, as at that time required by statute, and therefore was not a lien upon the real estate of the defendant.

The lien originated in the proceedings under the execution. Freeman, in his work on Executions, (section 282,) says: "The only effect of the levy of an execution upon real estate is to make the actual interest of the defendant therein liable to be taken and sold to satisfy the writ, and to make the title deraigned through such sale paramount to all conveyances and incumbrances made subsequent to the levy." Is it the interest at the time of levy, or at the date of the sale, which is sold? Freeman on Executions, (section 335,) in speaking of the title which passes under judgment and execution liens, adds "that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto and before the sale;" and we are referred to a number of authorities in support of the proposition. We have examined these authorities, but do not find them in point beyond establishing the gen-

eral proposition that the purchaser in the case we are considering takes only the interest of the judgment debtor.

The question has, however, been considered in our own court. In *Kenyon v. Quinn*, 41 Cal. 325, the defendant in an execution had pre-empted certain land, subsequent to which the execution was levied upon it. The debtor paid for the land, and received a certificate of purchase from the government after the levy and before sale under the execution. A patent afterwards issued, and this court held that, "assuming that the pre-emption claim of Bremens Kenyon was subject to seizure and sale under the defendant's execution, (a point not now necessary to decide,) all that the sheriff could have done, and all that he attempted to do, was to seize and sell such right, title, and interest as Kenyon had in the premises at the time of the levy, and such as he acquired between the time of the levy and the sale. At the date of the levy Kenyon had no title to the land, either legal or equitable; not then having paid the purchase money, or obtained a certificate of purchase. *Hutton v. Frisbie*, 37 Cal. 475. But after the levy, and before the sale, he paid the purchase money, and obtained a certificate of purchase, which vested in him an equitable title, and which entitled him to a conveyance of the legal title by a patent from the government. * * * The defendant, by his purchase and the sheriff's deed, had simply succeeded to the equitable title of Kenyon; and, when the latter afterwards obtained the legal title by means of the patent, he held it in trust for the defendant, [purchaser under execution,] and could have been compelled to convey it upon a proper application to a court of equity for that purpose."

It is the sale and deed thereunder which passes the title of the execution debtor. The judgment, execution, and levy by the officer constitute the authority and fix the origin of the lien, and, under the law, define the property to which such lien attaches; but they do not—any or all of them—measure the interest to which it attaches; or, rather, it attaches to any interest which the judgment debtor may have in the property, from the time such lien has its inception until a sale or termination thereof.

In this case the lien only commenced with the levy of the execution. The *venditioni exponas* did not enlarge or modify it, but simply compelled the sheriff to sell as though the original writ had remained in force. *Freem. Ex'ns*, § 58.

The legal effect of a sheriff's deed, properly executed after a valid sale of property under execution, (independent of the doctrine of relation under which a lien may have been perpetuated,) is at least equal to that of a quitclaim deed of the same property executed by the debtor on the day of sale.

In *Emerson v. Sansome*, 41 Cal. 552, it was said that a sheriff's deed transfers to the purchaser all the interest the execution debtor had in the land sold at the date of the levy, but no subsequently acquired rights; but upon examination of this and some other analagous cases it will be found the subsequently acquired rights have, in every instance, accrued after the sale; and in the only authorities we have been able to find where title vested before the sale it is held to have passed by the sheriff's deed thereunder. We therefore hold that, upon a sale under execution, the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution.

It follows that we may repeat in the language of the former opinion in this case: "The sale under the execution issued on the judgment in *Smith v. City of San Francisco et al.* was regular, and passed all the title which the city had on the day of sale." We may add that this sale, or others depending on like facts, were upheld in *Smith v. Morse*, 2 Cal. 524, and in *Welch v. Sullivan*, 8 Cal. 165.

Again, both parties to the action deraign title to the demanded premises through Rising, and we understand the principle to be settled that if, in an

action of ejectment, both parties claim to derive title from the same source, it is not necessary for the plaintiff to introduce in evidence a conveyance from the former owner to the person having the source of title. *Spect v. Gregg*, 51 Cal. 198; 2 Greenl. Ev. § 307, and note.

2. The title acquired by John McHenry under sheriff's deed passed by proper conveyances to, and on the thirtieth of March, 1853, was vested in, D. B. Rising, who on the day last mentioned executed a quitclaim deed of the premises to James H. Hodgdon for a consideration, as recited in the deed, of \$7,900. On the same day Hodgdon executed to Rising a power of attorney, by which, in consideration of five dollars, he constituted the latter his attorney in fact, "without any revocation or power of revocation" on the part of Hodgdon, the constituent authorizing the attorney so constituted to bargain, sell, and convey the land conveyed by deed to Hodgdon just above mentioned, as well as certain other lands then recently conveyed to him, some of them by Rising, and some by Rising and one Raphael Schoyer.

The deed to Hodgdon was recorded March 30, 1853, and the power of attorney also on the tenth of October, 1853. Rising, in his own name, and as attorney in fact of Hodgdon, on the tenth day of October, 1853, conveyed the demanded premises to David S. Turner and Samuel Hort in trust for the benefit of the creditors of the firm of Rising, Casselli & Co., of which firm Rising was a member; and under this deed of trust, and from the trustees mentioned as grantees, plaintiff derails title. Hodgdon left the state of California soon after the execution of the power of attorney, and departed this life in 1862. Defendants derails title through his devisee. After the death of Hodgdon, and in 1866, Rising, as attorney in fact of the former, conveyed by quitclaim deed to Rufus Wade, under whom plaintiff claims by deed executed in 1867.

Upon the facts, two main questions arise in reference to the validity of plaintiff's title: *First*, as to the right of Rising, under the power of attorney from Hodgdon, to convey the property in trust for the payment of the debts of the firm of Rising, Casselli & Co.; *second*, as to the authority of Rising, under the same power, to convey the property to Wade in 1866, after the death of Hodgdon.

The contract which exists between the principal and agent is called a contract of agency. The right of the agent to act in the name or on behalf of another is termed his authority or power; and this, if conferred by a formal instrument in writing, is said to be conferred by letter of attorney or power of attorney. It is with an instrument of this character that we have to deal. It was an instrument authorizing the conveyance of land, and was therefore necessarily in writing. In such cases "the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, or of the intention to confer additional powers; for that would be to contradict or to vary the terms of the written instrument." Story, Ag. § 76; *Hogg v. Snaith*, 1 Taunt. 347.

It must not be understood that the usages of business, or of agents of particular classes, cannot be introduced in evidence for the purpose of interpreting the powers actually given, or the modes of their execution. In other words, parol evidence may be received to interpret the powers conferred, but not for the purpose of enlarging them, or conferring others not enumerated.

Interpreting this instrument from what appears on its face, we find it was executed in consideration of five dollars paid, and was irrevocable by the principal. It cannot be contended that an agent authorized to sell and convey the property of his principal, can, as against such principal, convey it in trust for the payment of his own debts to one who has notice; and as, in this instance, the power was (as it was bound to be to authorize the conveyance) in writing, and was of record; thus imparting notice to the purchasers and

all concerned, the conveyance by Rising in trust for the payment of the debts of his firm cannot, as against Hodgdon, be upheld, unless the authority was so coupled with an interest in the property as to validate the conveyance made for the benefit of the agent.

It is claimed that the conveyance from Rising to Hodgdon, and the power of attorney back, were one and the same transaction, and were but parts of a scheme to defraud the creditors of Rising, who was in failing circumstances, and that the pretended conveyance was fraudulent and void, and, as a sequence, no title ever passed from Rising to Hodgdon. The circumstances would seem to lend plausibility to this theory of the object of the conveyance; but, assuming it as true, we do not see how the result claimed ensues.

A conveyance for the purpose of defrauding creditors is valid and binding as between the parties, and as to all other persons except creditors of the grantor; and they are not here complaining. So, too, a sale with the intent to defraud subsequent purchasers was, under the statute of frauds of 1850, (St. 1850, p. 266,) fraudulent, as against such purchasers for a valuable consideration and without notice, and as against such purchasers with notice, if the grantee in the fraudulent conveyance was privy to the fraud. A court of equity would in such cases, by direct proceedings instituted for such purpose, set aside and annul a fraudulent conveyance of this character. A court of law, also, in a proper case, upon pleadings setting out the facts constituting the fraud, might remedy the wrong. But in an action of ejectment, counting upon the legal title, with no proper allegations to that end, such an inquiry is not permissible.

It is further contended that the power was executed for a valuable consideration, was by its very terms irrevocable, and was coupled with an interest, and that, therefore, the attorney could sell and convey at will, to such persons, upon such terms, and for such consideration, as he saw fit.

First. The general rule is that the principal may revoke the authority of his agent at his mere pleasure. Story, Ag. § 462.

Second. Although the principal has expressly stipulated that the power shall be irrevocable, still if the agent has no interest in its execution, and there is no valid consideration for the execution of such power, it is a "mere nude pact, and is deemed in law to be revocable, at the will of the constituent, upon the principle that he who alone has an interest in the execution of an act is also entitled to control it." Story, Ag. § 476.

Third. Where an authority or power is given for a valuable consideration, or is coupled with an interest, or is part of a security for the payment of money, or the performance of some other lawful act, it is irrevocable, whether so expressed upon its face or not.

Fourth. The death of the principal revokes a power to the agent, by operation of law, except where coupled with an interest in the thing actually vested in the agent. Story, Ag. § 489.

Fifth. In reference to what is meant by the term "a power or authority coupled with an interest," some confusion has been created by loose expressions to be found in the cases either not well considered, or in which the point is not essential to a decision. The question was elaborately considered and definitely settled by Chief Justice MARSHALL, in *Hunt v. Rousmanier*, 8 Wheat. 174, in an opinion which seems to us to leave little room for later discussion. The doctrine of that case is that the term "a power coupled with an interest" means an interest in the subject-matter over or concerning which the power is to be exercised; that the interest must be in the thing itself. "In other words, the power must be ingrafted on an estate in the thing." It is not sufficient that the "interest" is in that which is to be produced by the exercise of the power; for in that case, as is well said by Chief Justice MARSHALL, they are never united. "The power, to produce the interest, must

be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot in accurate law language be said to be coupled with it."

The doctrine of *Hunt v. Rousmanier*, and of other cases on the question, as we understand them, requires, in cases relating to real estate, that such an interest or estate shall pass to the agent as will entitle him to execute the power in his own name. Unless thus vested with an estate in the subject-matter over which the power is to be exercised, it is not perceived how an agent could convey the estate of a dead man. That which a man cannot do himself cannot be done by an agent in his name. Story, Ag. § 488; *Barr v. Schroeder*, 32 Cal. 609. Testamentary powers, to be executed after the death of the testator, depend upon a different principle, and need not be considered here.

We conclude that, as no estate or title vested in Rising by virtue of the power conferred upon him, or so far as appears by the testimony, conceding it to have been admissible, it must follow—*First*, that his authority terminated with the death of Hodgdon, his principal, in 1862, and, as a consequence, that the deed to Wade, executed thereafter, was absolutely void; *second*, that as against his principal, Hodgdon, he had no right to execute a deed of trust to trustees for the payment of the debts of Rising, Casselli & Co.

Our next inquiry must be directed to the question of whether the trust deed executed by Rising to pay the debts of his firm was absolutely void and of no effect, or whether it conveyed title, and can stand until the subject of a direct attack to set it aside. If the latter, we need not in this action at law, in which no equitable rights are set up, pursue the subject further.

It is said the acts of an agent in excess of his authority may be ratified by the principal; that where the principal, with a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he thereby makes them his own, and will be bound as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent to which such acts, doings, or omissions reach. Story, Ag. § 239 *et seq.* The same author states that at common law there is a distinction between the ratification of acts which are void, and the ratification of acts which are voidable. In the former case, the ratification is inoperative and void for any purpose; in the latter, full validity is given to the acts until a judicial determination of their character. He seems to think, however, that this distinction is more properly applicable to cases of contracts and acts which are illegal or immoral or against public policy,—cases in which the acts, being void, ought not to be allowed to acquire any validity, since the same objections exist to the ratification as to the original transaction, and that in ordinary cases of agency the acts of the agent without or in excess of authority may be validated by ratification. *Taylor v. Robinson*, 14 Cal. 396; *Davidson v. Dallas*, 8 Cal. 227; *Dupont v. Wertheman*, 10 Cal. 354; *Ellison v. Jackson W. Co.*, 12 Cal. 542; *McCracken v. San Francisco*, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 590; *Blen v. Bear River & A. Co.*, 20 Cal. 602; *Racouillat v. Sansevain*, 32 Cal. 376.

This doctrine is referred to, not because the record shows a ratification of the acts of the agent, but because it is frequently presented as illustrating the doctrine applicable to void and voidable transactions.

In *Benham v. Rowe*, 2 Cal. 387, it was held that where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, such sale must stand. Wharton in his work on Agency holds that, "whenever an agent attempts to use his fiduciary powers for his own benefit, he will be liable to be arrested in the attempt by a court of equity." Section 231. In "all those instances in which one party purporting to act in his fiduciary character deals with himself in

his private and personal character, without the knowledge of his beneficiary,—as where a trustee or agent to sell, sells the property to himself,—such transactions are avoidable at the suit of the beneficiary.” Pom. Eq. § 957.

The conclusion we reach from a review of the cases bearing on the subject is that where a sale is made by an agent under a power authorizing him to sell and convey, and it appears upon the face of his deed, when compared with the power, that he has complied with the requirements of the latter, the legal title will pass to the grantee, and remain in him, and those holding under him, until set aside by a court of equity, notwithstanding the agent may have violated his duty to the principal by fraudulent practices which do not appear in the deed. In other words, a sale and conveyance being authorized, the *modus* and objects thereof, except so far as they appear in the record, cannot be summarily examined and disposed of by testimony *dehors* the record, in an action of ejectment, without pleadings formulated for such purpose, and with no object of setting aside the conveyance.

(2) If an agent acts without and in excess of the authority conferred upon him, and such want of authority is apparent upon the face of the record, his attempted action is void, and a conveyance under such circumstances is not simply *voidable*, but absolutely *void*, and advantage may be taken of it, by objection, in whatever court or proceedings it may be proffered as a basis of title.

Rising was fully authorized by the power of attorney from Hodgdon to sell and convey the demanded property to such persons, and for such purposes; and at such price, as he saw fit, subject only to the law. He could not make a deed of gift of the property, or convey it to himself, or, what was the same thing, convey it in trust to Turner and Hort for the payment of his own debts, and those of his copartners. In so doing he violated a fundamental principle governing and controlling the acts and conduct of agents; and the object being patent on the face of the deed, when taken in connection with his letter of attorney, such deed was in excess of authority and void. *Du-pont v. Wertheman*, 10 Cal. 367; *Mott v. Smith*, 16 Cal. 537; *Meade v. Brothers*, 28 Wis. 693; *Bostick v. Hardy*, 30 Ga. 836. This infirmity was, as we have stated, patent upon the record, and all parties dealing with the property took with notice of it. *Hassey v. Wilke*, 55 Cal. 525; *Wilson v. Castro*, 31 Cal. 435; *Brush v. Ware*, 15 Pet. 111.

In justice to counsel in the cause, and in deference to the authors of the former opinion filed in the case, we ought to further notice the question raised upon the testimony of Clark, by which it is claimed to have been shown that the powers of Rising were enlarged, so that his authority to convey the property could be upheld.

By section 1849 of the Code of Civil Procedure, it is provided that “where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.” We do not understand that it was the intention of the legislature, by this section, to vary or alter the rules of evidence existing prior to its passage. By the preceding section it had been provided that “the rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore proceedings against one cannot affect another.” In actions to set aside conveyances by which title passes, upon the ground of fraud, where the question is not as to the fact of conveyance, but the *animus* with which it was made, the declarations of parties are of course admissible to establish fraud. So a deed absolute on its face may be shown by parol to have been intended as a mortgage; and other cases might be cited in which courts of equity look to the intent of the parties, rather than to the form of their proceedings for the purposes of justice.

Here, however, the question is, was parol testimony admissible to enlarge

the power given and defined in a properly executed power of attorney, or to show that notwithstanding an absolute deed was made to Hodgdon, yet that Rising, his grantor, retained some interest in the property? Can this be shown in an action of ejectment,—an action at law in which no equitable relief is sought, and founded upon such pleadings as are usually met with in this class of cases? In such an action, can it be shown that A., who presents a patent from the government to land, has declared such patent to mean something different from what is expressed in it, and thus defeat the title conveyed thereby, or that a power of attorney to A., authorizing him to lease or repair, was intended to empower, and therefore did empower, him, to sell and convey an indefeasible title? To our minds the negative of these propositions is too apparent to need argument.

If we admit that the testimony of Clark was admissible under section 1849 of the Code of Civil Procedure, it does not follow that the facts to which he testified could defeat the operation of the deed from Rising to Hodgdon, or enlarge the powers of the former under his letter of attorney from the latter. These effects cannot be accomplished by parol. Were the rule otherwise, the tenure by which for wise purposes real estate is held and made to pass, would depend, not upon the solemn acts of the parties, evidenced by formal writings, carefully designed to express their precise meaning, and intended to be as enduring as the earth to which they relate, but upon the uncertain memory of living witnesses, who detail second-handed the declarations of the actors. Under such a rule, a power of attorney might be upheld by parol testimony in one generation, and in the next the legal structure reared upon and supported by it must fall for the want of testimony in its support.

Section 1849 of the Code of Civil Procedure simply provides that the declarations, acts, or omissions of the former owner, while holding the title, in relation to the property, are evidence. This should not be construed to enlarge the class of cases in which, before the Code, the declarations, acts, or omissions of the holder of the legal title were admissible, at common law, against himself; but rather to permit the declarations, acts, and omissions of the grantor to be introduced precisely as though he had retained the title, and was a party to the action.

The scope of the testimony is not enlarged by the Code. Any declarations, acts, or omissions of the grantor, while holding the title, in relation to the property, and which could have been introduced against him while an owner, may be introduced against his grantee,—nothing more. It does not measure or prescribe the effect to be given to such testimony when introduced, or render it efficacious to prove any fact which could not before be established by like testimony.

“Declarations of persons in possession of land, explanatory of the character of their possession, are admissible in evidence. * * * Possession is *prima facie* evidence of seizing in fee-simple; and the declarations of the possessor, that he is tenant to another, it is said, make most strongly against his own interest, and therefore are admissible. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession if made in good faith, should not be received as part of the *res gestæ*; leaving its effect to be governed by other rules of evidence.” Greenl. Ev. § 109.

Declarations by a person in possession, in disparagement of his title are to be received, “*leaving its effect to be governed by other rules of evidence.*” One of these rules was that real estate could not be conveyed by parol. Another was that an authorization or power to convey real estate could only be conferred by a written instrument. A third was that there could be no evidence of the contents of a writing, except the writing itself, save in certain excepted cases, of which this is not one. A fourth rule was that parol testimony could not be received to curtail, enlarge, alter, or modify the effect of

a written instrument. *Conner v. Clark*, 12 Cal. 168; *Ruiz v. Norton*, 4 Cal. 355; *Donahue v. McNulty*, 24 Cal. 411; *Osborn v. Hendrickson*, 7 Cal. 282; *Ward v. McNaughton*, 43 Cal. 159. The exceptions to this last rule, in case of ambiguity, mistake, etc., do not alter, but rather demonstrate, the rule.

Clark's testimony does not go to show that the deed from Rising to Hodgdon was a mortgage; but it is claimed that it shows that the deed from Rising to Hodgdon, and the power of attorney from Hodgdon to Rising, taken together, meant that, though the property was conveyed by Rising to Hodgdon, yet it really was not conveyed, and that Rising still continued to own it.

Could Rising thus by parol defeat his own deed? Could he say, "I conveyed to Hodgdon, but the parol agreement was that the title should not pass?" Could Rising so contradict his own deed, and revest the property in himself by parol? If Mr. Rising could not do it, can Clark do it by repeating what Rising told him? Can the statute of frauds be wiped out, which says, "No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing?" Code Civil Proc. § 1971. The foregoing section, though adopted since the transactions of which we speak, is but a transcript of the former law on the subject.

Certainly, one party to a written contract cannot at the time of its execution, or thereafter, destroy such written contract or deed, by declaring, *in the absence of the party with whom he had contracted, or to whom he had conveyed*, that his contract or deed was not intended to operate according to its tenor and effect. Clark had no knowledge whether or not a consideration was paid by Hodgdon to Rising for the deed in question.

Our conclusion is that the testimony of Clark was not competent to prove, in opposition to the writings, the facts claimed for it; and, admitting it to have been introduced without objection, (although such does not seem to be the case,) yet it cannot be given an effect which the law provides can only be obtained by virtue of written instruments. Section 1849, Code Civil Proc., makes the admissions, acts, and omissions of the holder of the title, while an owner, relating to the property, admissible against his grantee; but it does not make his oral declarations competent to prove that which can only be established by a writing, or give to them an effect which can only be obtained by a deed, or make them admissible under an issue to which they are foreign. In other words, it only makes them competent to prove what, under the law, such declarations, acts, or omissions are competent to prove, and in cases to which the evidence is pertinent.

Sneed v. Woodward, 30 Cal. 433; *McFadden v. Wallace*, 38 Cal. 58; *Phelps v. McGloan*, 42 Cal. 303; and *McFadden v. Ellmaker*, 52 Cal. 349,—were all cases in which the evidence offered was competent to prove admissible facts.

Wharton on Evidence, at section 1156, also lays down the doctrine that the admissions of a predecessor in title, as a rule, are admissible, "and are compatible with the rule that parol evidence is not admissible to vary dispositive writing." *Jackson v. Shearman*, 6 Johns. 22; *Jackson v. Vosburgh*, 7 Johns. 186.

In *Kimball v. Morrill*, 4 Greenl. 371, it was said: "When the declarations of parties are admitted in evidence as a part of the *res gesta*, it is because those declarations go to explain the true intent and meaning of the parties at the time. Now, the true intent and meaning of a deed, and the contents of that deed, are to be gathered from the deed itself. The language of the parties to it, whether used before or after, or at the time of its execution, cannot be given in evidence to limit, restrain, or enlarge its meaning. The

declaration, therefore, of the parties to a deed, as to its contents, are no part of the *res gestæ*."

In *Badger v. Story*, 16 N. H. (2d Ser. vol. 4) 171, it is said: "The grantor's declarations might also be given in evidence for other purposes. They could not be offered, as part of the *res gestæ*, to limit the terms to the deed itself, as between the parties to it, and to show that it was to be something different from what it purported to be on the face of it."

In *Jackson v. Cary*, 16 Johns. 305, 306, it is said: "The evidence of declarations made by the defendant avail nothing; for, although parol declarations of tenancy have been received, with certain qualifications, parol proof has never yet been admitted to *destroy or take away* a title. To allow parol evidence to have effect would be introducing new and most dangerous species of evidence. The statute, to prevent frauds and perjuries, which has been considered the *magna charta* of real property, avoids all estates created by parol, and all declarations of trust, excepting resulting trusts, regarding any lands, tenements, or hereditaments. Yet, in defiance of this statute, we are asked to divest the defendant of what appears to be a complete title to the premises, by her parol declarations. This cannot be listened to." *McCrea v. Purmort*, 16 Wend. 473, is to the same effect.

In *Rhine v. Ellen*, 36 Cal. 371, it is held that the operative words of conveyance and the covenants in a deed cannot be contradicted by parol testimony.

In *Judson v. Malloy*, 40 Cal. 307, it was held that testimony which contradicted or tended to limit the operation of the deeds in evidence, one of which was executed to and another by the witness, should have been excluded if objected to.

These are but samples of a larger number of cases to which we have been referred, establishing the same doctrine, and from the result of which we conclude the court below did not err in excluding the declarations of Hodgdon to Clark or to other parties, or of Rising to Nichols or others, in April, 1853, or at any other time, as each and all of said declarations seem to have been offered for the purpose of giving to the deed and power of attorney an effect not competent to be proven by parol testimony.

The tax deed offered in evidence, executed by E. H. Washburn, tax collector, was properly excluded. *Roberts v. Chan Tin Pen*, 23 Cal. 260; *French v. Edwards*, 13 Wall. 515; *Hewell v. Lane*, 53 Cal. 213.

Upon the whole case as presented, we are of opinion the order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

THORNTON, J. I concur in the judgment.

NOTE.

1. EXEMPTION—CLAIM AND WAIVER. The right of exemption is a personal one, and may be waived by the debtor, *Spitley v. Frost*, 15 Fed. Rep. 299; *Moffitt v. Adams*, (Iowa,) 14 N. W. Rep. 88; *Brumbaugh v. Zollinger*, (Iowa,) 13 N. W. Rep. 338; and the failure of the debtor to make the selection at the time of the levy, or a reasonable time thereafter, will be deemed a waiver, *Riggs v. Sterling* (Mich.) 27 N. W. Rep. 705; *Wicker v. Comstock*, (Wis.) 9 N. W. Rep. 25; *Zielke v. Morgan*, (Wis.) 7 N. W. Rep. 651; *Iliff v. Arnott*, (Kan.) 3 Pac. Rep. 525; but not if the officer refuses to give him an opportunity to make such selection, or denies his right to any exemption, *Wicker v. Comstock*, (Wis.) 9 N. W. Rep. 25; nor if the debtor has no notice of the levy, *Griffin v. Nichols*, (Mich.) 17 N. W. Rep. 63; and the claim may be made at any time before the sale, *Rice v. Nolan*, (Kan.) 5 Pac. Rep. 437; *Ellsworth v. Savre*, (Iowa,) 25 N. W. Rep. 699; *Crans v. Cunningham*, (Neb.) 13 N. W. Rep. 176; *McAbe v. Thompson*, (Minn.) 6 N. W. Rep. 479.

2. **EXECUTION SALE—NOTICE.** Irregularities or defects in the notice of sale, or the want of a notice, render such sale voidable, not void, *Rounsaville v. Hazen*, (Kan.) 5 Pac. Rep. 422; *Huffman v. Gaines*, (Ark.) 1 S. W. Rep. 100; but see to the contrary, *Helmer v. Rehn*, (Neb.) 15 N. W. Rep. 344; *Collins v. Smith*, (Wis.) 15 N. W. Rep. 192.

3. **PAROL EVIDENCE.** As to the admissibility of parol evidence to vary written instruments, see *Mellen v. Ford*, 23 Fed. Rep. 639, and note, 651; *Beason v. Kurz*, (Wis.) 29 N. W. Rep. 230, and note; *Chapman v. Polack*, (Cal.) 11 Pac. Rep. 764.

4. **SALE BY AGENT IN EXCESS OF AUTHORITY.** A sale of lands by an agent, on terms varying from those contemplated by the evidence of his authority, is wholly void, *New York Life Ins. Co. v. Fletcher*, 6 Sup. Ct. Rep. 837; *Jackson v. Badger*, (Minn.) 26 N. W. Rep. 908; *Seibold v. Davis*, (Iowa,) 25 N. W. Rep. 778; *Veeder v. McMurray*, (Iowa,) 23 N. W. Rep. 285; *Rountree v. Davidson*, (Wis.) 18 N. W. Rep. 518; *Hampton v. Moorhead*, (Iowa,) 17 N. W. Rep. 202; *Thomas v. Joslyn*, (Minn.) 15 N. W. Rep. 675; *Campbell v. Campbell*, (Wis.) 15 N. W. Rep. 138; *Jeffrey v. Hursh*, (Mich.) 12 N. W. Rep. 898. The acts of an agent within the apparent authority given him will bind the principal. *Sacalaris v. Eureka & P. R. Co.*, (Nev.) 1 Pac. Rep. 835; *Webster v. Wray*, (Neb.) 24 N. W. Rep. 207; *Dewar v. Bank of Montreal*, (Ill.) 3 N. E. Rep. 746; *Schley v. Fryer*, (N. Y.) 2 N. E. Rep. 280.

(70 Cal. 447)

BIGGS v. LLOYD. (No. 11,400.)

(Supreme Court of California. August 26, 1886.)

JURY—RIGHT TO TRIAL BY—WAIVER—RULE OF COURT.

The right to a jury trial is a constitutional right, and no act on the part of a litigant shall be deemed a waiver of the right, except such as are so constituted by express law. In this connection, a new rule of court has not the force of such a law.¹

Department 2.

R. C. Long and W. S. Goodfellow, for respondent, Biggs. *Gray & Sexton and Hundley & Gale*, for appellant, Lloyd.

MCKEE, J. This is an appeal from a judgment and an order denying a new trial in an action arising on contract. When the case was called for trial, on the sixteenth of April, 1885, the day for which it had been set for trial, defendants demanded a jury, but the court refused to grant the demand, and proceeded, against the objections and exceptions of the defendants, to hear and determine the case without a jury. The refusal was made on the ground that the defendants had waived a jury trial by not demanding a jury in the mode prescribed by the rules of the court. The rules of the court were as follows: "The first Monday in every month shall be termed law-day; and, if a jury is desired, it shall be demanded on the law-day when the case is set for trial." The rules of the court also provided: "A jury shall be drawn for the Monday succeeding law-day. All cases for trial by jury shall be tried before drawn juries."

The law-day of the court for April, 1885, occurred on Monday, the sixth of April. On that day the cause was regularly called to be set for trial, and it was set down for the sixteenth of April, at the hour of 10 o'clock A. M. The defendants did not then demand a jury, and the court did not draw or order a jury to be drawn for the trial of the cause.

Did the failure by defendants to demand a jury on the law-day constitute a waiver of their right to a jury trial on the day for which the cause was set for trial? We think not. For the court had no power to declare by its rules what shall constitute a waiver of a constitutional right, and the rules themselves do not declare that the failure to demand a jury in a case, upon the calling of the case on the law-day to be set for trial, shall amount to a waiver.

The constitution ordains: "A trial by jury may be waived, * * * in civil actions, by the consent of the parties, signified in such manner as may be prescribed by law." Section 7, art. 1, Const. Section 631, Code Civil Proc., declares: "Trial by jury may be waived by the several parties to an

¹ See note at end of case.

issue of fact arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following: (1) By failing to appear at the trial; (2) by written consent in person, or by attorney, filed with the clerk; (3) by oral consent in open court, entered in the minutes."

These are the only ways in which the right to a jury trial shall be deemed waived; it cannot be waived in any other way.

The defendants did not fail to appear at the trial; they appeared, and demanded a jury trial; and, as they had not consented to waive their right in the mode prescribed by the law, the court erred in denying the right.

Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; THORNTON, J.

NOTE.

The right to a jury trial is one of which a party can be deprived only by his own consent. *Rolfs v. Shallcross*, (Kan.) 1 Pac. Rep. 523; *Baylis v. Travelers' Ins. Co.*, 5 Sup. Ct. Rep. 494; *Hodges v. Easton*, 1 Sup. Ct. Rep. 307; *McGinty v. Carter*, (N. J.) 3 Atl. Rep. 78; *Kelsh v. Town of Dyersville*, (Iowa,) 26 N. W. Rep. 38; *Eshleman v. Chicago, B. & Q. R. Co.*, (Iowa,) 25 N. W. Rep. 251; *Risserv. Hoyt*, (Mich.) 18 N. W. Rep. 611; *Gregory v. City of Lincoln*, (Neb.) 14 N. W. Rep. 423. As to the waiver of that right, see *Kelly v. Town of Milan*, 21 Fed. Rep. 842; *Eshleman v. Chicago, B. & Q. R. Co.*, (Iowa,) 25 N. W. Rep. 251; *Spencer v. Robbins*, (Ind.) 5 N. E. Rep. 726.

70 Cal. 581

McKAY v. JOY, Adm'r, etc. (No. 9,719.)

(*Supreme Court of California.* August 31, 1886.)

PARTNERSHIP—SURVIVING PARTNER'S RIGHTS IN PARTNERSHIP PROPERTY—SECTION 1585, CODE CIVIL PROC.

Section 1585, Code Civil Proc., gives to the surviving partner ample power to take possession of the property of the partnership and wind up its affairs. **THORNTON, J.**, dissents.

In bank.

A. C. Brown, for appellant, *McKay*. *Eagon & Armstrong*, for respondent, *Joy, Adm'r, etc.*

BY THE COURT. Bill filed by a surviving partner against the administrator of his deceased partner for an accounting. The complaint alleged that there never had been any settlement or accounting between the plaintiff and the deceased before his death, nor since with the defendant. Section 1585, Code Civil Proc., gives to the surviving partner ample power to take possession of the property of the partnership, and wind up its affairs. It necessarily follows that he does not need the interposition of a court of equity to aid him in doing that which he has ample authority to do himself. Judgment affirmed.

I dissent: **THORNTON, J.**

(70 Cal. 403)

LEWIS v. ADAMS and others. (No. 9,979.)

(Supreme Court of California. August 16, 1886.)

1. **STATUTE OF LIMITATIONS—ACTION, WHEN BROUGHT—JOINDER OF NEW DEFENDANTS.**
Amending a complaint so as to join other parties defendant does not make a new action, as against the original defendant, so as to be barred by the statute of limitations.¹
2. **EXECUTORS AND ADMINISTRATORS—JUDGMENT OBTAINED BY ADMINISTRATOR—ACTION ON.**
A judgment obtained by an administrator is a debt at law due him personally, on which he can sue as an individual in a foreign state.²
3. **JUDGMENT—FOREIGN JUDGMENT—NOT REVIEWABLE.**
A judgment obtained in a foreign state cannot be reviewed when suit is brought on it in this state.³
4. **EXECUTORS AND ADMINISTRATORS—SUIT ON JUDGMENT—PLEADING.**
Where it is not necessary for a plaintiff to sue as executor or administrator, all averments as to his official capacity may be disregarded as surplusage.

In bank.

Action on judgment obtained in Texas. For former opinion in action by M. F. Lewis as *executrix*, see 8 Pac. Rep. 619, and 7 Pac. Rep. 779.

Smith, Brown & Hutton and *Victor Montgomery*, for appellant, M. F. Lewis. *Thom & Stephens*, for respondents, P. T. Adams and others.

MCKINSTRY, J. The action is upon a judgment of a district court of the state of Texas,—a court of general jurisdiction. The original complaint was filed February 15, 1882, and averred that the Texas judgment was against defendant Adams, and was given and entered March 15, 1877. On the eighth day of July, 1884, the plaintiff amended her complaint by inserting, in the appropriate connection, the names of Joseph Collins, James Dalrymple, and John Kennedy as judgment debtors, and as defendants in this action. In the present action summons was not served on Collins, Dalrymple, or Kennedy, nor did either of them appear herein. The superior court found in favor of the plaintiff herein, against the defendant Adams; but, on motion of the latter, granted a new trial. From the order granting a new trial plaintiff has appealed.

The court below found "all the allegations of the complaint, as amended, are true." If the facts averred in the amended complaint would establish the conclusion that the statute had not run, as against defendant Adams, the foregoing was a sufficient finding in favor of plaintiff on the issue of the statute of limitations. Ever since the decision in *Coveny v. Hale*, 49 Cal. 552, it has been held that if a finding be of probative facts, from which the ultimate fact necessarily follows, it is sufficient.

There is no dispute that the finding is sustained by the evidence; but it is insisted by respondent that, upon the facts as found, the judgment should have been for the defendant, and that the court below therefore properly ordered a new trial. It is urged that the foreign judgment was rendered more than five years prior to the filing of the amended complaint, and that, as the action set forth in the amendment was a different action from that sued on in the original complaint, the statute ran to the filing of the amendment.

If it should be conceded that, when a trial court deduces a wrong legal conclusion from facts found, this is a ground of motion for a new trial, as being a "decision against law," (as to which we express no opinion,) the amendment did not allege a new cause of action against the defendant Adams, and there is no question here as to the running of the statute in favor

¹See note at end of case, part 1. ²See note at end of case, part 2.

³See note at end of case, part 3.

of those first made defendants by the amendment. The Texas judgment was against all the defendants therein named, and if the non-joinder had not been specially pleaded, could have been introduced under the averments of the original complaint. Code Civil Proc. § 434. As we have seen, the summons in the present action was not served on the other defendants; and, if the original complaint had properly described the Texas judgment, judgment herein could have been entered against Adams alone. The liability of Adams remained the same before and after the amendment. When an action is against two or more defendants jointly liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against those served, in the same manner as if they were the only defendants. Code Civil Proc. § 414. A judgment is a contract within the meaning of the section. *Mahaney v. Penman*, 4 Duer, 603. The amendment, so far as defendant Adams is concerned, was merely a more complete statement of the cause of action, and related to the commencement of the suit.

Treating the judgment as a joint liability, the defendant Adams cannot say that a new cause of action is for the first time set out in the amendment to the complaint as against him. It has been held in Kansas that an action on a judgment against two or more may be maintained against any one of the defendants; that it is in effect a joint and several obligation. *Read v. Jeffries*, 16 Kan. 534. The contrary seems to be intimated in *Barnes v. Smith*, 16 Abb. Pr. 420. It is not necessary here to decide the question; but, if the Texas judgment was the several contract of the defendant Adams, it is apparent that an amendment which merely added to the description of the judgment a statement that others, as well as Adams, were judgment debtors, did not affect or change the liability of Adams, or constitute a new cause of action against him.

The respondent further contends that the court below was justified in granting a new trial,—the evidence being insufficient to sustain the finding,—because the judgment roll, read in evidence, showed an action and judgment of the court in Texas against Adams, Collins & Co., as *partners*, and upon a partnership liability. But the judgment was simply a judgment against Adams, Collins, Dalrymple, and Kennedy. We refrain from saying that such a judgment, upon a declaration charging defendants on a contract made or liability incurred by them as partners, was strictly regular. It is enough that the judgment was entered, and, if erroneous, it cannot here be reviewed.

Another point urged by respondent is that the superior court erred at the trial in overruling defendant's objections to the evidence offered by the plaintiff. Assuming that the specifications of error in the statement for new trial are sufficiently particular, the evidence referred to, as offered by the plaintiff, is the record of the Texas judgment. When that record was offered, the defendant's objections to it, other than those already incidentally referred to, were: "(1) Because the document shows a judgment in favor of M. F. Lewis, *executrix of the estate of Nat Lewis, deceased*, and it appears therefrom that the plaintiff, as executrix, appointed in Texas, has no jurisdiction nor right to maintain an action in this state; (2) because the court has treated this action as an action in the name of M. F. Lewis as an individual, and has held the description of plaintiff's official capacity to be mere surplusage."

Section 1294 of the Code of Civil Procedure, so far as it relates to any question before us, is: "Wills must be proved, and letters testamentary or of administration granted, * * * (3) in the county in which any part of the estate may be; the decedent having died out of the state, and not resident thereof at the time of his death."

And sections 1667 and 1913 of the same Code read:

"Sec. 1667. Upon application for distribution, * * * and if it is necessary * * * that the estate in this state should be delivered to the ex-

ecutor or administrator in the state or place of his residence, the court may order such delivery to be made," etc.

"Sec. 1913. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except * * * that the authority of * * * an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority."

Respondent contends that, by virtue of the foregoing provisions, the plaintiff cannot maintain this action, either in her official capacity or as an individual, and that the action could only have been prosecuted by one to whom letters were issued under the third subdivision of section 1294. It is claimed this view is supported by *Dial v. Gary*, 37 Amer. Rep. 738. In that case a resident of Massachusetts having died in that state, possessing a bond and mortgage executed by a resident of South Carolina, the administrator appointed in Massachusetts assigned these securities to a resident of South Carolina. The supreme court of South Carolina held that an action could not be maintained on them by the assignee in that state. The action was not upon a judgment recovered in Massachusetts.

Respondent also refers to Story's Conflict of Laws. In section 513 of that work, Judge Story says it has become a doctrine of the common law that no suit can be brought or maintained by any executor or administrator *in his official capacity*, in the courts of any other country than that from which he derives his authority. But at section 522 the learned author remarks that in contemplation of law there is no *privity* between persons to whom administration is granted in different states; that a judgment recovered by a foreign administrator against the debtor of his intestate will not form the foundation of an action by an ancillary administrator in another state, but the foreign administrator himself might, in such case, maintain a *personal* suit against the debtor in another state, because the judgment would, as to him, merge the original debt, and make it personally due to him in his own right, he being responsible therefor to the estate.

In *Attorney General v. Bouwens*, 4 Mees. & W. 171, Lord ABINGER, speaking of conflicts of jurisdiction between different ordinaries, said it had been established that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded.

Mr. Freeman, citing authority, thus lays down the rule with respect to the right of a foreign administrator to sue personally in this state on a judgment recovered by him, as administrator, out of this state: "A debt due to the estate of a deceased person, if sued upon and recovered by an administrator, is in law the debt of him who recovers it, and in whose name the judgment is rendered. He holds the legal title, subject only to his trust as administrator. He may sue upon the debt in his own name, without describing himself as administrator, and may therefore pursue the judgment defendant in a different state from that in which letters of administration were issued." Freeman, Judgm. § 217.

That the local administrator could not maintain an action on a judgment recovered by a foreign administrator, as such, in another state, was decided in *Talmage v. Chapel*, 16 Mass. 71. There the court held: *First*, the judgment debt was at law due to the foreign administrator, he being answerable to the estate of the intestate; *second*, that the ancillary administrator, appointed in Massachusetts, could not maintain an action on the judgment, not being privy to it. Counsel for respondent herein criticise that decision, saying: "It is absurd to say that by recovering a judgment the administrator becomes chargeable with it." And counsel claim that an executor or administrator appointed here could sue here on the judgment, because the foreign judgment is in favor of the *estate* which such an executor or administrator would represent. But the supreme court of Massachusetts did not hold that

the foreign administrator was *chargeable* with the judgment in the sense that he was bound absolutely to satisfy and pay it, but that he was answerable to the estate to the extent of using all reasonable efforts to collect the judgment. It would seem sufficiently plain that the Massachusetts administrator was not in privity with the title of the foreign administrator to the judgment, or with that of the person who had recovered the judgment, and to whom at law the judgment debt was personally due.

In *Biddle v. Wilkins*, 1 Pet. 686, the plaintiff, as administrator of one W., had recovered a judgment against the defendant in the district court of the United States for Pennsylvania. He instituted a suit on the judgment in the district court of the United States for Mississippi. The defendant pleaded that he had been appointed administrator of the estate of W. by the orphans' court of Adams county. The supreme court of the United States held that the debt due upon the judgment obtained in Pennsylvania by the plaintiff, as administrator of W.'s estate, was due to him in his *personal* capacity, and it was immaterial whether the defendant was or was not appointed administrator of the estate of W. in the state of Mississippi.

In *Low v. Burrows*, 12 Cal. 188, the supreme court of this state said: "The second objection is equally untenable. We concede that the administrator has power over only those assets within the state where letters are granted; and we might concede that in case of notes, bonds, etc., on debtors who live and have their property beyond the jurisdiction, the administrator has no jurisdiction or dominion. But this is not the case in respect to judgments. There can be no doubt if a debtor against whom the intestate in his life-time obtained judgment, though at the time of the death of the intestate the debtor was beyond the jurisdiction, afterwards came within the jurisdiction, the administrator might proceed to collect the money from him. The effect of a judgment, as such, unlike a note, is confined to the state where rendered. It is therefore record evidence of a debt. It may be sued on, it is true, out of the state. But it is not easy to see how an administrator of the creditor in California could take to himself as assets a judgment remaining on record in New York, merely from the fact that the debtor happened, for the time being, to reside in California. If the debtor went back to New York or had property there, it is clear that the California administrator could not collect the money. If he collected anywhere, it would not be by virtue of the judgment in New York vesting in him any title to it, but merely because the transcript of the judgment gave him evidence upon which he might sue. The judgment is a record; and for any use to be made of it, or any power to enforce it, by execution or other process, must belong to the administrator in New York, or this anomaly would result: That the administrator in California would own the judgment for the purpose of suing on it in California, and the administrator in New York would own it for the purpose of collecting it by issuing execution on it in New York. We think no such doctrine can be maintained."

According to the principles recognized by all the authorities, the judgment debt herein sued was a debt at law due to the plaintiff personally, and she was fully authorized to bring and prosecute this action.

We find nothing in the provisions of the Code of Civil Procedure that affects or modifies the general principles of law which control and determine the rights of the parties hereto. Section 1913 is merely declaratory of the rule of the common law that an executor or administrator, *as such*, has no power which he can employ extraterritorially. The third subdivision of section 1294 allows letters to issue in the county "in which any part of the estate may be." But, when the plaintiff recovered the judgment in Texas, the simple contract debt ceased to exist. It was merged in the judgment. The judgment was in Texas, and the simple debt was not an asset in this state, which an executor or administrator, here appointed, could sue to re-

cover. The Texas judgment would constitute a perfect defense to an action brought here on the original demand.

As to the second of the objections to plaintiff's evidence, as above enumerated, the court below was justified "in treating the action as an action in the name of M. F. Lewis, as an individual, and in holding the description of plaintiff's official capacity to be mere surplusage." When it is not necessary for a plaintiff to sue as executor or administrator, all averments in his complaint in relation to his official capacity may be rejected. *Owen v. Frink*, 24 Cal. 171. And in *Biddle v. Wilkins*, *supra*, the supreme court of the United States holds that if the plaintiff who has recovered a judgment, as administrator, in one jurisdiction, and who brings an action on the judgment in another, names himself as administrator in the last action, the averment may be disregarded. Order reversed.

We concur: MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.; ROSS, J.

NOTE.

1. AMENDING PLEADINGS—EFFECT ON THE STATUTE OF LIMITATIONS. Amending a complaint by substituting another plaintiff is not beginning a new action which might be barred by the statute of limitations, *Wade v. Clark*, (Iowa,) 2 N. W. Rep. 1039; nor is amending by asking for increased damages, *Cooper v. County of Mills*, (Iowa,) 23 N. W. Rep. 633; *Rucker v. Dailey*, (Tex.) 1 S. W. Rep. 316. But the statute is a bar to a cause of action for the first time set up in a supplemental pleading. *Brown v. Mann*, (Cal.) 9 Pac. Rep. 545. The statute of limitations is not saved by an irregular or defective service of process. *U. S. v. Eddy*, 23 Fed. Rep. 226.

2. FOREIGN EXECUTORS. In the absence of statutory provision, an executor or administrator cannot sue outside of the state in which he is commissioned, *Eells v. Holder*, 12 Fed. Rep. 668; *Mackay v. Central R. Co.*, 4 Fed. Rep. 617; *Creighton v. Murphy*, (Neb.) 1 N. W. Rep. 138; but in Minnesota he may be substituted to defend an action pending against his decedent, *Brown v. Brown*, (Minn.) 23 N. W. Rep. 238. But he may sue, in his own name, on a judgment recovered in the state in which he was appointed, *Wilkins v. Ellett*, 2 Sup. Ct. Rep. 641; and on a note belonging to the estate, made payable to bearer, *Knapp v. Lee*, (Mich.) 3 N. W. Rep. 244; and may foreclose a mortgage by advertisement, *Hayes v. Frey*, (Wis.) 11 N. W. Rep. 695.

3. FOREIGN JUDGMENTS. A judgment of another state, properly authenticated, will be examined only as to the jurisdiction of the court over the person and subject-matter, *Renaud v. Abbott*, 6 Sup. Ct. Rep. 1194; *Hanley v. Donoghue*, Id. 242; *Amsbaugh v. Exchange Bank*, (Kan.) 5 Pac. Rep. 384; *Downs v. Allen*, 22 Fed. Rep. 805; *McMillen v. Lovejoy*, (Ill.) 4 N. E. Rep. 772; *O'Rourke v. Chicago, M. & St. P. R. Co.*, (Iowa,) 7 N. W. Rep. 582.

A judgment obtained without personal service, or voluntary appearance of the defendant, has no extraterritorial effect, *Hart v. Sansom*, 3 Sup. Ct. Rep. 586; *Amsbaugh v. Exchange Bank*, (Kan.) 5 Pac. Rep. 384; *Tessier v. Lockwood*, (Neb.) 24 N. W. Rep. 734; and a judgment of another state is not conclusive as to the authority of the attorney who appeared in the action, *Citizens' Bank v. Brooks*, 23 Fed. Rep. 21.

LEWIS v. ADAMS. (No. 11,525.)

(*Supreme Court of California.* August 16, 1886.)

CASE FOLLOWED.

Lewis v. Adams, *ante*, 833, (No. 9,979,) followed.¹

In bank.

Smith, Brown & Hutton, for respondent, Lewis. *Thom & Stephens*, for appellant, Adams.

BY THE COURT. This is an appeal from a judgment in an action brought on a judgment recovered in the state of Texas. The appeal is on the judgment roll. All the points made by appellant were considered and disposed of in *Lewis v. Adams*, *ante*, 833, (No. 9,979.) Judgment affirmed.

¹See note to preceding case.

70 Cal. 550

FREY and another v. LOWDEN and another. (No. 11,279.)

(Supreme Court of California. August 31, 1886.)

1. WATERS AND WATER-COURSES—RIGHTS OF PROPERTY IN WATER—TENANTS IN COMMON IN THE USE OF THE FLOW OF A STREAM.

A court of equity has power to ascertain and determine the extent of the rights of property in water flowing in a natural water-course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property.¹

2. EVIDENCE—EXPERTS—TESTIMONY AS TO CAPACITY OF A DITCH TO CARRY WATER.

The capacity of a ditch to carry water does not require for its proof unusual scientific attainments or peculiar skill. It may be established, like any other fact, by competent testimony; and witnesses who have had long experience in measuring and selling water are as competent to testify to the fact as experts.

3. APPEAL—CONFLICTING EVIDENCE.

A finding made upon substantially conflicting evidence is not reviewable.

Department 2.

Hatch & Chadbourne and *J. W. Philbrook*, for respondents, Frey and another. *W. J. Tinnin*, for appellants, Lowden and another.

McKEE, J. This was an action to determine certain rights claimed by the plaintiffs to the use of the waters of a creek in Trinity county, known as the "Grass Valley Creek," to enjoin the defendants from infringing those rights, and to recover damages for conversion of a portion of the waters appurtenant to them. The court finds that both plaintiffs and defendants were owners, and entitled to certain rights in the flow, of the waters of the creek,—the plaintiffs to rights appurtenant to two ditches, one known as the "Ohio Flat Ditch," and the other as the "Frey & Taylor Ditch," and to a saw-mill upon the creek known as "Burns' Saw-mill," and the defendants to rights in the flow of the same water-course as appurtenant to two ditches of which they were owners,—one known as the "Lowden Ranch Ditch," and the other as the "Lowden & Singleton Ditch."

The right appurtenant to the Ohio Flat ditch was prior in time; that to the Lowden Ranch ditch was next in order. Subsequently the right appurtenant to Burns' saw-mill was acquired; and that was followed by the acquisition of the right appurtenant to the Lowden & Singleton ditch, after which the plaintiffs acquired the right appurtenant to the Frey & Taylor ditch.

Both plaintiffs and defendants derived their rights from appropriation under the statute laws of the state; and, under the law, they, in the enjoyment of their rights, became and were tenants in common in the use of the flow of the stream, and entitled to appropriate from it, to the extent of their rights, in the order of time at which they had been acquired.

The times at which the several ditches had been constructed, and their capacities to carry water, and the purposes for which the water of the stream was appropriated and used by means of the ditches, are fully covered by the findings made and filed by the court under sections 632, 633, Code Civil Proc. Upon these findings the court, by its decree, fixed and established the respective rights of the parties, and regulated between them the use of the flow of the water of the stream according to priority of rights.

There is no doubt of the power of a court of equity to ascertain and determine the extent of the rights of property in water flowing in a natural water-course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use of the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property.

But the principal assignment of error is that the findings, conclusions of

¹See note at end of case.

law, and judgment are not supported by the evidence; and it is specially assigned that the finding "that the Ohio Flat ditch was entitled to 1,000 inches of water" was made upon evidence given by witnesses for the plaintiffs, who had no knowledge of the science of measuring water, against the evidence of defendants' witnesses, who were experts, "were educated and experienced in the measurement of water, and who did make the actual measurement on mathematical rules."

The capacity of a ditch is a question of fact, which does not require for its proof unusual scientific attainments or peculiar skill. It may be established, like any other fact, by competent testimony; and the record shows that many of the witnesses called by the plaintiffs testified upon the subject from knowledge acquired by them in 30 years' experience in mining, and in measuring and selling water to miners. As non-experts, such witnesses were as competent as experts to testify to the fact; and, although their statements as to the fact were contradicted by the opinions of experts, that only made a conflict in the evidence, which had to be determined upon the credibility of the witnesses themselves and the weight of their evidence. The finding was therefore made upon substantially conflicting evidence; and a finding or verdict made upon such evidence is not reviewable.

The court did not err in overruling the objections made to the admissibility of the testimony of plaintiffs' witnesses; nor in denying the motions made to strike out their evidence. Nor was it error to enforce by injunction a cessation of acts by the defendants injurious to the plaintiffs' rights as ascertained and established by the court.

We find no reversible error in the record. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

NOTE.

A court of equity has authority to regulate the use of water, the right to which belongs to two or more persons in common. *City of Salem Co. v. Salem Flouring-mills Co.*, (Or.) 7 Pac. Rep. 497; *Lorenz v. Jacobs*, (Cal.) 3 Pac. Rep. 654.

See, also, as to co-tenancy in water-rights, *Lytle Creek Water Co. v. Perdew*, (Cal.) 4 Pac. Rep. 426; *S. C. 2 Pac. Rep. 732*; *Spenseley v. Janesville Cotton Manufg Co.*, (Wis.) 22 N. W. Rep. 574; *Allard v. Carleton*, (N. H.) 3 Atl. Rep. 313.

2 Cal. Unrep. 690

SHUMWAY v. LEAKEY. (No. 11,103.)

(*Supreme Court of California.* August 25, 1886.)

NEW TRIAL—CONFLICT OF EVIDENCE.

A new trial, asked for on the ground of insufficiency of the evidence to sustain the verdict, will be refused if the evidence is conflicting on every material point.

Department 2. Appeal from superior court, county of Lassen.

Action for the possession of goods, or their value, and for damages for their detention. The case was tried before a jury, and verdict rendered for defendant. Plaintiff moved for a new trial on the ground that the verdict was not justified by the evidence. The court denied the motion for a new trial on the ground that the record disclosed the fact that the evidence was conflicting on material issues, and that where such conflict exists the verdict of the jury ought not to be disturbed. From the order denying the new trial plaintiff appealed.

A. L. Shinn and J. D. Goodwin, for appellant. E. V. Spencer, for respondent.

BY THE COURT. The evidence is conflicting on every material point. Therefore we can find no error in denying the motion for a new trial; nor do we find any error in the record.

Judgment and order affirmed.

(70 Cal. 430)

HICKEN v. FRENCH. (No. 11,056.)*(Supreme Court of California. August 25, 1886.)***SCHOOLS AND SCHOOL-DISTRICTS—SCHOOL LANDS—CERTIFICATE OF SALE.**

A certificate for the sale of 320 acres of land, issued by the sheriff to a purchaser of school lands in California is void by reason of the act of April 26, 1858, § 1, which declares that lands shall be sold in lots not less than 40 nor more than 160 acres.

Department 1.

L. S. Taylor, (*W. C. Norton*, of counsel,) for respondent, *Hicken*. *Jo. Hamilton*, for appellant, *French*.

MYRICK, J. A contest arose in the office of the surveyor general of this state, between plaintiff and defendant, as to their respective right to certain school lands, and the surveyor general made an order referring the contest to the superior court of the proper county. In pursuance of that order this action was brought.

It appears from the findings that in 1860, under section 9 of the act of April 26, 1858, (St. 1858, p. 318,) a certificate of sale was issued by the sheriff to one Higgins for 320 acres, as purchased by him. It also appeared that for the year 1876-77 the land was assessed for state and county taxes, which taxes being unpaid, the land was sold therefor to the defendant, French. This sale, and the tax deed executed thereon, constitute the only right or title of defendant. The court found that Higgins never paid the state anything for the land, and that the state never enforced any lien for the purchase money; that the defendant, French, was never an actual settler on the land; and that the same had been open and uninclosed and entirely unimproved until the entry of plaintiff, in 1883.

The act above referred to declared (last clause of section 1) that lands should be sold in lots not less than 40 nor more than 160 acres, except in certain specified cases. The alleged purchase by Higgins was not within the exceptions. The sheriff had no authority to issue a certificate for the purchase by one person, at one sale, of a lot containing more than 160 acres. As the certificate was of a sale in one lot of more than that amount, the sale was void, and no title passed; and it follows that Higgins had no taxable interest, and French acquired no right or title by virtue of the tax sale.

Judgment and order affirmed.

We concur: **McKINSTRY, J.**; **ROSS, J.**

(70 Cal. 643)

PEOPLE v. CARRILLO. (No. 20,212.)*(Supreme Court of California. September 18, 1886.)***CRIMINAL LAW—TRIAL—REASONABLE DOUBT—INSTRUCTION.**

Where a judge instructed the jury that they were justified in finding the defendant guilty, if satisfied to a moral certainty and beyond a reasonable doubt, although not entirely satisfied "beyond a possible doubt," and that they were not legally bound to acquit him because they were not entirely satisfied "beyond all possible doubt," accompanying the written charge with oral language not reduced to writing, but intended to modify and render the charge unobjectionable, the instruction was held erroneous.

Department 1.

The Attorney General, for the People. *J. T. Noon* and *J. T. Campbell*, for appellant.

McKINSTRY, J. In the margin, opposite to instruction No. 5, requested by the prosecution, the judge of the superior court wrote, "Given; the word 'possible' inserted in reading in two places." There is nothing to indicate

where the word was inserted "in reading." The instruction to that extent was not in writing, because there is no evidence in writing of the instruction as actually given. But it is not necessary to say that for this reason alone the judgment should be reversed.

As reduced to writing, the instruction is as follows:

1 "The jury must be satisfied from
2 the evidence of the guilt of the
3 defendant beyond a reasonable
4 doubt before they can legally find
5 him guilty of the crime charged
6 against him; but, in order to justi-
7 fy the jury in finding the de-
8 fendant guilty of said crime, it
9 is not necessary that the jury
10 should be satisfied from the evidence
11 beyond the possibility of a doubt.
12 All that is necessary in order to
13 justify the jury in finding the de-
14 fendant guilty is that they shall
15 be satisfied, from the evidence, of the
16 defendant's guilt to a moral cer-
17 tainty, and beyond a reasonable
18 doubt, although they may not be en-
19 tirely satisfied (beyond a possible doubt) from the evidence
20 that the defendant, and no other
21 or different person, committed the
22 alleged offense; and if the jury
23 are satisfied from the evidence,
24 beyond a reasonable doubt,
25 that the defendant committed
26 the crime charged against him,
27 they are not legally bound to
28 acquit him because they
29 may not be entirely
30 satisfied that the defendant
31 and no other or different
32 person committed the alleged
33 offense."

The instruction was erroneous. *People v. Brown*, 56 Cal. 405; *People v. Kerrick*, 52 Cal. 446; *People v. Padillia*, 42 Cal. 535; *People v. Phipps*, 39 Cal. 326.

The insertion of the words "beyond a possible doubt," inserted in line 19, still left it to the jury to find the defendant guilty, although they might not be "entirely satisfied that the defendant, and no other person, committed the alleged offense." But the court did not simply read the instruction as reduced to writing, but accompanied the reading with other oral language, claimed to modify and render unobjectionable the written charge. Such oral language was not reduced to writing "by the judge, or any one else, nor was it taken down by the short-hand reporter." The bill of exceptions shows that the judge read the instruction down to and including the word "satisfied," in line 30, and then said "beyond all possible doubt;" after which he proceeded to read the rest of the instruction as written. This was error. *People v. Hersey*, 53 Cal. 575, and cases there cited.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MYRICK, J.

71 Cal. 50

HEATH v. WALLACE. (No. 11,492.)

(Supreme Court of California. September 22, 1886.)

1. PUBLIC LANDS—UNITED STATES SURVEY—SWAMP AND OVERFLOWED LANDS—TITLE OF STATE—ACT OF CONGRESS, JULY 23, 1866.

A description of land in the United States government survey as "subject to periodical overflow" cannot be said to mean the same as "swamp and overflowed lands," so as to pass title to the land to the state under the act of congress of July 23, 1866.

2. SAME—UNITED STATES SWAMP LANDS—REQUIREMENTS TO VEST TITLE IN STATE—ACT OF CONGRESS, JULY 23, 1866—SECTION 2488, REV. ST. U. S.

A survey of land by a county surveyor upon an application to purchase, and plat and field-notes made and filed in the office of the surveyor general of the state, and approved by him, such plat and field-notes being in accordance with the United States government survey of the township, section, and quarter section in question, and describing the land as swamp and overflowed, is not such a compliance with the second clause of section 4 of the act of congress of July 23, 1866, or with the second clause of section 2488 of the United States Revised Statutes, as will vest the title to the land in the state.

Department 2.

John B. Hall, for appellant, *Heath*. *W. L. Dudley*, for respondent, *Wallace*.

THORNTON, J. This is an action to recover possession of the N. W. $\frac{1}{4}$ of section 23, in township 3 N., range 7 E., Mount Diablo meridian. Judgment was rendered for the defendant, from which plaintiff appealed to this court. The questions to be decided here arise on the findings of fact, which are here inserted, and are as follows:

"(1) The United States subdivisional survey of township three (3) N., of range seven (7) E., Mount Diablo base and meridian, was made by Deputy United States Surveyor John Wallace in the year 1865, and said survey, with the field-notes and plat thereof, were duly approved and the approval certified by the United States surveyor general for the state of California on the twenty-third day of August, A. D. 1865. The said approved official plat of said survey was filed in the United States land-office of the Stockton land-district on the eighteenth day of October, A. D. 1865. A duly-certified copy of the field and descriptive notes of the said survey was filed in the said Stockton office on or about June 17, A. D. 1881. The land in suit is a part of said township three, (3,) and is within the limits of said Stockton land-district.

"(2) The said approved and certified plat upon its face exhibits a compact body of land consisting of the following sections, and subdivisions of sections, to-wit: All of section number 23; all of section number 26; all of section number 33; the south $\frac{1}{2}$ and the north-west $\frac{1}{4}$ of section number 25; the north $\frac{1}{2}$ of section number 35; the north $\frac{1}{2}$ and the south-west $\frac{1}{4}$ of section number 34; the south $\frac{1}{2}$ and the north-east $\frac{1}{4}$ of section number 27; the south $\frac{1}{2}$ of section number 28; the south-east $\frac{1}{4}$ of section number 32. All that part of said plat which includes the foregoing sections and subdivisions of sections is colored blue, (and by this color is distinguished from all other parts of the plat,) and thereon is written the words, 'Land subject to periodical overflow.' Of the field-notes aforesaid are the following: North between sections 22 and 23, var. 15 deg. 24 min. E. Chains 6.20, middle of slough, 30 links wide, course W. Chains 18.20, middle of slough, 50 links wide, course W. Chains 30.50, middle of slough, 80 links wide, course W. Chains 39.27, fence, course E. and W. Chains 40, set posts for corner to sections 14, 15, 22, and 23. Land level and first-rate, subject to overflow from slough. East on a random line between sections 23 and 26, closing with corner sections 22, 23, 26, 27. Land level, first-rate, subject to overflow. North between sections 23, 24, var. 13 deg. 24 min. Chains 40, set post for $\frac{1}{4}$ section corner in mound, trench, and pits. Chains 41.20, middle of slough, 50 links wide, course W.

Chains 78.20, middle of slough, 50 links wide, course N. W. Chains 80, set post for corner to sections 13, 14, 23, 24. Made mounds. Dug pits. Land level, first-rate, subject to overflow from slough.

"(3) That in and by the said descriptive and field-notes the said body of land (colored blue, and marked, 'Land subject to periodical overflow') is represented to be subject to inundation by the overflow of the Calaveras river and its branches, and is thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees, which have been erected to prevent the overflow of the water during the winter and spring months.

"(4) That in the month of April, 1865, one H. T. Hartwell made application, under and in accordance with the provisions of the act of the legislature of California of April 27, 1863, concerning state lands, to purchase the said north-west quarter of section twenty-three (23) from the state as being swamp and overflowed land belonging to the state, and on the twenty-eighth day of said April the county surveyor, Smith, of the county of San Joaquin, wherein the said land lies, made a survey, and recorded in his office a plat and field-notes thereof, in accordance with the said act of the legislature and the instructions of the state surveyor general. It is shown by the said plat and field-notes of the county surveyor that the survey of the said north-west quarter was and is in accordance with the United States survey of said township, section, and quarter section, and that the said north-west quarter is thereon (the plat and field-notes of said county surveyor) described as swamp and overflowed land, and containing 160 acres. The county surveyor certified and reported to the state surveyor general the said plat and field-notes, and the same were received and filed in the office of the state surveyor general on the twenty-second day of October, A. D. 1865; and on the twenty-third day of November, A. D. 1865, the said survey and plat and field-notes thereof were duly approved of record by said state surveyor general.

"(5) That in the month of April, 1869, the said Hartwell made application under and in accordance with the provisions of the act of the legislature of California of March 28, 1868, concerning state lands, to purchase the said north-west quarter of section twenty-three (23) from the state as being of the swamp and overflowed lands belonging to the state, and on the twenty-eighth day of April, 1869, the county surveyor, John Wallace, of the county of San Joaquin, made a survey, and recorded in his office a plat and field-notes thereof, in accordance with the said act of March 28, 1868, and the instructions of the state surveyor general. It is shown by the said plat and field-notes of County Surveyor Wallace that his survey of the said north-west quarter was and is in accordance with the United States survey of said township, section, and quarter section; and the said north-west quarter is thereon (the plat and field-notes of said County Surveyor Wallace) described as swamp and overflowed land, and containing 160 acres. Said County Surveyor Wallace certified and reported to the state surveyor general the said plat and field-notes, and the same were received and filed in the office of the state surveyor general on the fourth day of May, A. D. 1869, and the said survey, and the plat and field-notes thereof, were duly approved of record by the said state surveyor general on the twelfth day of November, A. D. 1869.

"(6) On the nineteenth day of April, 1870, the state of California issued and delivered to the said Hartwell a certificate of purchase of and for the land in suit, founded upon the said last-named application and approved survey. This certificate sets forth that Hartwell had made part payment of the purchase price, and was the purchaser of the land, and that on making full payment, and surrendering the certificate, he should receive the patent of the state for the same. On the first day of April, 1871, this certificate was sold and assigned in writing and delivered by Hartwell to the plaintiff, T. P. Heath.

"(7) That on the twenty-first day of July, A. D. 1876, a patent was issued and delivered by the state to said Heath, as assignee of the certificate for the

said land in suit. This patent is signed, attested, and countersigned by the governor, secretary of state, and register of the state land-office, with the seal of the state thereto affixed; and it sets forth that the land is swamp and overflowed, and had been duly and properly surveyed in accordance with law; that full payment had been made to the state for the land; that all the requirements of the act of congress, as well as the acts of the state legislature, in relation to swamp and overflowed lands, had been complied with; and that the governor of the state, by virtue of authority in him vested, thereby granted, bargained, sold, and conveyed unto T. P. Heath, his heirs and assigns, forever, the said tract of land, with the appurtenances thereto belonging.

"(8) That on the tenth of January, A. D. 1866, the said Hartwell filed in the said land-office at Stockton a pre-emptor's declaratory statement for the said north-west quarter of section 23, alleging settlement thereon September 20, 1862; and on the twenty-ninth day of October, A. D. 1873, the said Hartwell filed in said office a written abandonment of said pre-emption claim and filing. On the eighth day of December, A. D. 1873, the said declaratory statement was canceled on the records of said land-office by order of the commissioner of the general land-office of the United States.

"(9) That the land in suit (N. W. $\frac{1}{4}$ of section 23, township 3 N., range 7 E., M. D. M.) has always been within the boundaries, and has formed a part, of the United States land-district called the 'Stockton Land-district.' Except the said declaratory statement of the said Hartwell of January 10, 1866, no claim, filing, or entry to or upon the said land in suit for pre-emption, homestead, or other purposes, under the laws of the United States, was presented or made of record until the twenty-fourth day of July, 1876.

"(10) That on the twenty-fourth day of July, 1876, the defendant, M. T. Wallace, presented to United States Register Cottle, at the Stockton land-office, an instrument partly in writing and partly printed, called a 'Declaratory Statement,' with the name of said Wallace thereto subscribed. This statement set forth that said Wallace was a native citizen of the United States, and a married man, over the age of twenty-one years, and that on the twenty-fifth day of April, 1876, he settled and improved the said north-west quarter of section 23, and that he intended to claim said tract of land as a pre-emption right under the provisions of the act of congress approved September 4, 1841, and under the act approved March 3, 1853, entitled 'An act to provide for the survey of public lands in California, granting of pre-emption rights therein, and for other purposes;' that said Register Cottle received the said statement, but refused to file the same, and thereon indorsed that he rejected the said written application for the reason that the official plat on file in his office showed said land to have been returned as subject to periodical overflow.

"(11) That the said Wallace appealed from the said decision of the Stockton land register to the commissioner of the general land-office; and on the fifth day of September, 1876, the register and receiver of the Stockton land-office were, by a letter of the commissioner, informed that the north-west quarter of section 23 is claimed by the state under the first section of the act of July 23, 1866, as having been sold in good faith as swamp land prior to that date, and directing the said officers to give notice to the state authorities, to the said Wallace, and all other parties in interest, and hold an investigation to determine said claim of the state.

"(12) That on the eighth day of February, 1877, the register and receiver, after having held the said investigation, decided that the state had no valid claim to said land under the first section of the said act of July 23, 1866, which said decision was subsequently, to-wit, on the nineteenth day of May, 1877, affirmed by the commissioner.

"(13) That in and by the same decision of the commissioner of May 19,

1877, it was adjudged and determined that the state was not entitled to show the character of the said land as swamp and overflowed, under the fourth clause of the fourth section of the said act of July 23, 1866; that the state took an appeal from the last aforesaid judgment of the commissioner to the secretary of the interior, who, on the twenty-eighth day of December, 1877, overruled the commissioner in this behalf, and directed a hearing to be given to the state on the question of the character of the land by virtue of the said fourth clause of the fourth section.

"(14) That pursuant to said order of the secretary, and after notice to the state and all parties in interest, the United States surveyor general held an investigation as to the character of the land, and thereafter it was decided by the said surveyor general that the land was not in fact swamp and overflowed land on the twenty-eighth day of September, 1850, and thereafter said decision was affirmed by the secretary of the interior on the twenty-fifth day of February, 1881; and it was further then adjudged by the secretary that the said tract was subject to disposal under the pre-emption laws, and that Wallace be allowed to perfect his pre-emption claim thereto by entry and patent.

"(15) That after the last-stated decision of the secretary of the interior, to-wit, on or about the month of November, 1881, the said Wallace filed his declaratory statement and made proof and payment for said tract under the pre-emption laws.

"(16) That in the month of June, 1882, a patent of the United States, founded on the said entry, was issued and delivered to the said Wallace for the said tract.

"(17) That after the issuance of the patent to said Wallace the state of California applied to the land department of the United States, claiming that the state was entitled, in respect to said tract, to the benefit of the first and second clauses of section four (4) of the said act of July 23, 1866, and the provisions also of section 2479 and the first and second clauses of section 2488 of the Revised Statutes of the United States, and that said land be accordingly certified over to the state, because the said land, before the act of July 23, 1866, had been segregated and represented by the township survey, field-notes, and plat of the United States as swamp and overflowed, and had been segregated also by the state as swamp and overflowed by several surveys, conforming to the United States system of surveys, made before the passage of said act of July 23, 1866, and of said provisions of the Revised Statutes, and before the settlement of said Wallace.

"(18) That on the twenty-sixth day of April, 1883, the commissioner of the general land-office refused to consider the said application, and dismissed the same on the sole ground that the patent of the United States having already issued for the said tract to said Wallace, the department had no authority or jurisdiction of the subject of said application of the state; and March 3, 1884, the secretary of the interior affirmed this decision of the commissioner upon the same ground, and no other.

"(19) The plaintiff was not the owner of the tract of land in suit on the first day of September, A. D. 1876, and was not entitled to the possession thereof, and was not the owner, or so entitled, when this action was commenced.

"(20) The defendant was in the possession of the land in suit on the first day of September, 1876, and, when this action was commenced, withheld the possession from the plaintiff.

"(21) That the rents and profits of the said land in suit are of the annual value of \$150.

"(22) There is no record in the United States land-office at Stockton or elsewhere showing any selection of said land by the state of California, or any of its officers, prior to July 23, 1866, except so far as such selection may be shown by the facts hereinbefore found; nor is there any record showing that

there was any certification of this land as swamp and overflowed land ever made to the state of California.

"And, as a conclusion of law from the foregoing facts, the court finds that the defendant is entitled to judgment; and it is so ordered."

It is contended on behalf of plaintiff that he is entitled to recover the land in suit under the first clause of section 4 of the act of congress of July 23, 1866, entitled, "An act to quiet land titles in California." Section 4, 14 St. at Large, p. 219. The clause just referred to is as follows: "That in all cases where township surveys have been or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify over to the state of California, as swamp and overflowed, all the lands represented as such upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats."

It is urged that the township survey having been made in this case, and the plat approved, before the act of July 23, 1866, was passed, on which approved plat the land in controversy was represented as swamp and overflowed, it then became the duty of the commissioner of the general land-office, under this clause of the fourth section, to certify such land over to the state of California as swamp and overflowed, within one year after the passage of the act aforesaid; and that, as such duty was a merely ministerial one on the part of the commissioner, the above-mentioned portion of the act was in effect a confirmation to the state of the land in controversy; that thus the title vested in the state, and passed to the plaintiff, claiming under the state.

Conceding that such would be the consequence had the land in suit been represented as swamp and overflowed on the approved plat of the township survey, we are of opinion that the land is not so represented on the plat. The finding is that the land is designated thereon as "subject to periodical overflow." We cannot say that the words used, "land subject to periodical overflow," are the same in meaning as "swamp and overflowed land," or that they are intended to designate land as swamp and overflowed. So holding, we cannot sustain the above contention of plaintiff. We hold the same as to first clause of section 2488 of the United States Revised Statutes, which is substantially a re-enactment of the first clause of the fourth section of the act of 1866.

It is further contended on behalf of plaintiff that as the land in controversy had been surveyed upon the application to purchase made by Hartwell, the assignor of plaintiff, by the county surveyor of the county of San Joaquin; that the surveyor made a plat and field-notes of the N. W. $\frac{1}{4}$ in suit, in accordance with the United States survey of the township, section, and quarter section, described the same as swamp and overflowed, and containing 160 acres, returned such plat and field-notes to the state surveyor general, who received and filed the same in his office on the twenty-second of October, 1865, and approved them on the twenty-third of November, 1865,—that by virtue of the second clause of the fourth section of the act of 1866 above cited, and the second clause of section 2488 of the United States Revised Statutes, the title has passed to the state, and through it to the plaintiff.

The second clause of section 4 referred to is as follows: "The commissioner shall direct the United States surveyor general for the state of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said state; and, when he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward them to the general land-office for approval." The second clause of section 2488 of the Revised Statutes is substantially the same.

We are of opinion that the surveys and plats made, as in this case, under the acts of 1863 and 1868, on the application of a party desiring to purchase

the tract sought to be purchased, are not the segregation maps and surveys referred to in the act of congress of July 23, 1866, and the section of the Revised Statutes above referred to. Granting the survey and plat made on the application of Hartwell to purchase a specific tract of land (the N. W. $\frac{1}{4}$ in controversy) was a segregation map and survey, such as is embraced within the above-quoted clause from the act of 1866, it does not appear that the commissioner gave any direction to the United States surveyor general for this state, as required by the act, or that, if such order was given, it was complied with, or that any township plat was made under this order, or, if made, that it was approved at the general land-office. Such being the case, we cannot hold that any title has vested in the state under the clauses just above referred to of the act of 1866 and section 2488 of the Revised Statutes.

It would be going far to hold that the land in controversy was ever in any manner recognized by the land department at Washington as swamp and overflowed land, when it appears from the findings that in a controversy wherein the parties herein, including the state, were notified, and were heard, or had an opportunity to be heard, it was decided by the United States surveyor general for California that the land in suit was not swamp and overflowed, which decision was afterwards affirmed by the secretary of the interior. This decision was made, as appears from the findings, upon a trial had by order of the secretary of the interior, in which the question to be determined was whether or not the land in controversy was swamp and overflowed, and was ordered to be had under the last clause of section 4 of the act of July 23, 1866.

The foregoing disposes of all the material points discussed by the counsel for appellant.

There is no error, and the judgment is affirmed.

We concur: MCKEE, J.; SHARPSTEIN, J.

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SHERMAN v. FINCH. (No. 9,216.)

(*Supreme Court of California.* September 22, 1886.)

TROVER AND CONVERSION—MORTGAGED PROPERTY—DAMAGES—INSTRUCTION TO JURY.

In an action against an officer for damages for the conversion of personal property on a part of which the plaintiff held a bill of sale, and had a chattel mortgage on the remainder, an instruction to the jury that, if they found that the plaintiff was the owner or bailee of the property, his damages would be the value of the property at the time of the conversion, with interest and a fair compensation for the time and money properly expended in the pursuit of the property, and, if they found that the plaintiff held a chattel mortgage on part of the property, the amount of the mortgage debt, with interest, held a proper instruction.

In bank.

E. W. Wilson and *J. H. G. Weaver*, for respondent, *Sherman*. *S. M. Buck*, for appellant, *Finch*.

Ross, J. This action was brought for the alleged conversion of certain personal property. Upon a part of the property plaintiffs held a chattel mortgage, and for the other part a bill of sale from one Gibson, who was the original owner. Gibson was in debt to one Schoonover, upon which indebtedness he was sued, a judgment given against him, and on which judgment an execution was issued, and placed in the hands of the defendant officer. The officer levied upon and sold all of the said property, under and by virtue of the execution, as and for the property of Gibson, and sought to justify his proceedings upon the trial. The case was tried with a jury, and the verdict was against him. It is claimed to have been contrary to the evidence in the case, and errors of law are also claimed to have been committed during the progress of the trial.

Among them is an alleged error in the instructions of the court in respect to the measure of damages. At the request of the plaintiffs the court instructed the jury that if they should find from the evidence that the plaintiffs were the owners of, or entitled to the possession of, the property as pledgees, and that the defendant wrongfully converted it, the detriment caused by such wrongful conversion was presumed to be—*First*, the value of the property at the time of the conversion, with interest from that time; and, *second*, a fair compensation for the time and money properly expended in pursuit of the property.

Defendant, who is the appellant, does not complain of this instruction, but concedes that it was proper, and in pursuance of section 3336 of the Civil Code, which reads: "The detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, with interest at the option of the injured party; and (2) a fair compensation for the time and money properly expended in pursuit of the property."

But the court below further instructed the jury that if they should find that the defendant levied upon, sold, and converted that portion of the property upon which the plaintiffs held a chattel mortgage, "and that the said defendant neither paid nor tendered to said plaintiff the amount of the mortgage debt and interest, nor deposited the amount thereof with the county clerk or treasurer, payable to her order, then it will be your duty, as to that particular property, to render a verdict for the plaintiff in the amount of the mortgage debt and interest, to-wit, the sum of \$250, with interest from the twenty-fifth of September, 1882, at the rate of eight per cent. per annum." And again: "The plaintiffs have introduced in evidence a chattel mortgage. If you find that said mortgage was duly executed, delivered, and recorded, then I charge you that it devolves upon the defendant, the party attacking the instrument, to satisfy you that said mortgage was fraudulent, and that the plaintiff, Jennie M. Sherman, was a party to the fraud; and that if the defendant fails to do this you will find a verdict for the plaintiffs in reference to the property mortgaged for the amount of the mortgage debt, principal and interest." It is contended on behalf of the appellant that the instructions last quoted are in themselves erroneous, and are also in conflict with that first given.

As to that part of the property covered by the chattel mortgage, the instructions were based upon sections 2968, 2969, and 3338 of the Civil Code, which read as follows:

"Sec. 2968. Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor.

"Sec. 2969. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee."

"Sec. 3338. One having a mere lien on personal property cannot recover greater damages for its conversion from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses."

With respect to the property mortgaged, the instructions did not permit any compensation to the plaintiffs for loss of time and expenses, but confined the damage occasioned by the conversion of that property, if conversion should be found, to the amount secured by the lien. If the plaintiffs should also have been allowed compensation for the time and money properly expended in pursuit of that property, the error, if any, was favorable to the appellant, who cannot, therefore, be heard to complain. In other respects

the instructions in regard to the mortgaged property were in conformity to the provisions of the Code cited, and with the ruling of this court in the case of *Wood v. Franks*, 56 Cal. 217.

The first instruction given at plaintiff's request, to the effect that the damage caused by the wrongful conversion of the property, in the event it was found to have been wrongfully converted, was presumed to be—*First*, the value of the property at the time of the conversion, with interest from that time; and, *second*, a fair compensation for the time and money properly expended in pursuit thereof,—only applied, and in view of the instructions in respect to the mortgaged property could only have been understood by the jury to apply, to that portion of the property not embraced in the chattel mortgage.

But the evidence the court permitted the plaintiffs to give for the purpose of entitling them to compensation for time and money expended in pursuit of the property was not proper, and defendant's motion to strike the same out should have been granted. It was altogether too indefinite and uncertain. To entitle a party to such compensation, the testimony should tend to show that money was properly paid out, and time properly lost, in pursuit of the property, and how much. And, when that is done, it is for the court, or the jury, as the case may be, to allow a fair compensation therefor. In the present case it is impossible to say to what extent the verdict was affected by the testimony erroneously admitted.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.; MCKEE, J.

2 Cal. Unrep. 712

WILLIAMS v. SOUTHERN PAC. R. CO. (No. 9,272.) *

(Supreme Court of California. September 24, 1886.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SLEEPING ON RAILROAD TRACK.

When one goes upon a railroad, and lies down and goes to sleep in such a position as to be injured by a passing train, and is unseen by the officers in charge of the train, although they exercised ordinary care and diligence, *held*, that the railroad company is not liable. THORNTON, J., dissents.

In bank.

D. M. Delmas, for respondent, Williams. *S. F. Geil* and *H. V. Moorehouse*, for appellant, Southern Pac. R. Co.

ROSS, J. The plaintiff, being intoxicated, lay down by the side of the defendant's railroad track, at a point within its right of way, about a mile distant from Salinas, in Monterey county, and went to sleep; and while lying there in that condition had one of his feet so crushed by the engine of the defendant's south-bound passenger train as to require amputation. The train was on time, and was running at its usual speed of from 18 to 20 miles per hour. At the conclusion of the plaintiff's case a motion for nonsuit was made on behalf of the defendant, which the court below refused to grant; and a verdict having been subsequently returned for the plaintiff, the defendant moved for a new trial, which was denied.

An attentive examination of the record satisfies us that in both respects the court below was in error. There can be no sort of doubt that the act of the plaintiff in voluntarily going within the defendant's right of way, and lying down and going to sleep by the side of the track, in such a position that a passing train must strike him, was gross negligence. It is not easy to conceive of any that would be grosser. The case shows beyond question that that act on the part of plaintiff was the direct, proximate cause of his injury. Of course, notwithstanding the negligence of plaintiff, and the fact that he

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* Affirmed in banc. See 13 Pac. 299, 72 Cal. 120.

was a trespasser upon the defendant's right of way, defendant would clearly be liable for any wanton or willful injury to him. As was well said by Mr. Justice MCKEE, in *Tennenbrock v. Southern Pac. C. R. Co.*, 59 Cal. 270: "The mere fact that persons are wrongfully traveling on a railroad, afoot or on horseback, does not authorize officers of the company in charge of a train to run down such persons, or to wantonly inflict injuries upon them. If persons in that position are seen in time to avoid danger by warning them off by proper signals, such as ringing a bell or sounding a whistle, or slowing down, or stopping their train, it is the duty of the officers to resort to such means to prevent injury to the life or limb even of wrong-doers. The duty arises out of the circumstances of the situation, and it is as imperative upon them as any other duty. But if persons in that situation are unseen by the officers in charge of a train until too late, in the exercise of ordinary care and diligence appropriate to the duties which they have to perform for their employers, to prevent injuries to others, or to resort to any means in their power for that purpose, the company is not liable."

There is nothing in the evidence in the present case tending to show that the officers of the defendant's train were guilty of any wanton or willful act towards the plaintiff, and even if it could be held that the evidence tended to show negligence on the part of those in charge of the train, yet, in view of the fact that the evidence shows, without any conflict, that the plaintiff's own gross negligence directly contributed to the injury, we cannot sustain the judgment appealed from without overturning the rule with respect to contributory negligence, long established, and many times announced in this state in the cases, among others, of *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 419; *Flemming v. Western Pac. R. Co.*, 49 Cal. 253; *Robinson v. Western Pac. R. Co.*, 48 Cal. 421; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320.

The case of *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513, referred to and relied on by counsel for respondent, does not sustain his position, nor at all conflict with the doctrine of the cases above cited. In that case it was held that the evidence was sufficient to sustain the verdict of the jury to the effect that there was *no* contributory negligence on the part of the plaintiff, and that there *was* negligence on the part of the defendant. The plaintiff in that case was a child of tender years, and got upon the railroad track without the permission or knowledge of his parents, and was there prostrated by illness. In that condition he was injured by a passing train. Under such circumstances neither the child nor his parents could be fairly held guilty of contributory negligence.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; MYRICK, J.; MCKEE, J.; MCKINSTRY, J.

THORNTON, J. I dissent. I think there was evidence in the case on the question of negligence of defendant, and contributory negligence of plaintiff, which should have been submitted to the jury. This was done by the court below, and there was no error in so doing. The opinion of the majority in this case is in conflict with the judgments of this court in *Shafter v. Evans*, 53 Cal. 33; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *McKeever v. Market St. R. Co.*, Id. 300; and *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45. See, also, *New England Glass Co. v. Lovell*, 7 Cush. 321, and *Railroad Co. v. Stout*, 17 Wall. 657. These cases hold that on questions of negligence (and in this I include contributory negligence, which denotes negligence on the part of the plaintiff) the jury are not only to find the facts, but such inferences as follow from them. The question only becomes one of law when the facts proved are such that men of ordinary judgment and intelligence must all agree that they show negligence. The facts in this case are not of that character, for they tend to show that the engineer in

charge of the train could, if he had discharged his duty, have seen the plaintiff lying on the track. It makes no difference that the engineer testified that he was looking, and did not see plaintiff. His credibility was a question for the jury. The judgment in this case is a new departure, which must result in great embarrassment to this court whenever it is invoked as authority.

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PEOPLE v. LEE WAH. (No. 20,217.)

(*Supreme Court of California.* September 24, 1886.)

PHYSICIAN AND SURGEON — RENDERING MEDICAL SERVICE WITHOUT LICENSE — "EMERGENCY" — MISDEMEANOR — CALIFORNIA ACTS OF APRIL 3, 1876, AND APRIL 1, 1878.

Where one without a certificate renders gratuitous medical services to a person whose case has been given up by regular practitioners, this is not such an emergency as will relieve him from liability under acts of legislature of California of April 3, 1876, and April 1, 1878, making the practice of medicine without a license, except gratuitously and in case of emergency, a misdemeanor.

Department 1.

The Attorney General, for the People. *Wm. L. Gill*, for appellant, Lee Wah.

MYRICK, J. The defendant was accused of a misdemeanor in that he did willfully and unlawfully engage in the practice of medicine without having procured a certificate, as provided by the act of April 3, 1876, (St. 1875-76, p. 792,) and the act of April 1, 1878, (St. 1877-78, p. 918.)

The uncontradicted facts are that the defendant had a place of business in San Jose, at which he kept herbs. Two women (called as witnesses for the prosecution) went to his place of business, stated to him their ailments, and asked if he could give them herbs to effect a cure. He said he could. He prepared herbs of his own selection, and delivered them to the women, who took the herbs to their homes, and made and drank teas. They paid him at times \$10 per week; at other times \$6 per week. The payments were made regularly, without reference to the kind or amount of herbs, and continued several weeks,—in one case 10 weeks. The women testified that they did not pay him for medical services, but for the herbs only. The jury must have been of opinion that both the herbs and services were paid for.

At the request of the defendant the court instructed the jury that if they believed the services testified to were rendered gratuitously, and were rendered in each particular instance in case of emergency, a verdict of not guilty should be rendered. The court then proceeded to define "an emergency," within the meaning of the statute, (which declares that nothing therein contained should be construed to prohibit gratuitous services in cases of emergency,) as follows: "The question is, what is an emergency? Two ladies have testified before you, and stated that their condition was deplorable; that they consulted in vain other physicians; and that they regarded themselves, and were regarded by their friends and physicians, as incurable, and that they repaired to this defendant as a last resort. *The ladies stated upon their part it was an emergency,—an exigency in which death on the one hand and submitting themselves to that treatment on the other were the only alternatives. I instruct you that the emergency contemplated by the statute is not such as this case suggests. It means a case in which the ordinary medical practitioners of the schools provided for by the statute, who are provided with the proper diplomas, and have submitted themselves to the proper examination, are not readily obtainable.* This is an emergency, as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured. The jurors will readily understand that if a person has received an injury in a remote, isolated part of the country, in which some person not a regular practitioner should be called upon to render imme-

diate assistance, and should render it, as in the case of a severe injury, a case of obstetrics, or the like, *such instance would be an emergency which would justify a party in rendering assistance*, and that humanity and decency would require he should not be liable in a criminal prosecution for so doing. So, some person might get hurt, or faint, or fall in a fit in the street, and a person might render him assistance, and thus relieve him from pressing danger. We all understand that is an emergency. In that case no party should decline to render assistance, or be criminally prosecuted for so doing. If, however, a party is satisfied that another school of physicians, or another individual, can render him more efficient aid,—more beneficial services than others,—and he therefore seeks his aid, that is not such an emergency as the statute contemplates."

The appellant urges that these instructions are contradictory. The court left with the jury the question as to whether medical services were rendered gratuitously or for pay; and, in effect, told them if services were rendered gratuitously, and in emergency, they should acquit, but that the circumstances detailed in the testimony did not constitute "emergency" within the meaning of the statute. We see no contradiction.

The evidence was sufficient to justify the verdict. This disposes of all the points made by appellant.

Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 715

CRAMER v. TITTLE. (No. 11,723.)

(*Supreme Court of California.* September 24, 1886.)

APPEAL—UNDERTAKING—SURETY—CORPORATION—CONST. CAL. ART. 4, § 25—CALIFORNIA ACT OF MARCH 12, 1885.

Under article 4, § 25, of the constitution of California, the act of legislature of March 12, 1885, is void, in so far as it attempts to authorize the acceptance of a corporation as sole and sufficient surety in an undertaking on appeal.

Department 1.

J. J. Coffey, for respondent, Cramer. *Robert Ash*, for appellant, Tittle.

MYRICK, J. Motion to dismiss an appeal on the ground of failure to file an undertaking as required by law. An undertaking was filed, with one surety only, viz., the Pacific Surety Company. The company was incorporated under the laws of this state, and executed the undertaking under the act of March 12, 1885. St. 1885, p. 114. That act authorized the officer approving a bond or undertaking to accept, as sole and sufficient surety, any corporation incorporated for the purpose of making bonds and undertakings. The general statute concerning appeals requires that the undertaking on appeal be executed by at least two sureties. Section 941, Code Civil Proc. The constitution (article 4, § 25) prohibits the legislature from passing a special law regulating the practice of courts of justice, and in all cases where a general law can be made applicable.

If the statute in question be taken as an attempted amendment to the Code of Civil Procedure, the objection arises that no such object is stated in the title. If it be taken as an independent statute, it is a special law for regulating the practice of courts, in so far as it attempts to authorize one surety only in place of two. So, also, it is special in a case in which a general law could be made applicable. A general law providing for two sureties has been in force and effect for years. This statute attempts to change the general law in special cases, viz., where a certain kind of corporation is offered as surety.

We are of opinion that the statute, in so far as it attempts to authorize the

approval of a corporation as "sole and sufficient surety," is void. Motion granted without prejudice.

We concur: MCKINSTRY, J.; ROSS, J.

71 Cal. 105

WINGERTER v. WINGERTER. (No. 11,508.)

(*Supreme Court of California.* September 25, 1886.)

1. TRUSTS—ADMINISTRATOR INVOLUNTARY TRUSTEE FOR HEIR—FRAUD—SECTION 2224, CIVIL CODE CAL.

An administrator who procures the heir of his intestate to convey to him all the heir's interest in the estate, by representations which are actually untrue, though not made with a fraudulent intent, is an involuntary trustee of the property conveyed, for the benefit of the heir, under section 2224, Civil Code Cal.

2. EXECUTORS AND ADMINISTRATORS—SALE OF LAND TO PAY CLAIMS—DELAY AMOUNTING TO LACHES—CLAIMS BARRED.

Where there is a failure of personal property to pay a claim which the administrator holds against an estate, the administrator must institute proceedings for the sale of real estate belonging to the estate; and a delay of 13 years to institute such proceedings will bar the claim, although it has previously been allowed by the probate court.

Commissioners' decision. Department 2.

H. T. Gage and Graves & Chapman, for respondent, Jerome Wingerter.
Glassell, Smith & Patton, for appellant, Charles J. Wingerter.

BELCHER, C. C. This action was commenced in August, 1883, to obtain a decree that the defendant held the title to certain real property, described in the complaint, in trust for the plaintiff, and that he be required to account for its rents and profits. The case was tried, and judgment rendered in favor of the plaintiff. The defendant moved for a new trial, and, his motion being denied, appealed from the judgment and order.

The facts, as disclosed by the record, are substantially as follows:

In September, 1867, John D. Wingerter died intestate in the county of Los Angeles, being at the time a resident of that county, and leaving estate therein. The plaintiff was the only child and heir of the deceased, and, at the time of his father's death, was and now is a resident of the state of Missouri, and has never at any time been in the state of California. The defendant, a brother of the deceased, residing in this state, was, on the eighteenth day of October, 1867, duly appointed by the probate court of Los Angeles county the administrator of his estate, and he continued to act as such administrator until the settlement and distribution of the estate, in November, 1881. Upon his appointment the defendant took charge of the property of the estate, which consisted of some personal property and 23 acres of land, situate in the city of Los Angeles. Prior to 1870 the defendant sold the personal property, and paid all claims against the estate, except one for \$6,332.03, which was presented by himself and allowed by the probate judge, on the thirty-first of August, 1868.

The plaintiff first learned of his father's death some time in the year 1868, through his uncle Jacob Wingerter, who resided in Missouri, and informed plaintiff that defendant requested him to send defendant a power of attorney to represent plaintiff in the estate. Plaintiff was then a minor, and did not make a power of attorney at that time, but he became of age in 1871, and after that made and sent the power as requested. Plaintiff was informed in 1868 that his father owned, at the time of his death, a vineyard at Los Angeles, but he received no further information in regard to the estate till about the month of May or June, 1881, when the defendant sent to his brother, Jacob Wingerter, in Missouri, a deed conveying all of plaintiff's interest in his father's estate to defendant, and also containing a release of all claims of

plaintiff against defendant on account of his administration of the estate. In a letter accompanying the deed, defendant represented that the plaintiff's interest in the estate was worth little or nothing, and he requested that the plaintiff execute the deed, and release and return it to him, agreeing if he did so to pay him \$1,000. The deed was given to plaintiff, and he was informed of the contents of the letter, and of the offer of \$1,000 for his interest in the property, which sum was about twice the amount of the estimated cost of closing the estate. The plaintiff then, on the twelfth of July, executed the deed, and gave it to his uncle, to be returned to the defendant, and it was so returned. On examining the deed the attorneys for defendant were not satisfied with the certificate of acknowledgment, and they thereupon drew another deed and release in substantially the same form, and also a power of attorney, authorizing one Patton, then a clerk in the office of defendant's attorneys, to appear for plaintiff in the probate proceedings, and to consent to the immediate settlement of the estate and the accounts of the defendant as administrator, and to release and discharge defendant from all liability as administrator, and to make for plaintiff all other waivers and consents which he might think proper. The defendant then took these papers, and went with them to the state of Missouri, where he found the plaintiff, and again informed him that his interest in the estate was worth little or nothing, but that he would give him the \$1,000 promised if he would execute the papers last mentioned, at the same time telling him that there was some defect in the deed executed by him in July.

The plaintiff thereupon, on the fifteenth day of August, executed the deed and release and the power of attorney to Patton, and the defendant paid the thousand dollars. The defendant then returned to California, and in October presented to the probate court the final account of his administration, showing the property of the estate to consist of \$1,865.15 cash, two 500-gallon casks worth \$20, and the 23 acres of land before mentioned; and also showing that the plaintiff, as sole heir to the estate, had, by his deed, conveyed to defendant all his right, title, and interest in and to the property of the estate, both real and personal, and had released the defendant from all claims and demands whatsoever on account of his administration of the estate. The matter came on for hearing before the court on the seventh day of November, and thereupon, Patton appearing for the plaintiff, and consenting, all the property was distributed to the defendant.

When plaintiff executed the deeds to the defendant, he knew there was a vineyard upon the property, but had no knowledge as to its size, character, or value. He had full confidence in the defendant, and depended upon him entirely for information concerning the value of his interest in the estate, and he executed the deeds and power to Patton in the full belief that the representations made to him by defendant were true. So, when defendant's account was settled and distribution made, he did not appear, except as above stated, because he still believed in the representations of defendant, and supposed he had received all he was entitled to, and more than his interest in the estate was worth. In point of fact, the estate consisted of \$1,865.15 cash on hand, and of 23 acres of land in the city of Los Angeles, on 20 acres of which there was a vineyard in full bearing, and yielding from 80 to 114 tons of grapes per annum, then worth the sum of \$9,913. And the only unpaid claim against the estate was that of defendant for \$6,332.03, which was presented and allowed in 1868.

In making the representations which induced plaintiff to execute the deeds and power to Patton, defendant was not guilty of any actually fraudulent intent. On the contrary, as he viewed his claim, and the interest due upon it from the time of its allowance, and the costs and expenses of making a sale of the property, he regarded the estate as insolvent, or at most worth but little, if anything, over the claim against it. But nevertheless the representa-

tions were actually untrue. The claim of defendant against the estate, as presented by him and allowed by the court, consisted of a mutual open and current account, extending over a period of more than 10 years. No settlement of the account or statement of a balance had been had or made between defendant and deceased, and upon this account defendant had computed interest on each item at 12 per cent. per annum, compounded annually, and by this computation had made the balance due him \$6,332.03. Striking off the interest from both sides the balance due him was only \$2,353.86. Upon these facts the court below considered that defendant's claim should be treated as liquidated and settled, or without remedy, and that defendant held the real property in trust for plaintiff, and not subject to the payment of his claim, or to be charged therewith.

1. Did the evidence justify the findings? After carefully reading all the evidence presented in the transcript, we are of the opinion that it did. Upon some points there was a conflict, but even upon these points it seems to have preponderated in favor of plaintiff.

2. With regard to the deeds, it is admitted by the appellant that the principles of law apply which govern the dealings of parties standing in fiduciary relations, according to which, not only is the utmost good faith upon the part of the fiduciary required, but the burden of proof devolves upon him to show that such faith was observed, and also that the beneficiary was fully informed of his rights, and not misled even by unintentional misrepresentations. But with regard to the judgments of courts of competent jurisdiction it is claimed that the rule is different; that they can only be set aside for actual fraud; and that, as the defendant was guilty of no intentional fraud, the decree of distribution giving him title to the property should have been allowed to stand.

Section 2224 of the Civil Code provides:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

This action was not brought to set aside the deeds and decrees of distribution, but to charge the defendant as an involuntary trustee, for the benefit of the plaintiff, of the property which he fraudulently and wrongfully obtained under them. The action was authorized and proper, and plaintiff was entitled to the relief granted. *O'Connor v. Flynn*, 57 Cal. 293; *Olivas v. Olivas*, 61 Cal. 382.

3. It is earnestly argued for the appellant that, whatever view may be taken of the other points in the case, a reversal is necessitated by the ruling of the court that the claim of the defendant was barred by his failure to institute proceedings for the sale of the land, and that plaintiff was entitled to a reconveyance without paying any part of the indebtedness due from the estate to defendant. It is said the claim of defendant, after its approval, constituted a judgment, and required no further legal proceedings to establish its validity, and that the rule that he who seeks equity must do equity should have been applied.

It is settled law in this state, and has been ever since the decision in *Beckett v. Selover*, 7 Cal. 215, that on an application to sell the real estate, the heir may dispute the validity of the claims on which the petition is based, although they have been allowed by the executor or administrator and probate judge; that the petition to sell is a substitute for an action against the heir, who must be cited, and then first has his day in court; and that the "allowance" is only *prima facie* proof of the claim.

In *Estate of Crosby*, 55 Cal. 574, a petition had been presented and granted to sell real estate to pay a claim 17 years after the claim was allowed. After reviewing the authorities, the court, on page 586, said: "A full examination

of the foregoing and other cases, in which it was admitted that the statute of limitations did not apply, will show it to have been held, nevertheless, from the very nature of the proceedings and the character of the duties imposed upon the courts where the estates of deceased persons are administered, as well as from the various provisions of the statutes of different states, which, however they may differ in detail, are all impressed with an evident legislative intent that the proceedings shall be promptly inaugurated and continuously prosecuted, without unnecessary delay, that the courts of probate retain the power, and it is their duty, to refuse an order granting leave to sell where the delay amounts to laches." The court then, after stating that it could see nothing in the facts appearing in the findings to excuse the delay of 17 years, which had occurred in the case, further said: "It would seem that the circumstances which can excuse a delay otherwise unreasonable, must be such as arise out of the peculiar condition of the administration, and such as have prevented the executor or administrator from moving more expeditiously. * * * In any event, we cannot conceive of a case in which a delay to petition for more than seventeen years after qualification of an administrator could be held to be reasonable." The order directing the sale was reversed, and the court below was directed to dismiss the petition.

In this case the defendant delayed for *thirteen years* to petition the court for an order to sell the property to pay his claim, and no excuse is given, or attempted to be given, for the delay. During that time the rents, issues, and profits of the property, as returned by defendant, were \$6,820.85, and his expenditures as administrator amounted to \$4,955.70. He may have thought his claim bore good interest, and that he could take his own time to wind up the estate and pay it; but, if so, he was mistaken. The delay, being without excuse, was unreasonable; and if, in 1881, he had applied for an order to sell the property, his application would have been denied. The fact that, instead of applying for such an order, he went to the plaintiff, and, without explaining to him the condition of the estate, or telling him what or whose claims were against it, or why his interest in it was worth little or nothing, induced him to execute the deeds, and power to Patton, can put the defendant in no better position than he would have been in if he had applied for an order. The rule invoked by counsel, therefore, does not apply.

The other points made in the case do not require special notice.

In our opinion, the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 142

SNOW v. HOLMES. (No. 9,325.)

(Supreme Court of California. September 28, 1886.)

1. MORTGAGE—MISTAKE IN DESCRIPTION OF NOTE—FORECLOSURE.

Where a note was correctly described in a mortgage except as to its date, and no question was made that the note produced was the one referred to and intended to be secured, the mistake as to date was held immaterial, and therefore it was not necessary that the mortgage be reformed before foreclosure.

2. SET-OFF AND COUNTER-CLAIM—BREACH OF CONTRACT—GOOD-WILL.

Where the defendant purchased from the plaintiff, with certain tangible property, the good-will of a business, and gave a promissory note for a part of the purchase money, and the plaintiff afterwards willfully proceeded to draw off the defendant's customers, and to deprive him, to a large extent, of the good-will so purchased, and thereby damaged him in a sum greater than the amount remaining due on the note, *held*, that the defendant was entitled to have the damages sustained by him offset against the purchase money which the plaintiff was seeking to recover.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Fran-

H. L. Barnes, for respondent, *Snow*. *Langhorne & Miller*, for appel-
Holmes.

BELCHER, C. C. Action upon a promissory note, and to foreclose a chattel mortgage. The original complaint was filed August 2, 1880, and the amended complaint, August 10, 1882. In both complaints is set forth a copy of the note, and attached to them is a copy of the mortgage. The note is dated March 1, 1878, and is payable on demand, with interest. The mortgage is dated June 1, 1878. In the mortgage the note is correctly described, except that its date is given as February 8, 1878.

In the amended complaint it is alleged that the mortgage was made to secure the note sued on; that at the time the mortgage was prepared, signed, and delivered, the plaintiff did not have the note with him, and that the plaintiff and defendant then and there, by accident and mistake as to the date thereof, directed the notary who drew the mortgage to describe the note as bearing date February 8, 1878, instead of its true date; that the plaintiff did not discover the mistake so made until the month of January, 1882; and that by reason of the premises he is entitled to have the mistake corrected, and the mortgage reformed, by inserting therein the true date of the note in place of the erroneous one.

The answer raised no issue as to the fact that the mortgage was given to secure the note set out in the complaint, but it denied that, at the time the mortgage was prepared, signed, and delivered, the plaintiff did not have the note with him, or that either the plaintiff or defendant, by accident or mistake, directed the notary to describe the note as bearing date February 8, 1878, or that the defendant ever at all so directed the notary or any one else. It further denied that the plaintiff did not discover the mistake until January, 1882, and alleged that since the note and mortgage were made and delivered to plaintiff he had had possession of them, and "that continuously since the occurrence of said mistake the plaintiff has had all the means necessary for discovering the same within his power, and has had every reasonable cause to put him upon inquiry as to the same." The answer then alleged that the cause of action for the reformation of the mortgage was barred by the provisions of subdivision 4, § 338, Code Civil Proc.

The defendant also, by way of cross-complaint, set up that in 1874 the plaintiff was engaged in the business of cleaning and dyeing in the city of San Francisco, under the name of "John F. Snow Cleaning & Dyeing Works;" that the defendant purchased of the plaintiff a half interest in his said business, including the one-half of all property then owned and used by plaintiff in his said business, and the one-half of the good-will of said business, for the sum of \$5,000; that the property purchased, exclusive of the good-will, was not worth over \$1,500, and that the balance of the purchase price was for the good-will; that to effect the purchase the defendant paid to the plaintiff \$2,000, and gave him his promissory note for \$3,000; that the note so given was delivered up by plaintiff, and the note in suit given in place thereof, and that the defendant had paid one-half of the principal of the note, and the interest thereon up to July 1, 1880; that after his purchase the plaintiff and defendant carried on the business as copartners under the firm name of "John F. Snow & Co. Cleaning & Dyeing Works," until June 1, 1878, when the partnership was dissolved, and plaintiff sold, assigned, and conveyed to defendant all his right, title, and interest in and to the said business, and the property, assets, and good-will thereof, and the firm name, with the sole right to conduct the said business under the said firm name; that ever since the first of June, 1878, the defendant has carried on, and still carries on, the

business under the late firm name; that the principal place of business of the old firm, and of defendant as successor thereto, has been continuously and still is in the rear of lot 1623 Mission street, in the city and county of San Francisco; that on or about May 1, 1879, the plaintiff again entered into the business of cleaning and dyeing in the said city and county, under the firm name of "John F. Snow Cleaning & Dyeing Works," without the authority, license, or consent of defendant, and has thenceforth continuously so carried on the same; that, in order to deceive the public and induce the customers of the defendant to patronize the plaintiff and his establishment, the plaintiff has continuously advertised his cleaning and dyeing works as the original John F. Snow Cleaning & Dyeing Works, and has, in that and various other ways, represented his business to be the same as that of the old firm; that in September, 1881, the plaintiff constructed in front of the defendant's dye-works, at 1623 Mission street, a wooden building, and established therein a branch office of his business, and has ever since and is still carrying on thereat his business of cleaning and dyeing; that the sole object of the plaintiff in his acts and doings has been, and is, to create in the minds of the public the impression that the business of the plaintiff is a continuation of the business of the old firm, and to draw off the customers of the old firm, and to deprive the defendant of the good-will sold to him as aforesaid, and to appropriate the same to himself, and to harass, annoy, and injure the defendant and benefit himself; that the acts of the plaintiff have had the effect to deprive the defendant in large measure of the said good-will, and have drawn off his customers, and injured and damaged him in the sum of \$20,000; that, by reason of the facts aforesaid, the consideration for the note and mortgage has in great part wholly failed; and that the \$1,500, and interest already paid by defendant on the note, is a just and reasonable price for the property actually received by defendant from plaintiff, and of which he has not been deprived by the wrongful acts of the plaintiff as aforesaid; and that defendant, in law, equity, or good conscience, ought not to be required to pay any more. The prayer is that plaintiff take nothing by his action; that the note and mortgage be decreed to be fully paid, satisfied, and discharged; and that defendant have judgment for his costs.

The plaintiff answered the cross-complaint, admitting some of its averments to be true, and denying others.

At the trial the plaintiff called witnesses to prove the mistake made in the date of the note as it is described in the mortgage, and how it occurred, and also that he did not know of the mistake until January, 1882, and then rested his case. Counsel for defendant then called defendant as a witness in his own behalf, and offered to prove by him each and every one of the allegations and denials contained in his answer and cross-complaint. Counsel for plaintiff objected to the testimony offered, upon the ground that it was irrelevant, incompetent, and immaterial. The court sustained the objection, and the defendant reserved an exception to the ruling. Judgment was then entered in favor of the plaintiff. The appeal is from the judgment and an order denying a new trial.

Two points are made for the appellant. The first is that the mortgage could not be foreclosed until after it was reformed, and that the action, so far as it concerned the reformation of the mortgage, was barred, because the amended complaint was not filed till more than three years after the plaintiff knew or might have known of the mistake.

The point is not well taken. The note was correctly described in the mortgage, except as to its date, and no question was made that the note produced was the one referred to and intended to be secured. If the date had been entirely omitted from the description, the mortgage would still have been good, and might have been foreclosed. It was a case of misdescription in part, and the maxim, *falsa demonstratio non nocet*, applies.

In Massachusetts, where a statute referred to a vote of a town by a wrong date, it was held that the date might be rejected as surplusage, the reference being clear without it. *Shrewsbury v. Boylston*, 1 Pick. 105. So, where property was insured in a warehouse, described in the policy as "No. 1," when in fact it was "No. 2," it was held by this court that the false description might be rejected, as the remaining description of the property sufficiently identified it. *Hatch v. New Zealand Ins. Co.*, 7 Pac. Rep. 411.

As the mistake was immaterial, it was not necessary that the mortgage be reformed, and the statute invoked had therefore no application.

The second point presented, is that the court erred in refusing to hear testimony in support of the allegations of the cross-complaint. To this the respondent answers that there was no error, because the cross-complaint was uncertain and insufficient as a pleading, and demanded no affirmative relief.

The cross-complaint doubtless might have been improved in some respects, but it was answered, and not demurred to. As we read it, it in effect sets forth that the defendant purchased from the plaintiff, with certain tangible property, the good-will of a business, and gave the promissory note sued on for a part of the purchase money; that the plaintiff had afterwards willfully proceeded to draw off the defendant's customers, and to deprive him, to a large extent, of the good-will so purchased, and had thereby damaged him in a sum greater than the amount remaining due on the note; and the defendant asked, therefore, that it be held that the note was fully paid, satisfied, and discharged.

The good-will of a business is the expectation of continued public patronage, and is property, transferable like any other property. Sections 992, 993, Civil Code. "One who sells the good-will of a business thereby warrants that he will not endeavor to draw off any of the customers." Section 1776, Civil Code.

If the plaintiff did endeavor to draw off customers from the defendant, and succeeded in so doing, as alleged, there was a breach of the warranty which attended the sale of the good-will of the business, and the plaintiff became liable therefor in damages; and to recover those damages it was not necessary, as claimed, that the contract of sale be first rescinded. "If the vendor warrants the goods sold, and the vendee discovers, after they are delivered, that there has been a breach of the warranty, he is not compelled to return the goods, although he may do so and rescind the contract, but he is at liberty to retain them, and bring an action for the breach of the warranty, or he may plead the breach in reduction of damages in an action brought by the vendor for the purchase money." *Polhemus v. Heiman*, 45 Cal. 573.

Under this rule the defendant was entitled to have the damages sustained by him offset against the purchase money which the plaintiff was seeking to recover. The relief sought was affirmative, and it related to or depended upon the contract or transaction upon which the action was brought. Section 442, Code Civil Proc.

As presented, we think the pleadings were sufficient, and that the court erred in refusing to hear the testimony offered by the defendant.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

71 Cal. 87

PERKINS v. RALLS and others. (No. 11,537)

(Supreme Court of California. September 24, 1886.)

COURTS—CALIFORNIA SUPERIOR COURT—JURISDICTION—ACTION FOR DAMAGES AGAINST ASSESSOR—SECTION 57, SUB. 3, CODE CIVIL PROC.

An action to recover damages against a tax assessor for his alleged wrongful and malicious act is not within the jurisdiction of the California superior court, under section 57, sub. 3, Code Civil Proc.; following *Brown v. Rice*, 52 Cal. 491.

Commissioners' decision.

Department 2. Appeal from the superior court, county of Lassen.

E. V. Spencer and *J. E. Raker*, for plaintiff and appellant. *C. G. Kelley* and *A. L. Shinn*, for defendants and respondents.

FOOTE, C. The plaintiff instituted an action against the defendants, a tax assessor and his sureties, on his official bond, for the sum of \$132 damages, which he alleged he had suffered by reason of a wrongful and fraudulent assessment made by Ralls, one of the defendants. The complaint was demurred to on several grounds, among which was this: "That this court has no jurisdiction of the subject-matter of the action." The action was brought in the superior court of the county of Lassen. The demurrer was sustained, and, the plaintiff declining to amend his complaint, judgment was rendered against him for one dollar costs, from which he has appealed.

The plaintiff seeks to recover damages against the assessor for his alleged wrongful and malicious act, and for that purpose he brings an ordinary action for damages in the superior court for less than \$300. The action was not, in our opinion, within the jurisdiction of that court, under section 57, sub. 3, Code Civil Proc. It did not, within the purview of that section, involve "the legality of a tax." The reasoning of this court in *Brown v. Rice*, 52 Cal. 491, is applicable to this case.

The judgment should be affirmed.

We concur: **BELCHER, C. C.; SEARLS, C.**

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 115

WHITE v. DOUGLASS. (No. 9,642.)

(Supreme Court of California. September 27, 1886.)

1. JUDGMENT—SETTING ASIDE—ERRORS IN JUDGMENT.

A judgment based on a finding against an admission made in the pleadings cannot be sustained, unless it is apparent that the judgment would have been the same if the objectionable finding had not been made.

2. SCHOOLS—LANDS—STATE AGRICULTURAL COLLEGE LANDS—SECTIONS 3533 AND 3534, POL. CODE CAL.—CONSTRUCTION OF—POWER OF LAND AGENT.

Under the statutes (sections 3533 and 3534 of the Political Code) relating to the disposition of the agricultural college lands, the land agent of the university had no power to sell land to an applicant who was not a qualified purchaser, or whose application was not in the prescribed form.

3. SAME—CONFLICTING CLAIMS OF INDIVIDUALS—RIGHTS OF ACTUAL SETTLERS.

A person who has never settled upon university land, never occupied or improved it, acquires no right to purchase it which can be maintained against an application to purchase by an actual settler upon the same land.

In bank. Appeal from superior court, county of San Joaquin.

J. H. Budd and *W. L. Dudley*, for plaintiff and respondent. *S. L. Terry*, for defendant and appellant.

McKEE, J. This was an action to determine a contest about the right to purchase a parcel of land as a portion of the 150,000 acres of land granted to

the state for the use of an agricultural college. The right was adjudged in favor of plaintiff. From the judgment, and an order denying a motion for a new trial, the defendant appeals.

The application of each of the contestants was made to the land agent of the university under sections 3533 and 3534 of the Political Code. Defendant's application was first in time; it bears date twenty-sixth of February, 1874. That of the plaintiff about four years later; it bears date the seventeenth of January, 1878. Being first in time, defendant's application must be regarded as first in right, (*Crandall v. Woods*, 8 Cal. 136,) unless it was so defective in form as to be insufficient in law to originate a right, or, if sufficient in form, was not in fact accepted by the official to whom it was made, or the land proposed to be purchased was selected by the state or located for the benefit of the proposed purchaser, or unless the plaintiff had acquired a prior right to the land which entitled him to preference as a purchaser. Upon all these grounds it is claimed that the defendant had not acquired a right to purchase the land, and that the right of purchase was vested in the plaintiff.

The court finds that the defendant's application was made to the land agent of the university on the twenty-sixth of February, 1874; that upon filing the application the defendant paid to the agent the sum of \$269, which was received and accepted in part payment of the proposal to purchase "in case the application would be approved by the board of regents;" that certain rules and regulations as to the sale of university lands had been adopted by the board of regents, and were in existence and force at the date of filing the application, which required of an applicant to purchase any portion of said lands to accompany his application with an affidavit, "containing, among other things, a statement that there was no occupation of nor settlement upon the land sought to be purchased other than that of such applicant;" that the affidavit which accompanied defendant's said application contained no such statement; "that the application itself was never accepted by the board of regents, and the land which the defendant applied to purchase was never located in said United States land-office, Stockton district, Cal., in which the same was and is situate, for defendant's benefit." In addition, it is found that "the defendant never resided on the land which he applied to purchase, never occupied or cultivated or used it in any way, never was in possession of it, never made or had any improvements upon it, and never had any legal or equitable claim to it."

There is no specification that the evidence was insufficient to justify the last finding, or, indeed, any of the other findings, except (1) the finding as to rules and regulations of the board which were in force when the defendant filed his application, and required him to accompany his application with an affidavit of settlement and occupation by him of the land which he proposed to purchase; (2) the finding that the moneys paid by the defendant to the land agent were paid upon his application "in case the same would be approved by the board;" and (3) the finding of non-selection and non-location of the land by the land agent upon the defendant's application, and for his benefit as a proposed purchaser. It is assigned as errors that of these exceptional findings the first is not sustained by the evidence, the second is contrary to the evidence, and the third is contrary to the fact as admitted by the pleadings.

The first assignment of error is not true. The evidence was sufficient to sustain the finding.

The second and third assignments of error appear to be true; for the cross-complaint of the defendant contains the allegation "that, pursuant to his [defendant's] application, the land agent of the university filed in the United States land-office at Stockton, Cal., an application to have said land located as part of the agricultural college grant; said application being made for the use and benefit of the defendant." That allegation was not denied. The plaintiff answered it in the following words: "Further answering, plaintiff

admits that the land agent, upon the application of defendant, filed in the United States land-office at Stockton an application to have the land located as a part of the agricultural college grant, and that the application was made for the use of the defendant." The plaintiff also admits that he protested against the defendant's application, and he affirmatively alleged that the application was rejected, and that no appeal was taken from the decision. But there was no proof and no finding of the alleged facts, and we must presume that, as the land afterwards became the subject of controversy between the contending applicants, it was selected and located in place, for the purpose of sale, to whichever of the applicants was entitled to purchase. The finding is therefore contrary to the fact admitted by the pleadings.

Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of the fact being admitted, is conclusive. A finding against the admission is therefore outside the issues, and a judgment based upon such a finding, or upon a finding which is not justified by or is contrary to the evidence, cannot be sustained. *Silvey v. Neary*, 59 Cal. 97; *Tracy v. Craig*, 55 Cal. 91; *Bradbury v. Cronise*, 46 Cal. 287; *Hill v. Den*, 54 Cal. 20; *Gregory v. Nelson*, 41 Cal. 286; *Burnett v. Stearns*, 33 Cal. 468. Such a finding is therefore a reversible error, unless it is apparent that the judgment would have been the same if the objectionable finding had not been made, and it had been given with reference to the facts as admitted by the pleadings, or proved by uncontroverted evidence. *Robinson v. Placerville R. Co.*, 65 Cal. 263; S. C. 3 Pac. Rep. 878.

Assuming, therefore, as the basis of defendant's application, that the defendant never settled upon the land which he applied to purchase, never occupied it, nor made or had any improvements upon it, that his application to purchase was not made according to law, and that, upon his defective application, the land was selected and located in place by the land agent of the university, the question is, did the defendant have any right to purchase the land?

Under the congressional grant to the state of its agricultural college lands, the state, as owner, for the purposes of the grant, had the right to select the lands from surveyed or unsurveyed public lands within its territorial limits, subject to pre-emption and sale, (12 U. S. St. at Large, 503; 16 U. S. St. at Large, 68, 587,) and to prescribe *how* the lands should be selected, and to whom and in what manner they would be sold. By statutes passed twenty-third and twenty-eighth March, 1868, (St. 1868, pp. 248, 510,) and fourth of April, 1870, (St. 1870, p. 877,) the provisions of which were substantially re-enacted by sections 3533 and 3534 of the Political Code, the state conferred power upon the board of regents of the university to regulate the selection and sale of the lands, by instructions issued to the land agent of the university, who was authorized, as the agent of the state, to select the lands for the board of regents, and to sell them to applicants in the manner prescribed by the board by its instructions, and, upon effecting a sale, to issue certificates of purchase and patents to purchasers who complied with the conditions of sale fixed by the board. When, therefore, an application was made to purchase any of said lands, it called into exercise the power of the land agent to receive and act upon the application according to his instructions. After receiving the application, his first step, in the exercise of his power, would be to have the land applied for selected and located in place for the purpose of selling it to the applicant, if qualified and entitled to purchase. But he would have no power to sell the land, even after the selection and location, to an applicant who was not a qualified purchaser, or whose application was not made according to the instructions issued to him by the board of regents, under which he was acting. That, according to the unassailable findings of the court below, was the *status* of the defendant when he filed his

application; and the judgment of the court that he had no right to purchase the land was justified by the evidence and the facts admitted by the pleadings in the case.

But it is urged that, if the defendant had not the right to purchase the land, neither had the plaintiff, because his application, made on the seventeenth of January, 1878, was accompanied with an affidavit like unto the affidavit made by the defendant, and which accompanied his application. Unquestionably the objection would be well taken if the plaintiff's application was made under the same law; and it is undoubtedly true that the rule of law concerning such applications, once established, is presumed to continue in force until repealed or changed. Sub. 32, § 1963, Code Civil Proc. But the legislature changed the law by a statute passed thirteenth of March, 1874. St. 1873-74, p. 356. As changed, the law was in force on the day of the plaintiff's application to purchase. It is not denied, and the court finds, that the plaintiff's application was made in due form of law, and was accompanied by an affidavit which complied in all respects with the statute, and the rules and regulations of the board in force, and that thereafter, and before the commencement of this action, the board accepted and approved the application, and received from the applicant the sum of \$1,070 in payment of the purchase money of the land.

Upon these undisputed facts, in connection with the facts that the plaintiff was an actual settler upon the land, and had continuously occupied it and resided upon it with his family for 20 years, and had put improvements upon it of the value of \$1,500, and that the defendant had never settled upon, occupied, or improved it, we think that the plaintiff was vested with a right to purchase, and that the defendant was not. A person who has never settled upon university land, never occupied or improved it, acquires no right to purchase it which can be maintained against an application to purchase by an actual settler upon the same land, who has improved it, and resided upon it with his family for 20 years. In such condition it would be unjust and inequitable to sell the land to a mere outside applicant, who, it must be presumed, proposes to buy for the purpose of dispossessing the actual occupant.

Judgment and order affirmed.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MYRICK, J.; ROSS, J.

71 Cal. 136

HAMBLETON v. DUHAIN and another. (No. 11,513.)*(Supreme Court of California. September 28, 1886.)***1. PUBLIC LANDS—ACQUISITION OF RIGHTS BY PRE-EMPTION—RIGHTS OF PRIOR SETTLERS—CONFLICTING CLAIMS TO.**

No right of pre-emption can be established by a settlement and improvement on a tract of public land, when the claimant forcibly intruded upon the possession of one who had actually settled upon, improved, and inclosed the tract; and such intrusion, though made under pretense of pre-empting the land, is but a naked, unlawful trespass, and cannot initiate a right of pre-emption.

2. SCHOOLS—LANDS—19 St. U. S. 268—CONSTRUCTION OF.

The "Booth Act," (19 St. U. S. 268,) confirming to the state of California the title to certain school sections selected in lieu of those improperly supposed to be in Mexican grants, or which were otherwise defective or invalid, covers any and all defects in school selections.

Commissioners' decision.

Department 2. Appeal from superior court, county of Yolo.

C. H. Garontte, R. Clark, and John Lambert, for plaintiff and respondent.

J. H. Craddock, for defendants and appellants.

FOOTE, C. This was an action to quiet title to certain lands which the plaintiff claimed to have acquired mediately through various conveyances, from the state of California, by its patent. The cause was tried by the court, a jury having been expressly waived. Judgment was rendered for the plaintiff, and from that, and an order denying the defendants a new trial, they have appealed. The findings of fact are as follows:

"(1) That the tract of land in dispute, to-wit, the south-east quarter, and the south-east quarter of the south-west quarter, of section 1, and the north-east quarter of the north-west quarter of section 12, township 9 north, of range 2 west, M. D. M., was applied for by the locating agent of the state of California to the general government in lieu of the north-west quarter, and north half of the south-east quarter, of section 16, township 24; that the location of and the application for this tract was made in the year 1861, and in that year the selection was approved and accepted by the register of the United States land-office, and by the governor of the state of California, and was afterwards, in the year 1873, duly listed by the United States to the state of California; that at the time of the location of application for selection, approval, and acceptance of this tract of lieu land, the basis of the lieu, the said north-west quarter, and north half of the south-east quarter, of section 16 was covered by an Indian reservation, known as the 'Nome Lackee Indian Reservation;' that the said Indian reservation was relinquished by the government of the United States in the year 1870; that prior to the relinquishment of the said Indian reservation full payment had been made for this lieu land to the state of California by those through whom plaintiff claims, and a certificate of purchase issued by said state; that in the year 1883 the said lieu or indemnity land was canceled by reason of the relinquishment by the general government of the Indian reservation on the basis of the said tract of lieu land.

"(2) That one E. S. Drew, before the cancellation of this indemnity land, having paid the purchase money for this tract of land, received from the state of California a certificate of purchase therefor, and afterwards assigned the said certificate of purchase to one M. A. Woods; that the said M. A. Woods dying before the issuance of letters patent to him by the state of California for the said land, the same were issued to the heirs of the said M. A. Woods; that the said letters patent are in due and proper form, and pass to the said heirs the said tract of lieu land herein described.

"(3) That plaintiff, by direct conveyances from the heirs of M. A. Woods and their grantees, is in the actual possession, and was, at the time of the entry of defendants hereinafter referred to and found, in the actual possession.

sion of the said tract of land; that the said conveyances are in due form, and are and were duly recorded in the office of the recorder of Yolo county; that in the month of March, in the year 1877, plaintiff, while in the actual possession of the whole of this tract of land, held under his conveyance an undivided one-third of the same; that in the year 1879, while in the actual possession of the whole, plaintiff held under his conveyance an undivided one-third of said land, and in the year 1882, and subsequently, still being in the actual possession of the whole, he held the remaining third of said land under his conveyance as aforesaid.

"(4) That for about twelve years next preceding the commencement of this action plaintiff was in the actual and undisturbed possession of the whole of the said tract of land, either as tenant of the patentees of said land or their grantees, or holding the same by virtue of his conveyances as aforesaid, except during the time such possession was disturbed by the entry of defendants; that continuously during this period of time plaintiff cultivated and farmed the said tract of land, growing thereon crops of hay, grain, etc., and has improved the same by the erection of a building and fences thereon, and has from and since the month of September, 1879, hitherto paid the state and county taxes on the said tract of land.

"(5) That on the twelfth day of May, 1884, defendants and each of them were qualified and competent to make homestead entries under the homestead laws of the United States, that on said date C. C. Duhain, one of the defendants, filed his application with the register and receiver of the United States land-office, at Marysville, Cal., to enter a portion of said tract of land under the homestead laws of the United States, the said portion being the south-east quarter of section 1, township 9, of said tract; that on the same date James Whalen, one of the defendants, filed his application with the said register and receiver to enter the other portion of said tract of land under the homestead laws of the United States, being the south-east quarter of the south-west quarter of section 1, and the north-east quarter of the north-west quarter of section 12, township 9; that defendants took and performed all the preliminary steps incidental to their several homestead applications.

"(6) That, after having filed their homestead applications as set forth in the above finding, defendants entered upon the said lands, and each of them erected a small house thereon, dug a well, and exercised acts of ownership over the same; that at the time of the entry of defendants upon the said lands as aforesaid the same were inclosed with a good and substantial fence, with a dwelling-house erected thereon; that both the fence and the house had been previously built by plaintiff; that at the time of said entry plaintiff had growing on the larger portion of said tract of land a crop of wheat, and on the other portion a crop of hay, and at said time was in the actual possession of the whole of said tract, claiming title to the same through his several conveyances from the patentees of the state of California and their grantees.

"(7) That the defendants' claim of title to the said tract of land is founded solely upon their application to enter the same under the homestead laws of the United States."

It will be readily perceived that the defendants, as pre-emptioners, are not in a situation to claim any priority with the United States government which would entitle them to be heard in a court of equity to deny the plaintiff's right to have his title quieted under the state patent, even if the government of the United States, by its proper officers, might, if so minded, initiate proceedings to have that patent canceled, for the entry and settlement of the defendants was clearly unlawful. They entered without permission upon premises inclosed by a fence, which had been continuously for years in the undisturbed possession of the plaintiff, on which he had made substantial improvements and built a house, and upon which he had long cultivated (without hindrance or interference from any source) crops of grain and hay.

"The generosity by which congress gave to a settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land." *Atherton v. Fowler*, 96 U. S. 515. "No right of pre-emption can be established by a settlement and improvement on a tract of public land when the claimant forcibly intruded upon the possession of one who had actually settled upon, improved, and inclosed the tract, and such intrusion, though made under pretense of pre-empting the land, is but a naked, unlawful trespass, and cannot initiate a right of pre-emption." *McBrown v. Morris*, 59 Cal. 74. This being so, it follows that the defendants are utter strangers to any rights which the government of the United States may have to the lands in dispute, and cannot be heard to object to the quieting of plaintiff's title.

The fact that they are endeavoring to have the land-officers of the United States government reverse a former decision, which declared the title to this land to be in the state,—the plaintiff's patentor,—cannot give them any right to prevent the plaintiff from succeeding, as against them, in this action; for, according to the findings, they, being trespassers, cannot legally be heard to claim title from the United States, even if the title to the land is yet vested in the United States. So that, granting all the defendants claim, viz., that the title of the lands in dispute yet remains in the government of the United States, and conceding that the patent from the state through which the plaintiff claims does not convey to him a title as against the United States, nevertheless the defendants have no privity of claim, right, or of title with the latter which permits them to dispute the plaintiff's right.

But admitting that the lands in dispute, when selected by and certified to the state, were improperly so certified, and that the state, as against the United States government, was not entitled to them as *lieu* lands, yet by virtue of section 2 of the act of congress of 1877, commonly called the "Booth Act," such selections were made valid, for it is there provided "that where indemnity school selections have been made and certified to the state, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States." 19 St. U. S. 268.

The use of the words, "or are otherwise defective or invalid," shows that the intention of congress in enacting the law, of which they form an important part, was to cover any and all defects in indemnity school selections which might have been made and certified to the state. We are of opinion, therefore, that the defect in the selection and certification under consideration is such a defect as comes clearly within the letter as well as the intent of the statute, which is a curative act, designed to quiet the possession and confirm the claim of those who in good faith purchased from the state thinking they thereby got a good title, but who in law did not, and which, upon well-settled principles, should be liberally construed. *Martin v. Durand*, 63 Cal. 39-43.

The findings are sustained by the evidence, and no prejudicial error appears in the record. We are therefore of opinion that, considering the *status* occupied by the parties to this action towards each other, the judgment and order should be affirmed.

WE CONCUR: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 194

PEOPLE v. McDOWELL. (No. 20,227.)

(Supreme Court of California. September 30, 1886.)

1. LIBEL AND SLANDER—CRIMINAL PROCEEDINGS—EVIDENCE.

In an action for criminal libel, to allow a witness to testify to whom the article alleged to be libelous has reference, *held* to be error, this being for the jury to say.

2. SAME—PROVINCE OF JURY.

In actions for criminal libel, while the jury are to determine the law as well as the facts, they are not at liberty to determine that what the statute declares to be a criminal libel is not such.

Department 1. Appeal from superior court, city and county of San Francisco.

This was a prosecution for criminal libel.

The Attorney General, for the People. *S. W. & E. B. Holladay*, for defendant and appellant.

ROSS, J. The defendant is entitled to a new trial. The court below erred in permitting the witness Andrew J. Clunie to be asked and to answer the question: "Please look at page 6 of this paper, and state to whom the article contained upon that page, under the heading, 'Sharks and Humans,' [being the article alleged to be libelous,] has reference?" It was for the jury to say to whom the article referred.

The court below also erred in instructing the jury as it did, in effect, that they might, if they thought proper, ignore the law defining libel. While, in actions for criminal libel, the jury are to determine the law as well as the facts, they are, of course, not at liberty to determine that what the statute declares to be a criminal libel is not such.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; MYRICK, J.

71 Cal. 130

ELY v. YORE. (No. 11,139.)

(Supreme Court of California. September 28, 1886.)

FORCIBLE ENTRY AND DETAINER—TRESPASS.

Where the plaintiff was in actual and peaceable possession of land, upon which the defendant, at an unusual time and with a large number of men, entered, by tearing down the fence, and removing its materials to another part of the land, such acts were more than a trespass,—they constituted a forcible entry, whether the owner of the land was or was not absent from the scene of action; and the fact that the defendant did not personally remain in possession does not affect the character of his entry.

Department 2. Appeal from superior court, county of Yuba.

W. G. Murphy, for respondent, Ely. *E. A. Forbes*, for appellant, Yore.

MCKEE, J. The appeal in this case is from an order denying a motion for a new trial, and from judgment which awarded to the plaintiff restitution of a tract of land described in the complaint in the action, \$300 damages for a forcible entry on the land, and costs of suit. The judgment was given upon evidence which proved that on the sixteenth of August, 1886, plaintiff and defendant were coterminous occupiers of separate tracts of land; plaintiff being in the actual and peaceable possession of his tract, which was inclosed on all sides by a substantial fence, and the defendant in the actual possession of the land contiguous to the southern fence line of the plaintiff's land. Each of the parties being thus in possession of his land, the defendant, after night-fall of the said sixteenth of August, entered into the plaintiff's inclosure with several teams of horses and wagons, and a force of nine men, whom he em-

ployed for the purpose, and broke down and dug up the plaintiff's fence, which separated the two tracts of land, for the distance of about a mile, and carried the materials of the fence back upon the plaintiff's land for more than 30 rods north of where the fence had been taken up, leaving exposed and open a strip of summer-fallowed land over 30 rods wide.

There appears to have been a dispute between the parties about the right of possession of this strip of land on the southern line of the plaintiff's inclosure; and, while the dispute was going on, the defendant made his entry upon the land. At the time of the entry the plaintiff was not present. He resided within his inclosure, about two miles away, and had no knowledge of the entry by the defendant, nor of the acts committed by him in making the entry, until several days afterwards. When he discovered what had been done, he made no attempt to reconstruct the fence upon its original line, and the materials were left as they lay on the ground where the defendant had scattered them. The defendant and his men worked all night at hauling the fence away. The work was not finished until after sunrise the next morning, when the defendant, with his men and teams, retired from the ground. Personally he did not remain upon the land, but he asserted possession of it as a portion of the tract of which he was in the actual possession, and in October following he reharrowed the ground and sowed it in grain. The present action was commenced in November.

There was no doubt that the entry on the land was unlawful; but it is contended that it amounted in law to only a trespass, and not to a forcible entry. So that that is the question.

In *Dickinson v. Maguire*, 9 Cal. 51, it is said: "At common law a man dis seized of his land might lawfully regain possession thereof by force; and the party turned out by force had no remedy to regain possession." But that was changed by statute of 5 Rich. II., which contains the first principle of the law of forcible entry, and is expressed as follows: "(1) * * * That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner. (2) And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will." By subsequent statutes, justices of the peace were vested with jurisdiction to try the forcible entry complained of; and if the same be found by the jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiry into the merits of the title; for the force is the only thing to be tried, punished, and remedied. 4 Bl. Comm. 148.

These are substantially the provisions of existing legislative enactments of the United States upon the subject of forcible entry upon lands. The language of our Code is: "Every person is guilty of a forcible entry who either (1) by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or (2) who, after entering peaceably upon real property, turns out, by force, threats, or menacing conduct, the party in possession." Section 1159, Code Civil Proc.

By Code law a peaceable entry upon land is permissible, but an entry by force and violence is prohibited. The Code expression of an entry by "violence or circumstances of terror" is the equivalent of the English statutory law expression of an entry "with strong hand and a multitude of people." To constitute such an entry under either law it is not necessary that it should be accompanied with tumult or riot directed against the person of the party in possession. It will be sufficient if it is attended with such a display of force as manifests an intention to intimidate the party in possession, or deter him from defending his rights, or to excite him to repel the invasion of his

possession, and thus bring about a condition of things which the law was intended to prevent and punish; namely, acts tending to excite a breach of the peace. Where an entry is made with such a display of force, accompanied by destruction of property upon the land on which the entry is made, it is a forcible entry, whether the owner of the land was or was not absent from the scene of action.

Such is the result of the cases under our Code, and the statutory laws of other states. *Mason v. Powell*, 38 N. J. Law, 576; *Gray v. Collins*, 42 Cal. 152; *Brown v. Perry*, 39 Cal. 23; *Ainsworth v. Barry*, 35 Wis. 136; *Steinlein v. Halstead*, 42 Wis. 422; *Warren v. Kelly*, 17 Tex. 544; *Allen v. Tobias*, 77 Ill. 169. And an application of the principle of those cases to the facts of this case resolves the validity of the judgment appealed from.

It is conceded that the plaintiff was in the actual and peaceable possession of the premises upon which the defendant, at an unusual time, and with a large number of men, entered, by tearing down the fence, and removing its materials to another part of the land. Such acts were more than a trespass; they constituted a forcible entry. *Gray v. Collins* and *Brown v. Perry*, *supra*. The fact that the defendant did not personally remain in possession of the land upon which he entered by violence does not affect the character of his entry. He was legally adjudged guilty of a forcible entry.

Let the judgment and order be affirmed. So ordered.

We concur: SHARPSTEIN, J.; THORNTON, J.

71 Cal. 153

CITY AND COUNTY OF SAN FRANCISCO v. HEYNEMANN. (No. 8,623.)

(*Supreme Court of California*. September 28, 1886.)

TAXATION—TAX COLLECTOR—SURETY ON OFFICIAL BOND—STATUTE OF LIMITATIONS.

Where action was brought against a surety on the official bond of a tax collector nine years after the expiration of his term of office, the statute of limitations was held a bar, although a demand had been made four years previously upon the tax collector for the moneys for which he had failed to account.

In bank. Appeal from superior court of San Francisco.

Wm. Craig, for appellant, City and County of San Francisco. *T. R. Wise* and *A. Heynemann*, for respondent, Heynemann.

ROSS, J. The respondent, Heynemann, became surety on the official bond of Alexander Austin as tax collector of the city and county of San Francisco, for the two years commencing the first Monday of December, 1870, and ending the first Monday of December, 1872, when Austin's term of office expired. During his term the latter, as tax collector, received certain moneys which he failed to pay over or to account for. Nearly five years afterwards, to-wit, April 26, 1877, plaintiff demanded of Austin the money, which he failed and refused to pay; and nine years from the expiration of Austin's term of office—that is to say, January 6, 1881—plaintiff commenced this action upon the official bond of the delinquent. To the action a plea of the statute of limitations was interposed, which was sustained by the court below, and must be sustained here. It is attempted to be avoided on behalf of the city and county by saying that the statute did not commence to run until the demand was made on Austin in 1877. But to so hold would be to hold that the tax collector was not bound to pay over the moneys collected by him in his official capacity until the city and county made demand upon him for them. Clearly this was not so. The money was not received by the tax collector as an ordinary deposit. He received it in his official capacity, and was legally bound to pay it over to the proper custodian in accordance with the requirements of the law, and the contract of the sureties was that, in the event of his failure to do so, they should be held liable. Whether the law in force at

the time required him to pay the moneys collected to the treasurer of the city and county the first Monday of each month or not, there can be no doubt that he was legally bound to pay them over upon the expiration of his term of office. In such a case no necessity for any demand existed. The party was in default by his own act, and a debtor to the city and county for the amount due. *State v. Poulterer*, 16 Cal. 514. It results that the court below was right in holding the action barred by the statute of limitations.

The facts in the case of *San Luis Obispo Co. v. King*, 11 Pac. Rep. 178, (decided May 18, 1886,) were unlike the facts here, and, besides, what was there said in respect to the statute of limitations was unnecessary to the decision.

Judgment affirmed.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.

THORNTON, J. I concur in the judgment.

(72 Cal. 29)

PLUMMER v. WOODRUFF. (No. 9,793.)

(*Supreme Court of California*. September 28, 1886.)

PUBLIC LANDS—STATE LANDS—PURCHASE—AFFIDAVIT.

An affidavit for the purchase of lands from the state must strictly conform to all the requirements of the statute, and the matters of fact required to be alleged must be proved as set forth, in order to establish the right to purchase in case of contest.

Department 1. Appeal from superior court, county of Mendocino.

J. A. Cooper, for respondent, Plummer. *J. N. Mannon* and *F. R. Williams*, for appellant, Woodruff.

ROSS. If, as has been frequently held here, and which must now be regarded as settled, an affidavit for the purchase of land from the state must conform to all of the requirements of the statute authorizing the purchase, it logically follows that the matters of fact required to be alleged must, in case of contest, be proved as alleged, else no right to purchase accrues. In the case before us the plaintiff applied to purchase the land in contest under and by virtue of the provisions of section 3495 of the Political Code. If, as was stated in the affidavit and as is alleged in the complaint herein, there was no occupation of the land adverse to that of the plaintiff, the affidavit conformed to the requirements of the statute, and upon proof of the facts as alleged the plaintiff would have been entitled to judgment that he be permitted to make the purchase. But the findings of the court below are to the effect that there was, at the time of the plaintiff's affidavit and application, an occupation of a portion of the land adverse to any on his part. The fact that, notwithstanding such adverse possession, plaintiff might, under the circumstances specified in the statute cited, have been entitled to purchase, does not aid him here; for neither his affidavit nor complaint bring him within the provisions of the statute regarding the land as presented by the findings. In other words, it is not sufficient to show a state of facts which would have entitled him to purchase under an application which was in fact not made.

Judgment reversed, and cause remanded.

We concur: MCKINSTRY, J.; MYRICK, J.

(71 Cal. 126)

WHEELER and others v. WEST and others. (No. 11,167.)

(*Supreme Court of California*. September 28, 1886.)

1. PLEADING—ANSWER—CONTRACT.

A contract relied upon as a defense to an action should, when opportunity is afforded, be pleaded either *in hæc verba* or according to its legal intendment or effect.

2. EVIDENCE—ADMISSIONS—AMENDED COMPLAINT.

Where an original complaint has been superseded by an amended pleading, the allegations of the former are not admissible as evidence.

3. MINES AND MINING CLAIMS—LICENSE TO WORK A MINE.

A verbal contract, under which defendants were to enter and work a certain portion of a mine, if they saw fit, did not create the relation of landlord and tenant between them and the plaintiffs, but was simply a license to work the mine, protecting the defendants from a charge of trespass while the license was in force, but liable to revocation at the will of the licensors.

Commissioners' decision.

Department 1. Appeal from superior court, Placer county.

C. A. & F. P. Tuttle, for appellees, Wheeler and others. *Hale & Craig*, for respondents, West and others.

SEARLS, C. This is an action to perpetually enjoin defendants from extracting and removing gold from the mining claim of plaintiffs, situate in the county of Placer. Defendants had judgment, from which, and from an order denying a new trial, plaintiffs appeal. The amended complaint avers that on the twenty-eighth day of August, 1883, the defendants entered into the tunnel which penetrates the mining claims in question, and at a distance of about 2,000 feet from its mouth wrongfully began to dig the gold-bearing gravel and bed-rock on the sides of the tunnel, and to take gold therefrom; that plaintiffs required them to desist from so doing, which they refused to do; that they have continued such acts up to the time of the commencement of this action, and threatened to so continue; that defendants are insolvent, etc. The answer to the amended complaint denies all wrongful acts on the part of defendants, and avers "that ever since about the fourteenth day of February, 1883, and down to and including the first day of September, 1883, these defendants were lawfully possessed of and were actually engaged in working and mining said part of said claim, pursuant to a contract and agreement between plaintiffs and themselves; and defendants aver that they still are, and at all times since the said first day of September have been, entitled under said contract and agreement to continue the working of said part of said claim." Defendants justify their acts under this contract, but do not plead it except to the extent and in the manner above quoted.

At the trial, the defendants were permitted, against the objection of plaintiffs, to prove that plaintiffs and defendants entered into a verbal contract, by the terms of which defendants were permitted to enter upon, occupy, and mine a portion of the Paragon mining claim, the property of plaintiffs, in consideration of the payment to plaintiffs by the defendants of one-fourth of the gross yield of gold to be derived from such mining. The objection to the evidence under which this verbal contract was established, was based upon "the ground that no contract was pleaded in the answer, and no issue raised on any contract."

A contract relied upon as a cause of action, or defense to an action, should, where opportunity is afforded, be pleaded, either *in hæc verba* or according to its legal intentment or effect. The attempted plea of the contract by defendants was by way of confession and avoidance of the wrongful acts charged in the amended complaint, and, as pleaded, amounted to no more than a conclusion of law. The objection to the evidence should therefore have been sustained.

2. At the trial the defendants offered in evidence the original complaint in this action. Plaintiffs objected on the grounds that it was irrelevant, and had been superseded by an amended complaint. The objection was overruled, the complaint admitted, and this action is assigned as error. The error is well assigned. The original complaint had been superseded by an amended pleading, and thereafter its allegations were not admissible as evi-

dence for or against the plaintiffs. *Mecham v. McKay*, 37 Cal. 165; *Ponce v. McElvy*, 51 Cal. 222.

3. The verbal contract of February 14, 1883, as found by the court and jury, under which defendants were to enter and work a certain portion of the mine if they saw fit, and to exercise their own discretion whether they worked it or not, did not create the relation of landlord and tenant between them and the plaintiffs. The contract gave to them no greater right, and had no more force in law, than a verbal contract for the sale of the land would have possessed. Their right under such a contract was not in and to the realty, but to the gold as personalty, when it should be severed from the land. Had it been in writing, it would have given to defendants merely an incorporeal hereditament, and, being verbal, it operated as a license to them to dig and mine for gold within the specified limits, which license protected them from a charge of trespass while in force, but was liable to revocation at the will of the licensors. There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty, but as personal property; and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner. *Riddle v. Brown*, 20 Ala. 412; *Funk v. Haldeman*, 53 Pa. St. 229; *Gillett v. Treganza*, 6 Wis. 343; *Grubb v. Bayard*, 2 Wall. Jr. 81; *Caldwell v. Fulton*, 51 Pa. St. 483; *Dal v. Wood*, 2 Barn. & Ald. 724; *Potter v. Mercer*, 53 Cal. 673.

The agreement was revocable at the will of the plaintiffs, and, having been by them revoked before suit brought, plaintiffs were entitled to a recovery.

For these reasons we are of opinion the judgment and order appealed from should be reversed, and a new trial ordered, with leave to defendants to amend their answer if they shall be so advised.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered, with leave to defendants to amend their answer if they shall be so advised.

71 Cal. 134

PACKER v. BIRD and others. (No. 11,162.)

(Supreme Court of California. September 28, 1886.)

WATERS AND WATER-COURSES—NAVIGABLE WATERS—ISLANDS—RIPARIAN OWNER.

Where, by the terms of a patent, land is bounded by a navigable river, the title extends no further than the edge of the stream, and does not include an island, though the channel between that and the main-land may not be navigable.

Department 2. Appeal from superior court, county of Colusa.

John T. Harrington, for appellant, Packer. *W. G. Dyas* and *Stabler & Bayne*, for respondents, Bird and others.

THORNTON, J. In this action the controversy relates to an island in the Sacramento river, in that portion of the river which is a navigable stream. The plaintiff claims under a patent from the United States issued on a confirmed Mexican grant. The land as granted was bounded by the Sacramento river, and lay on the west side of the river. The patent, by its terms, is also bounded by the river. The contention of plaintiff is that the land granted and patented to him, being bounded by the river, extends to the thread of the stream, and includes the island.

We do not concur in this view. The river, being navigable in fact, the title extends no further than the edge of the stream. We think this conclusion accords with the rulings in *People v. Gold Run D. & M. Co.*, 4 Pac. Rep. 1152, and *Lux v. Haggin*, 10 Pac. Rep. 674. We think that the court ruled correctly in holding that the plaintiff acquired no title to the land sued for, by the patent of the United States in this case.

The appellant relies, to sustain his contention, greatly on the judgment in *Railroad Co. v. Schurmeir*, 7 Wall. 272. We cannot perceive its applicability to the facts of this case. The land sued for here is clearly an island. The court in the case cited manifestly did not hold the land in controversy to be an island. The slough, so called, in that case, was not, nor was it held to be, a part of the Mississippi river.

It makes no difference that the portion of the Sacramento river on the west side of the island is not ordinarily navigable, or not navigable at all. There is but one river, and that a navigable one. The waters on each side of the island constitute parts of one navigable stream.

The judgment and order are affirmed.

We concur: MCKEE, J.; SHARPSTEIN, J.

2 Cal. Unrep. 602

MONTGOMERY v. LOCKE and another. (No. 9,740.) *

(*Supreme Court of California.* August 30, 1886.)

1. WATERS AND WATER-COURSES—LEVEE—DAMAGE TO PROPERTY.

Where the effect of a levee constructed by the defendant was to retain upon the land of the plaintiff, longer than it would otherwise have remained, the accumulated water of floods, and his property was injured thereby, the defendant was held liable for damages.¹

2. DAMAGES—MEASURE OF—IN ACTIONS OF TORT—INJURIES TO PROPERTY.

In ordinary actions of tort, it is unnecessary to state specifically, and in amounts, the different statements or items which go to make up the sum total of the damages; it is enough to state the facts constituting the cause of action, and claim as much in gross, as damage for the wrong done.

3. SAME—SPECIAL DAMAGES—PLEADING—EVIDENCE.

If special damages are claimed, the facts establishing such special damages must be stated with particularity, in order that the defendant may be enabled to meet the charge if it be false, and, if not so stated, cannot be given in evidence.

Commissioners' decision. In bank.

J. O. Campbell and F. T. Baldwin, for respondent, Montgomery. *Byers & Elliott and W. L. Dudley*, for appellants, Locke and another.

SEARLS, C. This is an action to recover damages for injury to the land of the plaintiff by construction of levees, which are claimed to have obstructed the natural flow of water, and for a judgment that the levees, dams, and embankments of defendants be abated as a nuisance. Plaintiff had a verdict as follows: "We, the jury in the above-entitled cause, find for the plaintiff in the sum of fifteen hundred (\$1,500) dollars, caused by the repair and maintenance of levee No. one (1) by the defendants." Plaintiff thereupon waived all right to a decree abating the nuisance complained of, and judgment was rendered in his favor on the verdict for \$1,500, and costs. Defendants appeal from the judgment, and from an order denying a new trial.

Plaintiff is the owner of certain lands lying and being on and near the Mokelumne river. Defendant Holman owns land below and west of and adjoining that of plaintiff, and defendant Locke owns land still west of that of Holman. The land of plaintiff has a gentle slope to the south-west. A slough puts out of the river near the north-east corner of plaintiff's land,

¹ See note at end of case.

* Affirmed in banc. See 13 Pac. 401, 72 Cal. 75.

passes through it in a general south-westerly direction, having some branches and lateral sloughs, and passes off upon the land of defendant Holman, thence through that of defendant Locke, and unites with the Mokelumne river again at a point above Staples' Ferry. In times of flood a portion of the water from the river, and the surface water from the adjacent lands, flow into and through the slough.

In 1879 and 1880 the defendants built a levee upon the land of Holman, commencing near the lower end, near the south-east corner of plaintiff's land, and running thence, near the dividing line between the land of plaintiff and Holman, in a westerly and southerly direction, by which the main slough above mentioned was closed up, and water prevented from passing down through it. This is the levee No. 1 referred to in the evidence and verdict of the jury. The tendency of this levee was to hold the water, and back it on the land of plaintiff.

In April, 1880, there occurred a flood of short duration, which it is claimed was retained upon the land of plaintiff by levee No. 1 until it gave way. It was repaired by defendants, and a few weeks later a second flood occurred, which involved the whole vicinity, and continued for weeks.

There was testimony tending to show that the effect of levee No. 1 was to retain upon the land of plaintiff, longer than it would otherwise have remained, the accumulated water of this last flood, and that the effect of the standing water was to injure his alfalfa, fruit trees, and vines.

The instructions of the court to the jury were quite as favorable to the defendants as the law will warrant; and of the exceptions taken during the progress of the trial it is sufficient to say the errors relied upon are for the most part without merit, and, where otherwise, are not of sufficient importance to warrant a reversal of the judgment.

The objection to the statement, because not settled in time, is not supported by any such statement or bill of exceptions embodying the facts as will warrant us in the conclusion that the court below erred in overruling the objections of respondent to the settlement.

The demurrer to plaintiff's complaint was properly overruled. Each count of the complaint stated facts sufficient to constitute a cause of action against defendants. In ordinary actions of tort, it is unnecessary to state specifically, and in amounts, the different statements or items which go to make up the sum total of the damages. It is enough to state the facts constituting the cause of action, and claim as much in gross, as damages for the wrong done. *Shepard v. Pratt*, 16 Kan. 209. If special damages are claimed, the facts establishing such special damages must be stated with particularity in order that the defendant may be enabled to meet the charge if it be false, and, if not so stated, cannot be given in evidence. 1 Chit. Pl. (15th Amer. Ed.) 414.

We find no error in the judgment roll, and are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

WATERS AND WATER-COURSES—DIKES OBSTRUCTING THE FLOW OF WATER. No one has the right, even on his own land, to obstruct the flow of a natural stream, wholly or in part, without becoming answerable for the damages to the adjacent land-owners. *Wattier v. Miller*, (Or.) 8 Pac. Rep. 354; *Union Pac. Ry. Co. v. Dyche*, (Kan.) 1 Pac. Rep. 243; *Crawford v. Rambo*, (Ohio,) 7 N. E. Rep. 429; *Potter v. Howe*, (Mass.) 6 N. E. Rep. 233; *Valley Ry. Co. v. Franz*, (Ohio,) 4 N. E. Rep. 88; *Stone v. Roscommon L. Co.*, (Mich.) 26 N. W. Rep. 216; *McKenzie v. Mississippi & R. R. B. Co.*, (Minn.) 13 N. W. Rep. 123; *Weaver v. Mississippi & R. R. B. Co.*, (Minn.) 11 N. W. Rep. 114; *Van Orsdal v. Burling-*

ton, C. R. & N. Ry. Co., (Iowa,) 9 N. W. Rep. 379; O'Connor v. Fond du Lac, A. & P. Ry. Co., (Wis.) 9 N. W. Rep. 287; Ames v. Cannon River Manuf'g Co., (Minn.) 6 N. W. Rep. 787.

But the owner of land situate on a running stream has the right to construct embankments for the protection of his land, exercising due care not to cause material injury to the land of his neighbor, Barnes v. Marshall, (Cal.) 10 Pac. Rep. 115; Crawford v. Rambo, (Ohio,) 7 N. E. Rep. 429; and where such embankment does not dam up any water-course, but deepens the water on the other side caused by floods, the owners of such flooded lots cannot complain, Hoard v. City of Des Moines, (Iowa,) 17 N. W. Rep. 527.

71 Cal. 83

HOGAN v. CENTRAL PAC. R. CO. (No. 11,482.)

(Supreme Court of California. September 24, 1886.)

1. WAYS—OBSTRUCTION OF STREET—NUISANCE—ADJOINING LAND-OWNER—SPECIAL DAMAGE.

The owner of land which extends only to the margin of a street cannot maintain an action for a nuisance caused by the obstruction of the street, without showing special damage.¹

2. SAME—SPECIAL DAMAGE—WHAT CONSTITUTES.

When the other residents of a street suffer equally in kind with an abutting lot-owner by reason of the obstruction of the street, no special damage results to him from such public nuisance.

Commissioners' decision. Department 2.

J. C. Campbell, for appellant, J. M. Hogan. W. L. Dudley, for respondent, Central Pac. R. Co.

SEARLS, C. This is an action by the plaintiff, the owner of a house and lot situate upon Sacramento street, Stockton, to recover damages, to abate as a nuisance, and enjoin defendant from maintaining, an embankment and railway track upon and along said Sacramento street. The cause was submitted to a jury upon special issues, and upon the findings of such jury, which were adopted by the court, and upon certain other findings made by the court, judgment was entered in favor of the defendant. The appeal is by plaintiff from the final judgment, and the cause comes up on the judgment roll.

From the findings it appears, among other things, that Sacramento street, prior to March 31, 1869, was a public street, and used as such, and was 80 feet in width, and two miles in length; that plaintiff, since said date, has been the owner of the east half of block 199, described in the complaint, bounded on the east by the west line of Sacramento street, upon which lot of land he had a dwelling-house which he was accustomed to let for a rental of about \$30 per month. In 1869 it is admitted the defendant or its grantor constructed its railroad upon and through Sacramento street, consisting of an embankment five and one-half feet high, and some thirty feet in width at the base, upon which its railroad track is laid, and over which it runs its cars, etc. The railroad company obtained no authority or permission from the board of supervisors of the county of San Joaquin, or from the city council of the city of Stockton, to construct or maintain its road upon Sacramento street.

A space of say 35 feet in width is left on the west side of the embankment, along Sacramento street, for the passage of wagons, carriages, vehicles, etc., which is found to be room for their passage. The railroad was so constructed as to afford security to life and property, and so as not to unnecessarily obstruct or impair the passage of the street in front of plaintiff's premises. The facilities and means of ingress and egress to and from plaintiff's land, and the free use and occupation thereof, were obstructed by the embankment and track. The rents of plaintiff's property were not reduced by reason of the railroad, and he suffered no damage therefrom.

¹ See note at end of case.

Plaintiff was aware of the construction of defendant's road, did not consent thereto, but made no complaint, and gave no notice that it was a nuisance, until March, 1884, when the amended complaint was filed. Plaintiff has not sustained any injury, by reason of the construction and operating of said railroad, different in character or kind from that which other land-owners fronting on the line of said street have suffered.

The complaint shows that from December, 1862, to 1870, the Western Pacific Railroad Company was a railroad corporation, organized and doing business in the state of California, and under the laws thereof; that in June, 1870, the Western Pacific Railroad Company and the Central Pacific Railroad Company of California, also a corporation organized under the laws of the state of California, amalgamated and consolidated their capital stock, property, assets, franchises, liabilities, etc., under the corporate name of the Central Pacific Railroad Company, the defendant herein, which is a corporation organized and now doing business under the laws of the state of California, etc. The defendant admits these allegations, and avers that the Western Pacific Railroad Company was organized to construct and operate a railroad from San Jose, in Santa Clara county, to Sacramento, California, and that the railroad in question was constructed under the act of congress of July 1, 1862, and the several acts amendatory and supplemental thereto, commonly known as the "Pacific Railroad and Telegraph Acts of Congress," and under the statute of the state of California approved May 20, 1861, (St. 1861, p. 607), entitled "An act to provide for the incorporation of railroad companies," etc., and also the statute of the state of California approved April 4, 1864, entitled "An act," etc., (St. 1864, p. 471;) that, by virtue of the acts and statutes aforesaid, said Western Pacific Railroad Company was authorized, and it was lawful for it, to construct and operate its railroad in, on, and through Sacramento street, etc.

As before stated, the cause comes up on the judgment roll alone, and we must presume the findings were supported by the evidence. Upon the facts as presented, each party asked for a judgment, and the only question for consideration is, did the facts impose upon the court below the duty of rendering judgment in favor of plaintiff?

Two facts exist which we think must preclude his recovery:

1. His premises only extended to the west line or margin of, and did not include, the street upon which the railroad was constructed. He could not, therefore, maintain an action against the defendant for a nuisance caused by the obstruction of a public street in front of his lot, without showing some special damage. *Severy v. Central Pac. R. Co.*, 51 Cal. 195; *Thomp. Highw.* 256.

2. Plaintiff suffered no injury, by reason of the construction and operating of the railroad, different in character or kind from that which other land-owners fronting on the line of the street have suffered. It is well settled "that the special injury resulting from a public nuisance which will sustain a private action must be peculiar to the plaintiff, and not common to him and many others. If it operates equally or in the same manner upon many individuals constituting a particular class, * * * it is not a special damage to each within the meaning of the rule." *Thomp. Highw.* 256; *Lansing v. Smith*, 8 Cow. 146; *Butler v. Kent*, 19 Johns. 223; *Pierce v. Dart*, 7 Cow. 609; *Mills v. Hall*, 9 Wend. 315; *Tibbets v. Blade*, 60 Cal. 428; *Crowley v. Davis*, 63 Cal. 460; *Aram v. Schallenberger*, 41 Cal. 449; *Bigley v. Nunan*, 53 Cal. 403; *Payne v. McKinley*, 54 Cal. 532.

In view of the foregoing facts, and of the further fact that plaintiff had suffered no damage by reason of the railroad from June, 1870, to January, 1872, (from the time of the organization of the defendant to date of suit brought,) we are of opinion the judgment in favor of defendant was proper, and should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

NOTE.

WAYS—NUISANCE—ACTION BY LAND-OWNER FOR OBSTRUCTION. A private person cannot, without showing some damage special and peculiar to himself, maintain an action to remove an obstruction from the public highway, or to recover damages therefor, *Marini v. Graham*, (Cal.) 7 Pac. Rep. 442; *Platte & D. D. Co. v. Anderson*, (Colo.) 6 Pac. Rep. 515; *Sohn v. Cambern*, (Ind.) 6 N. E. Rep. 813, and note, 815; *Brant v. Plumer*, (Iowa,) 19 N. W. Rep. 842; *Goodsell v. Fleming*, (Wis.) 17 N. W. Rep. 679; nor can he maintain an action to enjoin or abate a public nuisance, *St. Louis v. Knapp*, *Stout & Co. Company*, 6 Fed. Rep. 221; *Potter v. Howe*, (Mass.) 6 N. E. Rep. 233; *Ofstie v. Kelly*, (Minn.) 23 N. W. Rep. 863; *Bushnell v. Robeson*, (Iowa,) 17 N. W. Rep. 888.

As to what are such special damages as will enable a party to maintain such actions, see *Baltimore & P. R. Co. v. Fifth Baptist Church*, 2 Sup. Ct. Rep. 719; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753; *S. C. 16 Fed. Rep. 25*; *Hatch v. Wallamet B. Co.*, 6 Fed. Rep. 326, 780; *Crescent M. & T. Co. v. Hayes*, (Cal.) 8 Pac. Rep. 692; *Shirley v. Bishop*, (Cal.) 8 Pac. Rep. 82; *Learned v. Castle*, (Cal.) 4 Pac. Rep. 191; *Tuebner v. California St. R. Co.*, (Cal.) 4 Pac. Rep. 1162; *Ofstie v. Kelly*, (Minn.) 23 N. W. Rep. 863; *Larson v. Furlong*, (Wis.) 23 N. W. Rep. 584; *Bott v. Pratt*, (Minn.) 23 N. W. Rep. 237; *Stadler v. Grieben*, (Wis.) 21 N. W. Rep. 629; *Brant v. Plumer*, (Iowa,) 19 N. W. Rep. 842; *Bushnell v. Robeson*, (Iowa,) 17 N. W. Rep. 888; *Pennoyer v. Allen*, (Wis.) 14 N. W. Rep. 609; *Brakken v. Minneapolis & St. L. R. Co.*, (Minn.) 11 N. W. Rep. 124; *Cain v. Chicago, R. I. & P. R. Co.*, (Iowa,) 6 N. W. Rep. 268; *S. C. 3 N. W. Rep. 736*; *Wilder v. DeCou*, (Minn.) 1 N. W. Rep. 48; *Dubach v. Hannibal & St. J. R. Co.*, (Mo.) 1 S. W. Rep. 86.

2 Cal. Unrep. 681

SMITH v. IDAHO QUARTZ MIN. CO. and others. (SILVESTER, Intervenor.)
(No. 11,425.)

(Supreme Court of California. August 12, 1886.)

FINDINGS HELD JUSTIFIED BY THE EVIDENCE.

Department 1. Appeal from the superior court, county of Nevada.

Action to recover the possession or value of certain timber and wood which plaintiff alleged defendant had cut and carried away from land, of which plaintiff claimed to be the owner. Defendant failed to answer, and was defaulted. One Silvester intervened, claiming the wood against both plaintiff and defendant, and denying that plaintiff was the owner of the premises, or that he had any interest therein other than as a mortgagor for the sum of \$200, and also that the wood cut and carried away had been so cut and taken by persons who were in possession of the premises under a claim of title adverse to the plaintiff. Evidence was introduced on these matters, and the court held in accordance with the allegations made in intervenor's pleading, and rendered judgment against plaintiff. Plaintiff appealed on the ground of insufficiency of the evidence to justify the findings and decision, and because of error at the trial in not compelling the intervenor to open the case; but, instead, holding that the burden of proof was on plaintiff.

J. I. Caldwell, for appellant. *E. W. Roberts* and *A. Burrows*, for intervenor.

By THE COURT. The court was justified by the evidence in finding that the plaintiff was not the owner of the premises upon which the wood and timber had been cut, and had no interest in the premises other than as security, and that he was not the owner of the wood and timber, and that the wood was cut by parties in the possession of the premises under a claim of title adverse to plaintiff. Under such circumstances, the alleged errors as to other matters are immaterial. Judgment affirmed.

(71 Cal. 62)

KRIPP v. CURTIS and another. (No. 11,243.)

(Supreme Court of California. September 22, 1886.)

1. WAYS—OF NECESSITY—GRANTOR MAY DESIGNATE.

In case of a grant of land which is inclosed by other land of the grantor, a right of way by necessity arises, but the grantor has the right to designate the way to be pursued. He may designate a new way in preference to one already in use, and in such case a subsequent purchaser of his remaining land takes the same subject to such right of way.¹

2. SAME—PRIVATE—BY PRESCRIPTION.

The use and enjoyment of a right of private way across the land of another for five years is sufficient to create a right of way by prescription, provided the user is under claim of right, is continuous, uninterrupted, and exclusive, and with the knowledge and acquiescence of the owner.²

3. EVIDENCE—WAY OF NECESSITY—GRANTOR'S DECLARATIONS.

In case of a dispute concerning the existence and location of a right of way claimed by plaintiff as a way of necessity, the declarations of the original owner of both plaintiff's and defendant's lands, who designated the way to be used at the time of his conveyance to plaintiff, are admissible.

Commissioners' decision. Department 2.

Grove L. Johnson, for respondent, Kripp. *McKune & George*, for appellants, Curtis & Payne.

SEARLS, C. This is an action to recover damages for the obstruction of a private road, and to remove and abate such obstructions as a private nuisance. Plaintiff had judgment abating the nuisance, and for damages in the sum of \$50, from which, and from an order denying a new trial, the defendants appeal. It is conceded that plaintiff has been the owner of the land described in his complaint since March 29, 1865, and that his title thereto came from one J. S. Curtis, who is also the grantor of defendants, by conveyances subsequently executed; that there was a public road running through the land of Curtis, about one-half mile from the land of plaintiff, and no public road to said plaintiff's land, or nearer thereto than said public road. The disputed facts were: (1) As to the existence of the public road from the highway to the land of plaintiff, and if yes, had it existed as such since 1865? (2) Had plaintiff any other way to the public road than the private way? (3) Did plaintiff hold and use the private way adversely to defendants and their grantors? The findings of the court were in favor of plaintiff upon all the issues joined in the cause.

The privilege which one person, or particular description of persons, may have of passing over the land of another in some particular line is termed a *right of way*. It is an incorporeal hereditament, (3 Kent, Comm. 419; Washb. Easem. 215; *Boyce v. Brown*, 7 Barb. 80,) an easement which does not necessarily divest the owner of the fee of the land, and, for all other purposes except the servitude or use as a way, he owns it, and may have his action for an injury to his residuary interest as fully as he would be entitled to were it all his own. *Gidney v. Earl*, 12 Wend. 98. A right of way may be public or private. Public ways, as applied to ways by land, are usually termed "highways" or "public roads," and are such ways as every citizen has a right to use. 3 Kent, Comm. 32. A private way relates to that class of easements in which a particular person, or particular description or class of persons, have an interest or right, as distinguished from the general public. Private ways in this country are frequently termed "public roads," and are so designated in our statutes. The expression has been criticised as inapt, and as tending to mislead, (*Sherman v. Buick*, 32 Cal. 241,) but it is nevertheless used to designate private ways. A right of way may arise in this state (1) by prescription,—that is, by an adverse user for five years; (2) by grant; (3) from

¹See note at end of case, part 1. ²See note at end of case, part 2.

necessity; (4) by statute. Whether what are known as private roads, under the statute, do or do not in all respects come under the denomination of private ways, is of no importance in this case, as no claim is made under the statute.

There are two counts in the complaint. The first sets out a right of way of necessity, and the second states facts sufficient to show a way by prescription.

It is a well-settled principle of law that the grant of a thing shall carry all things included without which the thing granted cannot be had. It follows from this just principle that if A. sell an acre of land to B., which is surrounded by other lands owned by A., a convenient way arises on behalf of B. to go over A.'s land as a necessary incident. Woolr. Ways, 20; 3 Kent, Comm. 513; *Holmes v. Seely*, 19 Wend. 507.

The rule is said to be the same, although the land sold be not wholly inclosed by the lands of the grantor, but partly by the land of strangers, for the reason that the grantee may not go over strangers' land. *Clarke v. Rugge*, 2 Rol. Abr. 60; *Smyles v. Hastings*, 22 N. Y. 217. This way of necessity should be a convenient one over the adjoining land of the grantor, due regard being had to the interest of both parties. Subject to this limitation, the grantor may, in the first instance, designate the way to be pursued, and, in the event of his failure so to do, the grantee may choose for himself. *Holmes v. Seely*, *supra*.

The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case; and it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way. *McDonald v. Lindall*, 3 Rawle, 492; *Dodd v. Burchell*, 1 Hurl. & C. 122. A right of way thus acquired is said to be appendant or annexed to the estate, and will pass as appurtenant to the estate when sold. In this it differs from a right of way in gross, which is a mere personal right, which cannot be assigned nor transmitted by descent, and which dies with the person. 3 Kent, Comm. 420. A right of way from necessity only continues while the necessity exists. It is not enough that it continues to be a way of convenience, if it ceases to be indispensable as a means of access to the land. Washb. Easem. 220; *Holmes v. Seely*, *supra*; *New York Life Ins. Co. v. Milnor*, 1 Barb. Ch. 353. In the last-mentioned case it was held that "it would not be enough, however, that one having such way of necessity should acquire a parcel of land adjoining that to which such way belongs, to which there is access by a prescriptive right of way, since the owner of such a way could only use it as a means of access to the particular parcel to which it is appurtenant." In other words, that as the right by prescription only applies to, and can only be exercised for, the precise land to which it is appurtenant, it cannot be extended to other land so as to extinguish a right of way from necessity to the latter.

2. As to plaintiff's alleged right of way by prescription. A prescription supposes a grant before the time of legal memory. It is founded on the immemorial use of the way by the claimant, and his ancestors or grantors. Immemorial use, at common law, was time out of mind. Time out of mind, in contemplation of law in this state, is five years. An uninterrupted use and enjoyment of a right of private way over the land of another in this state for five years becomes an adverse enjoyment sufficient to raise the presumption of a grant. To have that effect, however, the user must have been under a claim of right,—must have been continuous, uninterrupted, and exclusive, and with the knowledge and acquiescence of the owner. *Thomp. Highw.* 338. "The time of enjoyment is deemed to be uninterrupted when

it continues from ancestor to heir, and from seller to buyer." *Id.* 3; Kent, Comm. 442; *Corning v. Gould*, 16 Wend. 534. The use of the easement for five years, unexplained, will be presumed to be under a claim or assertion of right, and adverse, and not by leave of or favor of the owner. *Lansing v. Wiswall*, 5 Denio, 213. Wherever there is a question as to the user for a sufficient length of time, and whether the circumstances are of such a character as to constitute a right by prescription, the facts are to be determined by a jury, or by the court sitting as such. *Corning v. Gould, supra*.

Tested by these elementary rules, the evidence was ample to support the findings of the court in favor of plaintiff. The grantor of plaintiff had purchased land from Curtis, under whom defendants also hold, which could not be reached except across the land of Curtis, or over that of strangers. There had been a way from the land of plaintiff, passing through the grounds of Curtis near his house. The latter, deeming it inconvenient to have this way left open, had, prior to the purchase by plaintiff, designated the way now in question; and, when plaintiff was about to purchase, pointed it out as the way by which the land he was thinking of purchasing was to be reached. The road was opened, and its user was sufficient notice to defendants, who were subsequent purchasers under Curtis.

There was no error in the admission of the declarations of Curtis. They related to the designation of the line of the way. He had the primary right to designate the portion of his land over which the way by necessity should pass, and the evidence tended to show that he had done so. It is true, as contended by the appellants, that a grant of a right of way cannot be created by parol. But it is equally true that a way of necessity does not lie in grant, and is not created by deed, but by operation of law, and as an appurtenant of a thing granted.

We are of opinion the judgment and order denying a new trial were clearly right, and should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

1. WAYS—PRIVATE—BY NECESSITY. A private right of way by necessity is created over the lands of the grantor, when one conveys lands otherwise inaccessible from the public highway, *French v. Smith*, (N. J.) 3 Atl. Rep. 130; *Valley P. & P. Co. v. West*, (Wis.) 17 N. W. Rep. 554; *Jarstadt v. Smith*, (Wis.) 8 N. W. Rep. 29; or leases such land, *Powers v. Harlow*, (Mich.) 19 N. W. Rep. 257. As to circumstances insufficient to create a right of way by necessity, see *Prowattain v. City of Philadelphia*, (Pa.) 4 Atl. Rep. 806; *Morgan v. Meuth*, (Mich.) 27 N. W. Rep. 509; *Scott v. Palms*, (Mich.) 12 N. W. Rep. 677; *Weinmeister v. Ingersoll*, (Mich.) 10 N. W. Rep. 67.

2. PRESCRIPTION. In order to acquire a prescriptive right of way over the lands of others, the use of such way must be open, adverse, continuous, and under claim of right, and such as to exclude the idea that it was permissive. *Webster v. City of Lowell*, (Mass.) 8 N. E. Rep. 54; *Dexter v. Tree*, (Ill.) 6 N. E. Rep. 506; *Zigefoose v. Zigefoose*, (Iowa,) 28 N. W. Rep. 654; *State v. Mitchell*, (Iowa,) 12 N. W. Rep. 598; *Graham v. Hartnett*, (Neb.) 7 N. W. Rep. 280; *Baldwin v. Herbst*, (Iowa,) 6 N. W. Rep. 257. A private right of way over a railroad may be acquired by prescription. *Gay v. Boston & A. R. Co.*, (Mass.) 6 N. E. Rep. 236. In Iowa no easement of footway can be acquired by prescription. *Willard v. Calhoun*, (Iowa,) 23 N. W. Rep. 22. As to evidence insufficient to establish a right of way by prescription, see *Teeter v. Quinn*, (Iowa,) 17 N. W. Rep. 529.

71 Cal. 122

ARCATA & M. R. R. CO. v. MURPHY. (No. 9,379.)

(Supreme Court of California. September 28, 1886.)

RAILROAD COMPANIES—RIGHT TO TAKE LAND FOR RAILROAD—APPRAISEMENT—INSTRUCTION TO JURY.

On an appeal from a judgment condemning land for a right of way for a railroad, it was held immaterial whether the instruction fixing the day following the filing of v. 11p. no. 21—56

the complaint as the time for the jury to consider the market value of the land was correct in point of time or not, when there was no evidence of an increase in the value of the land between the commencement of the action and the trial.

Department 1. Appeal from superior court, county of Humboldt.

J. J. De Haven, for respondent, Arcata & M. R. R. Co. *J. H. D. Chamberlin*, for appellant, Murphy.

THE COURT. Action to condemn land for a right of way for a railroad. Plaintiff had judgment and defendant appealed. Defendant was permitted to give and did give evidence as to the value of the land as a bridge site; therefore no error was committed in that regard of which the defendant can complain. The complaint was filed April 11, 1883. The trial was had June 5, 1883. The court instructed the jury to consider the market value of the land, April 12, 1883. There was no evidence that there had been an increase in the intrinsic value of the land between the commencement of the action and the trial; therefore it is immaterial whether or not the instruction was correct in point of time.

We see no error. The judgment and order are affirmed.

71 Cal. 123

SCROUFE v. CLAY. (No. 9,760.)

(*Supreme Court of California*. September 23, 1886.)

PROMISSORY NOTES—ACTION—AVERMENT OF NON-PAYMENT.

To maintain action on a promissory note, the averments of the complaint must allege non-payment; it is not sufficient to state that the defendant "has refused and still refuses to pay."

Department 1. Appeal from superior court, county of Mendocino.

T. L. Carothers, for respondent, Scroufe. *R. Percy Wright*, for appellant, Clay.

THE COURT. Action on a promissory note. The complainant averred that the defendant "has refused and still refuses to pay" the principal or interest of the note, or any part thereof, and "that there is now due" the sum, etc. The complaint was demurred to on the ground that there was no allegation of non-payment. The demurrer was overruled. We are of opinion the demurrer should have been sustained. The averments of the complaint are not equivalent to an averment of non-payment. "The failure to pay constitutes the breach, and must be alleged," *Frisch v. Caler*, 21 Cal. 71; *Davenay v. Eggenhoff*, 43 Cal. 395.

Judgment reversed, and cause remanded, with directions to sustain the demurrer.

71 Cal. 168

MITCHELL v. CLARK. (No. 8,832.)

(*Supreme Court of California*. September 29, 1886.)

DAMAGES—MEASURE OF—BREACH OF CONTRACT—SPECIAL DAMAGES—NECESSARY AVERMENT.

A plaintiff cannot recover for special injuries from the breach of a contract without averring in the complaint the special circumstances, and the defendant's knowledge of them, which would entitle him to greater damages than such as arise in the usual course of things.

In bank. Appeal from superior court, city and county of San Francisco.

Henry E. Highton, for respondent, Mitchell. *Geo. W. Taylor*, for appellant, Clark.

MCKINSTRY, J. In *Hadley v. Baxendale*, 9 Exch. 341, it was laid down that the damages which one party to a contract ought to receive, in respect

to a breach of it by another, are such as arise "naturally"—that is, in the usual course of things—from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. The doctrine of that case has since been followed, and is said by Lord CAMPBELL to accord with the Code Napoleon, with Pothier, and "with all the authorities." *Smeed v. Foord*, 1 El. & El. 612. When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach, in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties, (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party,) and such purpose was known to the other party, the facts showing the special purpose, and the knowledge of the other party, must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because, in the usual course of events, the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed, entitling the purchaser to greater damages for the defeat of a special purpose, known to the contracting parties, (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market,) such circumstances must be stated in the declaration, with the facts which, under the circumstances, enhanced the injury. 1 Suth. Dam. 764.

Here the plaintiff placed in the hands of the defendant a certain sum of money, to be paid when it should become due from the plaintiff to a third person with whom plaintiff had contracted. The consequence which would follow, in the usual course, from a failure of the defendant to pay the money, would be that plaintiff would be obliged himself to pay his creditor. If the plaintiff was insolvent when he intrusted defendant with the money, and the circumstances—known to defendant—were such as that the sacrifice of plaintiff's only property would probably follow from defendant's neglect to pay the money to Jackson, it might be argued that such sacrifice, and consequent greater damages than would usually flow from a breach of a like contract, were in the contemplation of defendant as well as of plaintiff when their contract was entered into. We express no opinion whether the complaint herein may be amended, or in what particulars; nor do we express any opinion as to what injuries may be proved, in case of any supposed amendment, as flowing naturally and directly from facts which may be alleged in the complaint as amended and established by evidence. It is enough to say that, under the present complaint, evidence with respect to the action brought by Jackson against plaintiff, the attachment of his property, its sale as perishable, and the consequent loss, was not admissible.

The complaint herein alleges no facts showing it was known to defendant that damages would probably flow from a breach of the contract by him greater than such as would follow from a breach of the contract "in the usual course of things." The averment that the defendant knew that the plaintiff "fully and exclusively" relied on the defendant to pay \$1,500, as he agreed to pay it, is but an averment of that which would be implied from the contract. "Parties when they enter into contracts may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance; but they are not supposed to know the conditions of each other's affairs, nor to take into consideration any existing or contemplated transactions, not communicated nor known, with other persons. Few persons would enter into contracts of any considerable extent, as to subject-

matter or time, if they should thereby incidentally assume the responsibility of carrying them out, or be held legally affected by other arrangements over which they have no control, and the existence of which is unknown to them." 1 Suth. Dam. 77.

In *Hadley v. Baxendale*, *supra*, ALDERSON, B., said: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to defendant, and thus known to both parties, the damages resulting from a breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." In *Hadley v. Baxendale* the declaration averred the special circumstances, but the plaintiff failed to prove that they were communicated to the defendant. The court said: "The only circumstances communicated by the plaintiffs to the defendants were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill."

The cases cited in which bankers or others had refused to pay drafts drawn on them by one having sufficient moneys in their hands, or where they had specially agreed to provide for the drafts, are cases in which the distinction between "general" and "special" damages was recognized.

Under a general allegation of damages, a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of. These damages the law implies will proceed from the act, although the amount may often be in the reasonable discretion of the jury. They are called "general," as contradistinguished from "special," damages, which are required to be specially stated in the declaration.

It was intimated by Lord TENTERDEN in *Marzetti v. Williams*, 1 Barn. & Adol. 415, and was expressly decided in *Rolin v. Steward*, 14 C. B. 595, that a banker who refuses to pay a check or draft drawn by a customer, who had sufficient funds in the banker's hands, is liable, not only in nominal damages, but in real and substantial damages. In the latter case an instruction to the jury was approved, in which they were told they ought to give, "not nominal or excessive, but reasonable and temperate, damages;" that is, that the jury might assume, because under the circumstances the law would imply, some injury from the breach of the contract, although no actual damage was proved, and that it was their province reasonably to assess the general damages.

In *Larios v. Bonany*, 5 P. C. App. Cas. 346, certain items of special damage were alleged, of which the court held that one only (five dollars, the cost of protest) should be allowed. It also reduced the amount found as general damages by reason of a presumed loss of credit by the plaintiff.

In *Prehn v. Royal Bank*, L. R. 5 Exch. 92, the plaintiff recovered certain special damages, alleged and proved, and does not seem to have recovered anything by way of general damages.

Boyd v. Fitt, 14 Ir. C. L. 43, was an action against a defendant upon a contract whereby he agreed to act as agent in Glasgow for the plaintiffs. Part of the agreement was that the defendant should open a cash account in a bank to the amount of £500, to be used in honoring and retiring cash orders of the plaintiffs; the latter to put in the hands of the defendant a sum equal to the full amount of orders drawn. Although more than the amount was in his hands, defendant failed to have funds in bank to meet an order for £250, which was dishonored, to (as was alleged) the special injury of plaintiffs, whose credit and business were thereby injured. The special injuries

of the plaintiffs were pleaded, since at the trial the lord chief baron "allowed the names of certain persons who had withdrawn their business from the plaintiff, in consequence of their bills having been dishonored, to be introduced into the summons and plaint in addition to those therein mentioned." Page 44. It is true, LEFROY, C. B., seems to have intimated that, as the jury had found that the special damages alleged were the natural consequences of defendant's breach of contract, the finding could be treated as if it were a finding of general damages. Page 56. But the special injuries, although the natural, were not the necessary, consequence of the breach, and it was requisite to plead them as they were in fact pleaded. The general damages which are implied from a breach of contract, and which need not be pleaded, must not be confused with special damages, which will not be presumed from the mere breach, but yet may have occurred by reason of injuries following from it. Such special injuries, if they have occurred, must be averred, in order that the defendant may have notice of, and be prepared to contest, them.

Reference has been made to *Fisher v. Val de Travers Asphalt Co.*, 1 C. P. Div. 511, where plaintiff averred certain special damages as being the natural, although not necessary, consequence of a breach of the contract. *Vide* 1 Suth. Dam. 763, and cases cited. The court allowed part of the special damages claimed and rejected the rest.

As we understand them, none of the cases referred to hold that, where the damages sustained are not such as would arise naturally "in cases not affected by any special circumstances," the plaintiff may prove such damages, without averring the special circumstances (and the other party's knowledge of them) which would entitle him to claim greater damages than such as arise "in the usual course of things."

Evidence on the part of plaintiff of damages beyond such as the plaintiff would ordinarily be entitled to recover for a breach of the contract set forth in the complaint was objected to by the defendant herein, who excepted to the ruling of the court admitting such evidence. Under the averments of the complaint, the plaintiff should have been limited to a recovery of \$1,500 and interest.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKEE, J.; ROSS, J.; MORRISON, C. J.

THORNTON, J. I concur in the judgment of reversal, and remanding the cause for a new trial, but differ *in toto* from the reasons assigned for such judgment in the opinion.

71 Cal. 169

BREEZE and others v. BROOKS and another. (No. 8,671.)

(*Supreme Court of California.* September 29, 1886.)

FRAUDULENT CONVEYANCE—CONSIDERATION—ESTOPPEL.

If one purchases land, taking the legal title in his own name, the consideration therefor being paid by another, the former is merely a trustee holding the naked legal title for the other; and if such trustee executes a deed to the other party without the payment of a new consideration therefor, such deed is not void, and the *cestui que trust* does not, by allowing the trustee to claim the land as his own, estop himself from claiming title to the premises. Ross, J., dissenting.

In bank. Appeal from superior court, county of San Mateo.

Fox & Ross, for respondents, Breeze and others. *E. B. & J. W. Mastick*, for appellant P. Brooks. *W. C. Belcher*, for appellant John Brooks.

THE COURT. This cause was heard before department 2 of this court, and an opinion rendered January 27, 1886. 9 Pac. Rep. 670. A hearing by the court in bank was granted, which has been had. For the reasons given in

the opinion in department the judgment and order are reversed, and cause remanded for a new trial.

Ross, J. I dissent. The land in controversy is a part of the Rancho Buri Buri, the legal title to which was, prior to the year 1865, held by divers persons as tenants in common. Among them was one Patrick Brooks, who then was, and since has been, in the actual and exclusive possession of a small portion of the *rancho*, and who then held in fee an undivided interest therein sufficient to secure to him, on partition, the portion so possessed. At the same time Patrick and one Fay (who was not one of the tenants in common) were together in possession of another and distinct portion of the *rancho*, such portion being the tract of land in controversy in the present suit. In that state of affairs and on the twenty-sixth of August, 1865, Patrick acquired, by purchase and a deed of conveyance, the interest of Fay, and thereupon took the exclusive possession of the portion last mentioned. Thereafter, and in the same year, (1865,) Patrick delivered possession of the last-mentioned tract to his brother, John Brooks, and subsequently, to-wit, October 17, 1865, purchased an undivided 1-120th interest in said *rancho*, and caused the conveyance thereof to be made to John, and to be placed upon the records of the county. His purpose in so doing was to secure in severalty, on a partition of the *rancho*, each of said tracts,—the tract upon which he resided, in his own name; and the other in the name of his brother John.

It is not important to inquire in this case into the *morale* of that proceeding. In point of fact, the ranch was partitioned in and by a final decree of partition, made and entered by the Twelfth district court on the twenty-ninth day of May, 1868, in an action brought for the purpose, and to which both Patrick and John were parties, by which decree the tract of land upon which Patrick resided was set apart to him in severalty, and the tract in controversy here in severalty to John Brooks.

From the year 1872 to the year 1875, John Brooks dealt with the plaintiffs to the present action, who were merchants, and during that time became indebted to them for goods sold and delivered in the sum of \$707. The findings are to the effect that during the time of such dealings John Brooks resided upon the tract of land in question with his family, and cultivated the same, and exercised exclusive control thereof, and appeared and acted in relation thereto as the owner, and stated to the plaintiffs at the time he first asked for and received credit from them that he was the owner of said premises; that plaintiffs believed said statements, and relied upon them, and knew that he (John) was so in exclusive possession, exercising control thereof as owner, and was entirely ignorant of the fact that Patrick had, or claimed to have, any interest therein, and solely by reason of such statements, apparent ownership, and belief, gave John said credit; that as a matter of fact John Brooks then was, and ever since has been, insolvent, of which fact Patrick was at all times aware. On the second day of January, 1875, John Brooks executed to the plaintiffs his promissory note for the amount of his indebtedness to them, and three days afterwards, to-wit, January 5, 1875, he executed to his brother, Patrick, a deed conveying to him the legal title to the land in dispute. Subsequently the plaintiffs commenced suit upon the promissory note, recovered judgment thereon, upon which execution was issued, and under it all of the right, title, and interest of John Brooks in the land was sold by the sheriff to the plaintiffs, who in due time received a sheriff's deed therefor, and thereafter commenced the present action to compel the conveyance of the legal title to them.

Beyond question John Brooks never was the real owner of the land; but in cases of this sort the question is not who was the actual owner, but whether the circumstances are such as that, in equity and good conscience, the apparent owner should be deemed and held to be the real owner for the

protection of one who has innocently dealt with him as such. The findings here show that Patrick knew that his brother, John, was insolvent, and, knowing that fact, caused the legal title to the land to be conveyed to him, and to be put upon the records of the county, put him in actual and exclusive possession,—in a word, clothed him with every *indicia* of absolute legal and equitable ownership, and permitted the matter so to remain for a period of more than six years. He put it in the power of John to appear to the world as the true owner, and he had actual knowledge that John did assert himself to be the true owner in the partition suit, and that he was treated and recognized as such in and by the final decree in that action.

Whether or not he had actual knowledge that John represented himself to the plaintiffs to be the real owner does not appear from the findings, one way or the other. Nor is it essential that it should, under the facts of this case. 2 Pom. Eq. Jur. § 811, and authorities there cited. It does appear from the findings that John did so represent himself; and that, solely because of such representations, plaintiffs extended to him the credit, and the records of the court as well as of the county sustained his pretensions. Having caused the title to the property to be conveyed to John, and to be so recorded in the public record of deeds, and having installed him in the actual and exclusive possession of the land, and having actual knowledge that John afterwards, in the partition suit, asserted himself to be its legal and equitable owner, and that the court so adjudged him, and having voluntarily caused these appearances and pretensions to be maintained for a long series of years, can it, with any show of reason or justice, be held that Patrick did not expect John to be recognized and dealt with by third parties as the true owner? Under such circumstances, was it not both natural and probable that he would be so treated and dealt with? Undoubtedly so. And, if so, ought the party whose conduct occasions the confidence and loss, to be heard to say that he who appeared to be the owner was in fact not such? Was there not such fault and negligence on the part of Patrick Brooks in concealing his own title as amounted to constructive fraud? I think there was. "The authorities establish the doctrine," said the court of appeals of New York in *Trenton Banking Co. v. Duncan*, 86 N. Y. 230, "that the owner of land may, by an act *in pais*, preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light and doubtful character. To authorize the finding of an estoppel *in pais* against the legal owner of land, there must be shown, we think, either actual fraud, or fault or negligence equivalent to fraud, on his part, in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in *Storrs v. Barker*, 6 Johns. Ch. 166, as to render it just that, as between him and the party acting upon his suggestions, he should bear the loss. Moreover, the party setting up the estoppel must be free from the imputation of laches in acting upon the belief of ownership by one who has no right." To the same effect are *Boggs v. Merced Min. Co.*, 14 Cal. 367; *Stevens v. Dennett*, 51 N. H. 330; *Anderson v. Armstead*, 69 Ill. 454; 2 Pom. Eq. Jur. 805 *et seq.*, and cases there cited.

I am therefore of opinion that, to the extent of protecting the plaintiffs, John Brooks should be deemed and held to be the legal and equitable owner of the property in question at the time of the accruing of the indebtedness from him to the plaintiffs, and the deed from John to Patrick Brooks being without consideration paid at the time of the judgment, levy, and execution sale of the plaintiffs, it results that Patrick Brooks may be compelled to convey to plaintiffs the legal title to the premises. But this should only be done

upon such terms and conditions as are just. The proper protection of the plaintiffs does not demand the absolute and unconditional conveyance of the legal title from Patrick Brooks to them. The justice of the case only requires that the land in question shall make good to them the amount of the afore-said indebtedness, with interest. Upon the return of the cause to the court below these amounts can be ascertained, and the decree so modified as to require the defendant Patrick Brooks to convey the legal title to the property to the plaintiffs, unless he shall, within a stated time thereafter, pay to the plaintiffs the amount so ascertained by the court. For these reasons I think the cause should be remanded, with directions to the court below to modify the decree so as to accord with the views here expressed, and, as so modified, that it should stand affirmed.

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HARNISH and others v. BEAMER and others. (No. 11,289.)

(Supreme Court of California. September 29, 1886.)

1. APPEAL—TRANSCRIPT OF RECORD—ENTRY OF JUDGMENT.

The counsel for respondents, on an appeal, having stipulated that the transcript of the record is correct, cannot be heard to impeach it by showing that judgment was entered at another and later date, after the appeal was taken.

2. PLEADING—DEMURRER—FORM OF.

If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer; if, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed.

3. INJUNCTION—JUDGMENT BY DEFAULT.

Where a judgment, valid on its face, was rendered against one person, who was never served with summons, and never appeared in the cause, and was entered against another by default before the time for answering had expired, it was held necessary for them to show, nevertheless, in order to stay the enforcement of the judgment, that they had a good defense to the action at law, and the averment that at the time of the entry of the judgment there was no cause of action was held a perfect defense.

Department 2. Appeal from superior court, county of Yolo.

C. P. Sprague and *J. Lambert*, for appellants, Harnish and others. *G. P. Harding*, *W. A. Dorn*, and *W. M. R. Parker*, for respondents, Beamer and others.

THE COURT. This is an action for a decree enjoining the defendants from enforcing against the plaintiffs a judgment obtained in a justice's court in and for Alisal township, county of Monterey, in favor of defendant J. J. Conner, and against said plaintiffs. A demurrer was interposed to the complaint herein on the ground that the same did not state facts sufficient to constitute a cause of action against the defendants; *second*, that said complaint does not state facts sufficient to constitute a cause of action against the defendants M. L. Dexter and George W. Roadhouse, etc.; *third*, that there is a misjoinder of parties in this: that said M. L. Dexter and George W. Roadhouse are not proper or necessary parties. The demurrer was sustained, and, plaintiffs declining to amend, final judgment was entered in favor of defendants, from which judgment this appeal is prosecuted by said plaintiffs.

Objection is made by respondents that the judgment was not entered in the cause until after this appeal was taken, and a certificate of the clerk of the superior court in support of the position is filed, showing that judgment was entered "on October 5, 1885, or within a few days after said date," etc. The record before us shows on its face that judgment was entered September 7, 1885, and counsel for respondents, having stipulated that the transcript is correct, cannot be heard to impeach it by showing the entry of judgment at another and later date.

The complaint to which the demurrer is interposed shows, in substance, that the plaintiffs are both residents of Yolo county, state of California, and were

such residents on the twenty-fourth of June, 1884; that defendant Beamer is sheriff of Yolo county; that defendant Dexter is county clerk of Monterey county, and that defendant Roadhouse is a justice of the peace of Alisal township, county of Monterey; that on the twenty-fourth day of June, 1884, defendant Conner commenced an action against the plaintiffs herein, in the court of defendant Roadhouse, in said Alisal township, and caused a summons to issue therefrom, which was served on F. B. Harnish in Yolo county, on the first day of July, 1884; that no other service was ever had upon the plaintiffs herein, or either of them; that defendant Roadhouse falsely made an entry in his docket showing that both of the plaintiffs herein were served with summons on the first day of July, 1884, at said Alisal township, and that a like false entry was made by said justice, showing that the defendants therein and plaintiffs here appeared and demurred to the complaint on the fifth day of July, 1884,—all of which the justice knew to be false,—and that no appearance whatever was made by the plaintiffs, or by any one for them, in said action; that the justice never acquired jurisdiction of the persons of these plaintiffs, or of either of them, or of the subject-matter of said action.

The complaint further avers the entry of judgment by the justice against these plaintiffs on the eleventh day of July, 1884, for \$100 and costs; that such judgment was void, and that these plaintiffs were ignorant of its entry until long after the expiration of the time for an appeal; that Conner had no cause of action against plaintiffs, or either of them, at the time said judgment was entered; that an abstract of the judgment was filed in the office of the county clerk of Monterey, and that on the third day of July, 1885, defendant Dexter, as county clerk, issued an execution on said judgment, directed to the defendant Beamer, requiring him as sheriff to satisfy the writ out of the property of these plaintiffs; that on or about the tenth of August, 1885, Beamer, as sheriff, levied upon certain property of William Harnish, and will levy upon other property, and sell the same, etc., if not restrained; that Dexter, as county clerk, will issue other executions, etc.; that the judgment of Conner against plaintiffs, though void, is valid upon its face, etc.

(1) If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer. (2) If, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed. The demurrer is general, and we need only to inquire whether there is a statement of all the facts essential to a recovery. If this question can be answered in the affirmative, the demurrer should have been overruled, even if such facts are imperfectly stated.

The judgment, as against William Harnish, who was never served with summons, and who never appeared in the cause, was in fact void; but as the record shows service and appearance, and the judgment is fair on its face, it cannot be attacked collaterally. As to the plaintiff, F. B. Harnish, the judgment is voidable, because entered by default before the time for answering had expired. Code Civil Proc. § 845. But something more is required to warrant a court of equity in interposing to stay the enforcement of the judgment. Equity will not overturn a judgment valid on its face unless it is an *unjust* judgment. It must be against conscience, and it must appear that a like judgment would not follow in the same action, or upon the same cause of action. *Gregory v. Ford*, 14 Cal. 139. It therefore became necessary for the plaintiffs to show that they had a good defense to the action at law, and this they have done by averring that, at the time of the entry of judgment complained of, J. J. Conner had no cause of action against them. This averment shows a perfect defense to the action.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

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PIKE and others v. BRITTAN. (No. 9,009.)

(Supreme Court of California. September 29, 1886.)

MASTER AND SERVANT—LIABILITY OF LANDLORD TO TENANT FOR NEGLIGENCE OF JANITOR.

A landlord is liable to a tenant for injury to his goods caused by the overflow of a wash-basin, the cock of which was negligently left open by the janitor employed by the landlord.¹

In bank. Appeal from superior court, city and county of San Francisco.

R. Thompson, for respondents, Pike and others. *W. H. L. Barnes*, for appellant, Brittan.

BELCHER, C. C. This is an appeal from an order granting the plaintiffs a new trial. The motion was made on the minutes of the court, and the case comes here on the judgment roll, without statement or bill of exceptions. The action was brought to recover damages, and the facts, as they are disclosed by the record, are as follows: The defendant owned a building which was situate on California street, in the city and county of San Francisco, and was three stories high. The plaintiffs were sublessees of a room on the ground floor, and had stored in the room a stock of goods, wares, and merchandise. Above the room occupied by the plaintiffs was a room occupied by a tenant of the defendant, and above that a room occupied by the janitor of the building, who was in the employment and under the control of the defendant. In each of these upper rooms the defendant had placed a wash-basin, to which, for the purpose of bringing water to it, a pipe extended from the water main in the street, and from which a waste and overflow pipe led off to the sewer in the street. In the supply-pipe was a stop-cock to turn the water on and off, and for the waste-pipe was a plug, to be used in holding the water in, and then letting it out off from the basin. The supply-pipes for both basins were so large that, when the stop-cocks were turned so as to allow full heads of water to run, the basins would fill up and overflow in less than a minute of time, though the waste and overflow pipes were unobstructed and free. On the twenty-eighth of November, 1878, the basin in the room next above that occupied by the plaintiffs overflowed, and the water ran down and damaged the plaintiffs' goods. Again, on the fifth of December following, the basin in the room occupied by the janitor overflowed, and the water ran down, and did more damage to the plaintiffs' goods. These overflows were caused by the stop-cocks being carelessly and negligently left open by the occupants of the rooms in which the basins were placed.

The court found: "*Eleventh*. That the said first-mentioned overflow came from room number nine, in said building, then occupied by Mr Niece; and that this overflow did the larger part of the said damage, but not all. *Twelfth*. That the said second overflow came from a room in said building occupied at the time by the janitor of said building, and that the said janitor was then in the employ of said defendant. *Thirteenth*. That the said second overflow was caused by the basin cock being negligently and carelessly left open when the water was turned off in the building, and the plug in the bottom of the basin was left in by the said janitor, thereby causing an overflow when the water was again turned on for the use of said building. *Fourteenth*. That the said fixtures placed in said building by the defendant were at that time reasonable, suitable, and safe for the purpose for which they were constructed, if used with proper and reasonable care. *Fifteenth*. That the injury sustained by the plaintiff was caused by the negligent and careless use of said fixtures by some person or persons other than the defendant, and over whom defendant had no authority or control; and who turned on the water

¹ See note at end of case.

into said basin or basins, and carelessly and negligently omitted to turn off the said water and permitted the same to flow, without shutting off the same when its use was no longer necessary."

Upon the findings judgment was rendered in favor of the defendant. The new trial appears to have been granted because the findings were conflicting, and did not support the judgment. It may be admitted, as claimed for the appellant, that a landlord is not liable to one tenant for injuries caused by the negligence of another tenant, but still that does not meet the whole case. "If the injury result from the negligence of the owner, either in constructing or upholding the freehold, he is responsible; but is not, in general, responsible for the negligence of the tenant in the use of it." *Eakin v. Brown*, 1 E. D. Smith, 44.

Without seeing the testimony, we are unable to say whether the defendant can be held liable for the damage caused by the first overflow, but we think it clear that he is liable for so much of the damage as was caused by the second overflow. "A master is responsible to third persons for the negligence of his servants in the course of their employment, as such, to the same extent as if the act were his own." *Shear. & R. Neg.* § 59. The janitor whose negligence caused the second overflow was the servant of the defendant, and his negligence was in the course of his employment. The conclusion of the court, therefore, that the defendant was not liable at all, was unauthorized by the facts, and the new trial was properly granted.

The order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

NOTE.

As to how far the master is liable for the negligence of his servant, see *Brooke v. New York, L. E. & W. R. R.*, (Pa.) 1 Atl. Rep. 207, and note, 210; *State v. Smith*, (Me.) 4 Atl. Rep. 412; *Philadelphia, W. & B. R. Co. v. Brannen*, (Pa.) 2 Atl. Rep. 429; *Heenrich v. Pullman P. Car Co.*, 20 Fed. Rep. 100, and note, 103; *Pittsburg, C. & St. L. Ry. Co. v. Kirk*, (Ind.) 1 N. E. Rep. 849, and note; *Walton v. New York Cent. S. C. Co.*, (Mass.) 2 N. E. Rep. 101; *Rosecranes v. Iowa & M. T. Co.*, (Iowa,) 21 N. W. Rep. 769; *Schulte v. Holliday*, (Mich.) 18 N. W. Rep. 752; *Hofer v. Hodge*, (Mich.) 18 N. W. Rep. 112.



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